NOTES OF REFERENCE

Appended to Blackstone's Commentaries

St. George Tucker

Notes of Reference (1803)

TO THE CONSTITUTION AND LAWS OF THE
FEDERAL GOVERNMENT OF THE UNITED STATES;
AND OF THE COMMONWEALTH OF VIRGINIA,
APPENDED TO BLACKSTONE'S COMMENTARIES

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Note:
This text does NOT include Blackstone's Commentaries
or the footnotes to those Commentaries.

Spelling has been modernized.

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Advertisement

The Editor having procured a copy of a late Edition of Blackstone's Commentaries, published in London, by Edward Christian, Esq. has made a selection of such of the Notes, contained in that Edition, as appeared to him most likely to be of use to an American Student. In the *Second Volume*, the selection has been more copious than in any of the others: they are distinguished, by his name being subjoined to the end of each Note.

MAY 12, 1803.

To the Reader

Messrs. Pleasants and Pace, having, since this Edition of the Commentaries has been in the press, published a new collection of the LAWS OF VIRGINIA, containing, not only, all the acts printed in the edition of 1794, but likewise, a very considerable number of acts passed since that period ; the Editor avails himself of the opportunity, thereby afforded him, to assist the researches of the student, in consulting any act contained in that collection, which may be referred to in the notes, or appendices to this work. For this purpose, he has formed the following table, shewing, the correspondence between the edition of 1794, and subsequent sessions acts, and the chapters in the latter collection ; by means of which, any act contained in that collection, and referred to in the following notes, may readily be found.

Preface

When a work of established reputation is offered to the public in a new dress, it is to be expected that the Editor should assign such reasons for so doing, as may not only exempt him from the imputation of a rash presumption, but shew that some benefit may be reasonably expected to result from his labors.

Until the *Commentaries on the Laws of England* by the late Justice Blackstone made their appearance, the students of law in England, and its dependencies, were almost destitute of any scientific guide to conduct their studies. "A raw and unexperienced youth," he remarks, "in the most dangerous season of life is transplanted on a sudden into the midst of allurements to pleasure without any restraint or check, but what his own prudence can suggest; with no public direction in what course to pursue his inquiries; no private assistance to remove the distresses and difficulties which always embarrass a beginner. In this situation he is expected to sequester himself from the world, and by a tedious lonely process to extract the theory of law from a mass of undigested learning." "How little, therefore, is it to be wondered at" he adds, "that we hear of so frequent miscarriages, that so many gentlemen of bright imaginations grow weary of so unpromising a search; and that so many persons of moderate capacity confuse themselves at first setting out, and continue ever dark and puzzled during the remainder of their lives!" Such is the picture which our author gives us of the difficulties which at that time attended the study of the law, even in those Inns of court whither those who sought to acquire a knowledge of the profession, generally repaired for instruction. On the appearance of the Commentaries, the laws of England, from a rude chaos, instantly assumed the semblance of a regular system. The *viginti annorum lucubrationes* it was thought might thereafter be dispensed with, and the student who had read the Commentaries three or four times over, was lead to believe that he was a thorough proficient in the law, without further labor, or assistance; the

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crude and immethodical labors of Sir Edward Coke were laid aside, and that rich mine of learning, his Commentary upon Littleton, was thought to be no longer worthy of the labor requisite for extracting its precious ore. This sudden revolution in the course of study may be considered as having produced effects almost as pernicious as the want of a regular and systematic guide, since it cannot be doubted that it has contributed to usher into the profession a great number, whose superficial knowledge of the law has been almost as soon forgotten, as acquired. And this evil we may venture to pronounce has been much greater in the Colonies dependent upon Great-Britain, than in England itself, for the laws of the Colonies not being at all interwoven with the Commentaries, the colonial student was wholly without a guide in some of the most important points, of which he should have been informed; admitting that he were acquainted with the law of England upon any particular subject, it was an equal chance that he was ignorant of the changes introduced into the colonial codes; which either from inexperience, inattention, or other accidental circumstances have undergone a variety of modifications, provisions, suspensions, and repeals, in almost all the colonies dependent upon great Britain. The Commentaries, therefore though universally resorted to as a guide to the colonial student, were very inadequate to the formation of a lawyer, without other assistance; that assistance from the partial editions of colonial laws (at least in Virginia) was extremely difficult to be obtained. Few gentlemen, even of the profession, in this country, have ever been able to boast of possessing a *complete* collection of its laws; the Editor confesses that his own endeavors to procure one have hitherto been ineffectual.

Not many years after the reception of the Commentaries into the libraries of gentlemen of the profession, and the adoption of them as a guide to those who wished to acquire it, the revolution which separated the present United States of America from Great Britain took effect; this event produced a corresponding revolution not only in the principles of our government, but in the laws which relate to property, and in a variety of other cases, equally contradictory to the law, and irreconcileable to the principles contained in the Commentaries. From this period, that celebrated work could only be safely relied on as a methodical guide, in delineating the general outlines of law in the United States, or at most, in apprizing the student of what the *law had been;* to know *what it now is,* he must resort to very different sources of information; these, although the period which has elapsed since their first introduction is scarcely more than twenty years, are now so numerous, (at least in this state) and so difficult to be procured, that not one in fifty students of law has at this day any chance of perusing them.

Notwithstanding these circumstances, the Commentaries have continued to be regarded as the *student's guide,* in the United States; and many there are, who without any other aid have been successful candidates for admission to the bar in this state, and perhaps in others: it cannot, therefore, be surprising that so many who have obtained licences to practice, discover upon their entrance into the profession a total want of information respecting the laws of *their own* country. A misfortune which their utmost diligence thereafter is required to remedy. A misfortune unavoidably attendant on that obscurity into which the laws of this state have been thrown, by *partial editions,* and by the *loose* and *slovenly* manner in which the acts of the legislature are *stitched* together, and dispersed throughout the country in *unbound,* and even *uncovered sheets,* more like ephemerons than the perpetual rules of property, and of civil conduct in a state.

These inconveniences had been sensibly felt by the Editor, whose utmost diligence had been in vain applied to their removal, when he was *unexpectedly* called to fill the chair of the professor of law in the university of William and Mary, in Virginia, then vacant by the resignation of a gentleman,[1] to whose advice and friendly instruction he was indebted for whatever talent he might be supposed

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to possess for filling the office of his successor. Great as he felt the distance between himself and his predecessor, the partiality of his friends persuaded him to accept an office which he was by no means prepared to discharge to his own satisfaction. To prepare a regular course of *original lectures* would have required some years of study, and of labor, not only in collecting, but in methodizing and arranging his materials. The exigencies of the office did not permit this: he was obliged, in the short period of two or three months, to enter upon the duties of it: he determined to be *useful* to his pupils as far as his best endeavors would enable him to be so, without regarding the form in which his instructions might be conveyed. The method, therefore, which he proposed to himself to adopt, was to recur to *Blackstone's Commentaries* as a text, and occasionally to offer remarks upon such passages as he might conceive required illustration, either because the law had been confirmed, or changed, or repealed, by some constitutional or legislative act of the *Federal Government,* or of the commonwealth of *Virginia.* This method he was led to adopt, partly, from the utter impracticability of preparing a regular course of lectures, for the reasons before mentioned; and, partly, from the exalted opinion he entertained of the Commentaries as a model of methodical elegance and legal perspicuity: a work in which the author has united the various talents of the philosopher, the antiquarian, the historian, the jurist, the logician and the classic: and which has undergone so many editions in England, Ireland, and America, as to have found its way into the libraries of almost every gentleman whether of the profession, or otherwise; and from general acceptance, had become the *guide* of all those who proposed to make the law their study. By these means he proposed to avail himself not only of the Commentator's incomparable method, but of his information as an historian and antiquarian, his classical purity and precision as a scholar, and his authority as a lawyer; without danger either of loss, or depreciation, by translating them into a different work; he was also encouraged to hope that by these means he might render that incomparable work a *safe,* as well as a delightful guide to those who may hereafter become students of law in this commonwealth.

It was foreseen, that the execution of this plan would not consist merely of short explanatory notes, and references to our state code: but that the prosecution of it would not unfrequently lead to inquiries, and discussions of subjects which neither form a part of, nor even bear any relation to, the laws of England. The Constitution of the United States of America, and the particular Constitution of the state of Virginia, it was supposed would afford a field of inquiry which yet remained to be fully explored; it was considered that it would be necessary to investigate the nature of that compact which the *people of the United States* have entered into, one with another; to examine the powers entrusted to those who exercise the government, and to satisfy ourselves of their just extent and limits; to consider the connection between the federal government, and the state governments; to trace with accuracy, as far as the novelty and intricacy of the subject would permit, their respective rights, dependencies, and boundaries; to survey, with attention, the whole complicated structure of our government, and consider how far the parts of a machine so immense, intricate and complex, are likely to correspond, or interfere with the operations of each other. Such a discussion would necessarily lead to an examination of the principles of our government, in the course of which a dissent from the received maxims of that which we had shaken off would be unavoidable; and in such an investigation it was conceived that it would be more proper to rely on the authority of the American Congress, or of the several State Conventions, than the opinions of any speculative writers on government whatever: inasmuch as the declarations and acts of those Bodies were the foundation of the late revolution, and form the basis of the several republics that have been established among us; and have thus become *constitutional declarations* on the part of the people, of their natural, inherent, and unalienable rights. From this circumstance, those acts and declarations might be considered, *in our own republic at least,* as settling the controversy between speculative writers, in

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all cases to which they extend. *Mr. Locke,* for example, contends that all power is vested in the people: this opinion is controverted by some, and doubted by other eminent writers on government, among whom it is sufficient to mention the learned *Grotius,* and the author of these *Commentaries.* Were it required to investigate this question hypothetically, it might be necessary to recur to the arguments on both sides, and decide according as they may be found to preponderate, since no preference could be given to the bare *authority* of either of these great names. But when we find this principle asserted by congress in the *Declaration of Independence;* and by the Convention of Virginia in our *Bill* of *Rights;* insisted on, again, by the Convention of the State upon the *ratification* of the *Constitution* of the *United States;* and finally acknowledged by the Amendments proposed to the *Constitution* by Congress, and since ratified by the several states, the contest, as it applies to the *principles of our government,* is at an end; and we are authorised to insist on the *affirmative,* with whatever ingenuity the opposite argument may be maintained.

The Constitution of Virginia formed under circumstances which have occasioned its authority to be doubted, even by one of the most enlightened politicians that this country has produced, it was also supposed, would require a full and candid discussion. Framed at a time when America might be supposed to be in the cradle of political science, it will not be surprising if many defects have been discovered in it: to examine them impartially, and to propose a remedy for them, or at least for the most obvious and dangerous, it was presumed, could not be an unprofitable undertaking, and would naturally fall in with the plan which the editor proposed to adopt.

The authority and obligation of the Common Law of *England* in the *United States,* was another subject, which it was deemed both necessary and proper to inquire into. If the arguments upon which the learned commentator founded his opinion, that "the common law of England, as such, had no allowance or authority in the British American colonies," antecedent to the revolution which separated them from each other, seem questionable, on the one hand, the opinion that it is now the *general law* of the land in the *United States,* in their *collective* and *national* capacity and character, appears not less questionable on the other. The Editor has therefore bestowed some considerable attention on the subject; and though he cannot flatter himself that his researches and conclusions will prove satisfactory, or convincing, to all parties, he cannot but persuade himself that those who impartially seek after truth, will incline to the same opinion with himself.

And, again; although the common law is by express legislative adoption the law of the land in Virginia, under certain restrictions, yet it has from time to time undergone such a variety of amendments, both statutory, and constitutional, that no student without some guide to assist him, can possibly know what to receive, or what to reject; it was, therefore, thought indispensibly necessary to advertise him in what cases its authority and obligation have been either in part diminished or totally destroyed by such amendments. And lastly, as the common law is a collection of *general* customs, it might not be amiss to inquire whether *particular* customs have any, or what force, among us.

The frequent recurrence to the *statute law of England,* in the *Commentaries,* might lead an unwary student to presume that all its provisions were in force in this country; or if he had heard that a part of the statutes only, were received and acknowledged as binding upon us in this commonwealth, he would be left in a state of the most absolute uncertainty respecting them; neither knowing which to receive, nor which to reject, as in the case of the provisions of the common law just mentioned. If he had been informed of the positive repeal of all British statutes by a late act of the legislature of Virginia, he might be tempted to suppose that it would be merely loss of time to peruse the abstract of them in the *Commentaries,* although a short marginal note, might instruct him, perhaps, that they

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still are retained in our code, and form an important part of our jurisprudence. True it is, those provisions have no longer authority as acts of the British parliament: but a great number of them have been expressly adopted by our legislature; others have undergone some alteration the better to adapt them to our use; in some the very words of a statute have been retained, whilst in others the phraseology has, perhaps more from inadvertence than design, been changed; a considerable number have also been either tacitly, or expressly, rejected, or repealed. To a student pursuing a systematical course of study it must be highly important to be delivered from a labyrinth of uncertainty, by casting his eye to the bottom of the page, and there finding whether the statute he is considering still forms a part of, or has been expunged from, that code, which he wishes to understand.

Not only the regulations contained in the statutes, but many of the rules of the common law have been occasionally interwoven in, or where doubtful, explained by legislative acts; thereby ascertaining their meaning, and placing their validity beyond a doubt. To point out these cases, might save the student infinite labor, time, and error.

But, the almost total change in the system of laws relative to property, both *real* and *personal,* in Virginia, appeared more particularly to demand a strict scrutiny, and investigation; in the course of which it might not only be necessary to remark the more obvious, but the imperceptible, and perhaps unintended, changes, wrought by a loose, or incautious phrase, or reference. Instances of this kind have unfortunately more than once occurred in our code, and are the unavoidable result of frequently tampering with the rules of property.

The regulations of our internal police, the organization of our courts of judicature, both in the *federal* and *state* government; their respective jurisdictions, and the mode of proceeding therein; are moreover subjects, concerning which the student can expect to receive very little information from the Commentaries, without the aid of notes to direct his attention to such as have been established here with similar powers. The courts of judicature in England have in general afforded the models of ours; but local circumstances have necessarily introduced a variety of new regulations, which by imperceptible and gradual changes, have lost all resemblance to the British original.

But independent of those alterations in the system of our jurisprudence to which local circumstances might be supposed to have given birth, there are a great number which appear to be merely the suggestions of political experiment, or a desire to conform to the newly adopted principles of republican government; among these we may reckon the abolition of *entails;* of the right of *primogeniture;* of the preference heretofore given to the *male* line, in respect to real estates of inheritance; and of the *jus accrescendi,* or right of survivorship between *joint-tenants;* the *ascending* quality communicated to real estates; the *heretability* of the *half-blood;* and of *bastards;* the *legitimation* of the latter, in certain cases; and many other instances in which the rules of the common law, or the provisions of a statute, are totally changed.

Many parts of the laws of England are also either obsolete, or have been deemed inapplicable to our local circumstances and policy; these it might be proper to recommend to the perusal of the student, rather as matter of curiosity, than of necessary information to him as an American Lawyer. To this class might be referred the learning respecting ancient feudal tenures; the whole doctrine of copy-holds, and tithes, and whatsoever relates to special or particular customs. The constitution of the crown and parliament, with their several rights, prerogatives, and privileges, would at first appear to fall into the same class: but it was conceived that it might not be uninstructive to shew how far they have been rejected in our own constitutions; or where retained, in what manner they have been distributed thereby. In some cases it would be found that they have been confided solely to the

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President of the United States; that in others they are participated by the Senate, as an executive council; in other instances, Congress, taken collectively, are the depositaries of the sovereign will and authority of the people; and, if the Editor's partiality does not deceive him, it will be found, upon a candid investigation of the subject, that wherever the constitution of the United States departs from the principles of the British constitution; the change will, in an eminent degree, contribute to the liberty and happiness of the people, however it may diminish the splendour of the government, or the personal influence of those who administer it. For these reasons, it was conceived, that a more particular attention might be proper to those parts of the *Commentaries,* which treat on these subjects, than at first view might appear to be necessary.

The subject of domestic slavery, which, happily for the people of England, it was unnecessary to treat of in the Commentaries, is one, which a student of Law in Virginia ought not to pass over without attention. How far the condition of that unfortunate race of men, whom the unhappy policy of our forefathers has reduced to that degraded condition, is reconcileable to the principles of a free republic, it might be hard for the advocates of such a policy to shew. It was, at least, presumed that in this enlightened age, when philanthropy is supposed to have been more generally diffused through the civilized nations of the earth than at any former period; and in this country, where the blessings of liberty have been so lately, and so dearly purchased, it could not be deemed improper to inquire whether there was a due correspondence between our avowed principles, and our daily practice; and if not, whether it were practicable, consistently with our political safety, to wipe off that stigma from our nation and government. Though the rights of nature, and the dictates of humanity, might heretofore have yielded to the suggestions of interest, the prejudices of education, or the apprehensions of timid politicians; it was still hoped to be demonstrable that reason and justice are reconcileable to our political and domestic interests.

The late revision and republication of the laws of this commonwealth, might at first view appear to supersede the necessity of particular references thereto; the subjects being generally arranged under their proper heads, in bills of considerable length, it might be supposed, would enable the student to consult the statutes, and form his own notes of their operation. But the inconvenience formerly hinted at, arising from *partial,* instead of *complete* editions of our statute law, has full operation in consequence of the omission of a multitude of acts, whose various and often contradictory provisions (so far as they could be reconciled) were consolidated into single bills; in the formation of which the date of the original law, and not only the date, but the alterations produced by amendatory acts, have unavoidably been lost sight of. Hence, the late code can only be considered as operating upon cases *subsequent* to the revisal; for a knowledge of the law *antecedent* thereto, the student must hunt through five other partial compilations, or through the scattered pages of the unbound Sessions's acts, scarcely less difficult to be collected than the leaves of the Sybils. To assist his labors, and often to supply the want of a *law* which no diligence might enable him to procure, was deemed an object of no small importance. And here we may be permitted to remark, that the settlement of this country is too recent not to render that policy very questionable, which consigns to oblivion not only temporary and occasional acts, but the laws which regulate personal property, (which have, *perhaps without intention,* been repeatedly altered and omitted) and even those, by which the titles to lands have been originally acquired, and are still held; not to mention those, by which counties have been divided, courts established, records removed, and a multitude of other arrangements made, altered, and repealed; so as to render a complete acquaintance with the laws of this country, one of the most difficult of human acquirements. A general view of such of the omitted laws as relate to the original acquisition, and subsequent disposal of lands, and other estates of persons dying intestate would well deserve the attention of the student; and although most of them

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are now out of print, a bare enumeration of their titles, with the periods of their enaction, suspension, or repeal, might be of singular use to those whose interests are likely to be affected by their temporary existence. In researches of this nature a stock of knowledge is acquired whose value is the more precious as it becomes more scarce. To form a complete digest of statute law appears to have been a favorite object with the legislature of Virginia from its first settlement – but unfortunately every attempt of the kind seems to have been the parent of new perplexities, by the introduction of new laws; and the re-enaction, omission, or suspension of former acts, whose operation is thus rendered *doubtful,* even in the most important cases. It has been supposed, for instance, that whenever the legislature have had a bill before them, the rejection of any particular clause therein contained is to be considered as a declaration of the legislative will, that the part rejected shall not be law; or if it be law already, that it shall thenceforth cease to be the law of the land: but will it be supposed that it was the intention of the legislature in 1792, when they struck the act of 1788, c. 23. out of the slave law, to repeal *that act,* by which the act of 1748, declaring that a *person guilty of the manslaughter of a slave should incur no punishment for it,* had been but a few years before *repealed;* under circumstances which excited a just horror that such an act should so long have disgraced our code. On the other hand, would it not probably be equally wide of the truth to presume it was the intention of the legislature to continue in force those parts of the act of 1748, which were also stricken out of the same bill, in the year 1792, and by which the *outlawing* and *shooting* of run-away slaves had been formerly authorized? Though no *general rule* can therefore be laid down upon this subject, it appeared practicable to assist the student in forming a tolerably just conclusion in particular cases. To aid his researches in the several instances before pointed out, was another object of the Editor's undertaking.

Such being the outlines of his plan, he entered upon the execution of it with a zeal, which, if it had been seconded with equal ability, would doubtless have produced a valuable system of federal and state jurisprudence, so far at least as relates to the commonwealth of Virginia – to have engrafted the laws of all the states in the union, was a work too extensive in the plan, and would have been too voluminous in its execution for him to undertake, whatever might have been his aids, or his talents for such an undertaking: he therefore contented himself with the hope of being particularly useful to the students of law in his *own* state, and generally so, to those in *other* states, who were solicitous to become acquainted with the principles of the *constitution* of the *federal government,* and the *general laws* of the *union.*

Before he concludes, it may not be improper to add a few remarks on the study of the law in this country. If it be true that those nations which have been most distinguished for science, have been also most distinguished for the freedom they have enjoyed, the conclusion would immediately follow that liberty and science were inseparable companions. But here an objection immediately presents itself, that illiterate and barbarous nations are found to possess a greater portion of freedom, in their constitutions and government, than is to be met with in any civilized nation whatsoever. The ancient Gauls and their neighbors the Germans, not to mention other barbarous nations, appear to have lived under a kind of government as free as that of the Indians of this continent, and were equally strangers to literature and to science. But with these and all other barbarous nations, government has always been a most simple machine, adapted to very few purposes, and those such as might obviously be effected by the aid of a simple contrivance. Their dress, their houses, their mode of living, and their mode of warfare, all partook of the same simplicity. An itinerant nation, or one living in common, would have few ideas respecting the rights of property; their martial temper rendered every individual the arbiter, asserter, and avenger of his own personal rights. Hence very few cases occurred where there could be room for the authority of the civil magistrate to

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interfere: such magistrates, therefore, appear to have been unknown among them: even their military chiefs seem to have possessed no personal authority but in war; and it is not improbable that their military institutions partook in an eminent degree of the simplicity of the civil. The principles, upon which the government, whether civil or military, was to be administered, being few and simple, were easily understood. Government in this state may be compared to a seedling oak, that has just burst the acorn and appears above the surface of the earth with its first leaves; it advances with civilization, rears its head in proportion as the other increases; and puts forth innumerable branches till it covers the earth with an extensive shade, and is finally regarded as the king of the forest: all behold it with reverence, few have any conception of its magnitude, or of the dimensions, or number of its parts; few are acquainted with the extent of its produce, or can compare the benefits derived from its shade, with the loss of soil which it appropriates to its own support. In such a state, in vain would the rude hand of the barbarian attempt to trace its figure; science, only, is equal to the task, and, even she will find it painful, laborious, and incessant; since every year is the parent of new branches, or the destroyer of old ones: nor will a superficial observation of its exterior alone, suffice; the roots may be decayed, the trunk hollow, and the monarch of the forest ready to fall with its own rottenness and weight, at the moment that its enormous bulk, extensive branches, and luxuriant foliage would seem to promise a millennial duration.

Moreover, society and civilization create a thousand relations unknown to savage life: these are extended and diversified in such a manner that the machine of government becomes necessarily more complex in its parts, in proportion as its functions are multiplied. Those who administer it acquire a mechanical acquaintance with its powers, and often, by a slight alteration in the frame, produce an entire revolution in the principles of its action; to detect the cheat requires a thorough acquaintance with the principles of its original construction, and the purposes to which it was intended to be applied. Hence the facility with which governments, free in their institution, have been overturned by the usurpations, or contrivances, of those, to whom the administration of them has been committed. Science counteracts this mechanical monopoly of knowledge, and unfolds to its votaries those principles which ought to direct the operations of the machine; discloses the application of other powers, and demonstrates the source from which they spring, and the effect they are calculated to produce. Hence, since the introduction of letters, those nations which have been most eminent in science, have been most distinguished by freedom. Man only requires to understand his rights to estimate them properly: the ignorance of the people is the footstool of despotism.

The study of the law may seem in all countries, in some degree, to be connected with the study of the constitution of the nation. Yet in arbitrary governments questions concerning the constitution rarely occur, and are still more rarely discussed; hence in such governments the study of the law, merely as a profession, does not seem necessarily to require the study of the constitution; the former being limited to such controversies between individuals, as do not involve in them any question of the authority of the government itself: and the latter being supposed to be a theme too exalted for the comprehension of a private individual, and as such discouraged and neglected, until time or accident has directed the attention of men of talents to a subject so important to the happiness of mankind. But in America the force and obligation of every positive law, and of every act of government, are so immediately blended with the authority of the government itself, as confided by the people to those who administer it, that no man can pretend to a knowledge of the laws of his country, who does not extend that knowledge to the constitution itself. Yet the study of the constitution is not more necessary to the right understanding of the force and obligation of any positive law, than the study of the law, as a science, is to a full and perfect understanding of the constitution: for the rules of law must not unfrequently be consulted, to explain the principles

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contained in the constitution: thus, they mutually contribute to the due investigation and understanding of each other.

In a government founded on the basis of equal liberty among all its citizens, to be ignorant of the law and the constitution, is to be ignorant of the rights of the citizen. Ignorance is invariably the parent of error: where it is blended with a turbulent and unquiet temper, it infallibly produces licentiousness, the most terrible enemy to liberty, except despotism: and even more terrible than despotism itself, were it not invariably short lived, whilst the other endures for ages; on the contrary, when ignorance is united with supineness, liberty becomes lethargic, and despotism erects her standard without opposition. An enlightened people, who have once attained the blessings of a free government, can never be enslaved until they abandon virtue and relinquish science. These are the nurses of infant liberty and its fostering genii when matured. To seek their favor is to secure it; to neglect, is infallibly to lose it.

If an acquaintance with the constitution and laws of our country be requisite to preserve the blessings of freedom to the people, it necessarily follows that those who are to frame laws or administer the government should possess a thorough knowledge of these subjects. For what can be more absurd than that a person wholly ignorant of the constitution should presume to make laws pursuant thereto? or that one who neither understands the constitution nor the law, should boldly adventure to administer the government! Yet such instances occur not unfrequently in all countries, and the danger that they will frequently occur in this, is perhaps greater than in any other. The road to office, in most other countries is filled with a thousand turnpikes, which are rarely opened but to the rich and powerful. These possess at least the means of education and information. With us it is equally open to all; but men of talents and virtue are not always the foremost in the course; persons of this description are generally more backward, than those of inferior pretensions, to the confidence of the people; a confidence which, if they do not, they are infinitely more liable to abuse, than if their minds had been properly enlightened by study and application.

Not only the study of the constitution, but an acquaintance with the civil history of our country, seems necessary to constitute a thorough knowledge of its laws. The several epochs required to be well known, when the laws of England were the sole rule of jurisprudence among us; or were interwoven with the laws of our own institution; which last were nevertheless considered in a subordinate degree of authority; or when the authority of the former was wholly superseded, and the latter substituted entirely in their stead, without any check or control; and, lastly, when by an entire change of the government a new order of things was introduced, and the authority of a part of the laws of the commonwealth were submitted to the control of the federal constitution, and jurisprudence; otherwise the student can never be certain of the validity of a law, but must wander perpetually in the mazes of doubt and error. To assist his researches in all these respects has been particularly the object of the Editor's labors; in submitting the result of them to the public, he is not without hope that the design will be approved, however the execution may fall short of his own wishes, or the public expectation.

St. Geo. Tucker.

July 10th, 1802.

Table

N. B. The chapters in Pleasant's and Pace's collection correspond with the chapters, as numbered in

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the edition of 1794, from chap. 1, to chap. 181, inclusive: the correspondence between the succeeding chapters and the Sessions acts, as published annually, will appear below.[2]

Abbreviations

USED IN THE NOTES AND APPENDICES TO THIS EDITION.

C. U. S. Constitution of the United States.

L. U. S. Laws of the United States.

A. C. U. S. or Amendts. C. U. S. Amendments to the Constitution of the United States.

C. V. Constitution of Virginia.

B. R. or B. R. V. Bill of Rights, of Virginia.

V. L. or L. V. Laws of Virginia.

Sess. Acts. Sessions Acts, of Congress, or of the General Assembly of Virginia.

Purvis. Compilation of the Laws of Virginia, by Purvis, or Pervis.

L. V. Edi. 1733. 1753. 1769. 1785. 1794. The several Editions of the Laws of Virginia, published by authority, in those years, respectively.

N. B. The references to the laws of the United States correspond with the Chapters, as numbered in the Acts of the several Sessions, which have been distributed according to Law. The Acts of 2. Cong. 2. Sess. in Swift's Edition are numbered differently: there is a variance of 44 Chapters in the numbering of the Acts of that Session; but, any Act of that Session referred to in this Edition, may be readily found by adding 44 to the number of the Chapter in that Edition.

NOTES

1. Mr. Wythe the present chancellor of Virginia.
2.

Sessions Acts	Pace's Edition	Sessions Acts	Pace's Edition	Sessions Acts	Pace's Edition	Sessions Acts	Pace's Edition
1795 c. 1	c. 182	c. 25	c. 216	c. 14	c. 250	c. 71	c 284
c. 2	c. 183	c. 27	c. 217	c. 15	c. 251	1801 c. 1	c. 285
c. 3	c. 184	c. 28	c. 218	c. 19	c. 252	c. 2	c. 286
c. 5	c. 185	c. 42	c. 219	c. 23	c. 253	c. 3	c. 287
c. 8	c. 186	c. 4.5	c. 220	1799 c. 1	c. 254	c. 4	c. 288
c. 9	c. 187	1797 c. 2	c. 221	c. 2	c. 255	c. 5	c. 289
c. 10	c. 188	c. 4	c. 222	c. 3	c. 256	c. 7	c. 290
c. 11	c. 189	c. 5	c. 223	c. 8	c. 257	c. 8	c. 291
c. 13	c. 190	c. 6	c. 224	c. 11	c. 258	c. 9	c. 292
c. 14	c. 191	c. 7	c. 225	c. 17	c. 259	c. 10	c. 293
c. 15	c. 192	c. 8	c. 226	c. 33	c. 260	c. 11	c. 294
c. 16	c. 193	c. 9	c. 227	c. 34	c. 261	c. 12	c. 295
c. 17	c. 194	c. 20	c. 228	c. 46	c, 262	c. 13	c. 296
c. 18	c. 195	c. 22	c. 229	c. 49	c. 263	c. 14	c. 297
c. 19	c. 196	c. 23	c. 230	c. 58	c. 264	c. 25	c. 298
c. 20	c. 197	c. 24	c. 231	c. 59	c. 265	c. 23	c. 299
c. 54	c. 198	c. 25	c. 232	c. 64	c. 266	c. 15	c. 300
1796 c. 1	c. 199	c. 26	c. 233	1800 c. 2	c. 267	c. 16	c. 301
c. 2	c. 200	c. 23	c. 234	c. 4	c. 268	c. 17	c. 302
c. 5	c. 201	c. 24	c. 235	c. 6	c. 269	c. 18	c. 303
c. 6	c. 202	c. 36	c. 236	c. 12	c. 270	c. 19	c. 304

c. 7	c. 203	c. 44	c. 237	c. 38	c. 271	c. 21	c. 305
c. 8	c. 204	c. 55	c. 238	c. 39	c. 272	c. 24	c. 304*
c. 9	c. 205	c. 65	c. 239	c. 40	c. 273	c. 23	c. 306*
c. 11	c. 206	c. 108	c. 240	c. 43	c. 274	c. 84	c. 307*
c. 12	c. 207	1798 c. 1	c. 241	c. 44	c. 275		
c. 13	c. 208	c. 2	c. 242	c. 51	c. 276	October	Appx.
c. 16	c. 209	c. 3	c. 243	c. 53	c. 277	1782 c. 19	c. 1
c. 17	c. 210	c. 6	c. 244	c. 54	c. 278	1784 c. —	c. 2
c. 18	c. 211	c. 7	c. 245	c 58	c. 279		c. 3
c. 19	c. 212	c. 9	c. 246	c. 59	c. 280		c. 4
c. 20	c. 213	c. 10	c. 247	c. 60	c. 281	1792 c. 20	c. 5
c. 23	c. 214	c. 11	c. 248	c. 61	c. 282	c. 27	c. 6
c. 24	c. 215	c. 13	c. 249	c. 70	c. 283		

* There is a small error in the numbering of these three chapters in Pleasant and Pace's Edition; they are here referred to as numbered.

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APPENDIX
to Vol. 1

NOTE A

Of Sovereignty and Legislature

1. Blackstone's Com. page 46. "Sovereignty and Legislature are indeed convertible terms; one cannot subsist without the other."

THE generality of expression in this passage might lead those who have not considered with attention the new lights which the American revolution has spread over the science of politics, to conclude with the learned commentator, that, "By the sovereign power, is meant the making of laws; and wherever that power resides, all others must conform to and be directed by it, whatever appearance the outward form and administration of justice may put on. It being at any time in the option of the legislature to alter that form and administration by a new edict or rule, and to put the execution of the laws into whatever hands it pleases: and all the other powers of the state must obey the legislative power in the execution of their several functions – or else the constitution is at an end."[1]

Before we yield our full assent to this conclusion, we must advert to a fact, probably truly stated by the learned author at the time he wrote; "That the original written compact of society had, perhaps, in no instance, been ever formally expressed, at the first institution of a state."[2]

In governments whose original foundations cannot be traced to the certain and undeniable criterion of an original written compact – whose forms as well as principles are subject to perpetual variation from the usurpations of the strong, or the concessions of the weak; where tradition supplies the place of written evidence; where every new construction is in fact a new edict; and where the fountain of power has been immemorially transferred from the people, to the usurpers of their natural rights, our author's reasoning on this subject will not easily be controverted. – But the American revolution has formed a new epoch in the history of civil institutions, by reducing to practice, what, before, had been supposed to exist only in the visionary speculations of theoretical writers. – The world, for the first time since the annals of its inhabitants began, saw an original written compact formed by the free and deliberate voices of individuals disposed to unite in the same social bonds; thus exhibiting a political phenomenon unknown to former ages. This memorable precedent was soon followed by the far greater number of the states in the union, and led the way to that instrument, by which the union of the confederated states has since been completed, and in which, as we shall hereafter endeavor to show, the sovereignty of the people, and the responsibility of their servants are principles fundamentally, and unequivocally, established; in which the powers of the several branches of government are defined, and the excess of them, as well in the legislature, as in the other branches, finds limits, which cannot be transgressed without offending against that greater power from whom all authority, among us, is derived; to wit, the PEOPLE.

To illustrate this by an example. By the constitution of the United States, the solemn and original compact here referred to, being the act of the people, and by them declared to be the supreme law of the land, the legislative powers thereby granted, are vested in a congress, to consist of a senate and house of representatives. As these powers, on the one hand, are extended to certain objects, as to lay and collect taxes, duties, etc.[3] so on the other they are clearly limited and restrained; as that no tax or duty shall be laid on articles exported from any state – nor any preference given by any regulation of commerce or revenue to the ports of one state over those of another, etc.[4] These, and several others, are objects to which the power of the legislature does not extend; and should congress be so unwise as to pass an act contrary to these restrictions, the other powers of the state are not bound to obey the legislative power in the execution of their several functions, as our author

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expresses it: but the very reverse is their duty, being sworn to support the constitution, which unless they do in opposition to such encroachments, the constitution would indeed be at an end.[5]

Here then we must resort to a distinction which the institution and nature of our government has introduced into the western hemisphere; which, however, can only obtain in governments where power is not usurped but delegated, and where authority is a trust and not a right – nor can it ever be truly ascertained where there is not a written constitution to resort to. A distinction, nevertheless, which certainly does exist between the indefinite and unlimited power of the people, in whom the sovereignty of these states, ultimately, substantially, and unquestionably resides, and the definite powers of the congress and state legislatures, which are severally limited to certain and determinate objects, being no more than emanations from the former, where, and where only, that legislative essence which constitutes sovereignty can be found.

NOTES

1. Blackstone's Commentaries, p. 49.

2. Ibid. 47.

3. C. U. S. Art. 1. § 8

4. C. U. S. Art. 1. § 9.

5. The following letter from the judges of the federal district court of Pennsylvania, to the president of the United States, may serve to illustrate the principle here contended for:

> Sir, to you it officially belongs to "take care that the laws" of the United States "be faithfully executed." Before you, therefore, we think it our duty to lay the sentiments, which on a late painful occasion, governed us, with regard to an act passed by the legislature of the Union.
>
> The people of the United States have vested in Congress all legislative powers "granted in the constitution."
>
> They have vested in one supreme court, and in such inferior courts as the congress shall establish, "the judicial power of the United States"
>
> It is worthy of remark, that in congress the whole legislative power of the United States is not vested: an important part of that power was exercised by the people themselves when they "ordained and established the constitution."
>
> "This constitution" is "the supreme law of the land." This supreme law "all judicial officers of the United States are bound, by oath or affirmation, to support."
>
> It is a principle, important to freedom, that, in government, the judicial should be distinct from, and independent of, the legislative department. To this important principle, the people of the United States, in forming their constitution, have manifested the highest regard.
>
> They have placed their judicial power, not in congress, but in "courts." They have ordained that the "judges" of those courts shall hold their offices "during good behavior;" and that "during their continuance in office, their salaries shall not be diminished."
>
> Congress have lately passed an act, "to regulate" (among other things) "the claims of invalid pensions."
>
> Upon due consideration, we have been unanimously of opinion, that, under this act, the circuit court, held for the Pennsylvania district, could not proceed –
>
> 1. Because the business directed by this act, is not of a judicial nature; – it forms no part of the power, vested by the constitution, in the courts of the United States: the circuit court must consequently have proceeded without constitutional authority.
>
> 2. Because, if upon that business, the court had proceeded, it's judgments (for it's opinions are it's judgments) might, under the same act, have been revised and controlled by the legislature, and by an officer in the executive

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department, such revision and control we deemed radically inconsistent with the independence of that judicial power which is vested in the courts: and consequently, with that important principle, which is so strictly observed by the constitution of the United States.

These, Sir, are the reasons of our conduct. Be assured that, though it became necessary, it was far from being pleasant. To be obliged to act contrary either to the obvious directions of congress, or to a constitutional principle, in our judgment, equally obvious, excited feelings in us, which we hope never to experience again.

Signed, James Wilson, John Blair, Richard Peters. Philadelphia, April 18th, 1792.

American Museum, Vol. 12. Part 2d. Appendix, 2d page, 7,8. See also the letter from the judges of the federal district court of New York, to the president of the United States on the same subject, dated April 10th, 1792, and signed, by John Jay, chief justice of the United States, William Cushing, one of the associate judges of the supreme court, and James Duane, judge of the district court.

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NOTE B

Of the Several Forms of Government

THE concise manner in which the commentator has treated of the several forms of government, seems to require that the subject should be somewhat further considered: this has been attempted in the following pages; in the course of which the student will meet with considerable extracts from the writings of Mr. Locke, and other authors, who have copiously treated the subject; of which an epitome, only, is here offered for the use of those who may not possess the means of better information.

Preliminary Remarks

A nation or state is a body politic, or a society of men united together to promote their mutual safety, and advantage, by means of their union.

From the very design, that induces them to form a society that has its common interests, and ought to act in concert, it is necessary that there should be established a public authority, to order and direct what ought to be done, by each, in relation to the end of the association.

This political authority, is by some writers denominated the sovereignty;[1] but, for reasons which will be hereafter explained, I prefer calling it the government, or administrative authority of the state, to which each citizen, subjects himself by the very act of association, for the purpose of establishing a civil society.

All men being by nature equal, in respect to their rights, no man nor set of men, can have any natural, or inherent right, to rule over the rest.

This right cannot be acquired by conquest, for the few, are, in a state of nature, unable to subdue the many.

Were it ever possible that the few could triumph over the many, the power thus acquired, can not be transmissible by inheritance, since it may fall into hands incapable of maintaining it.

The right of governing can, therefore, be acquired only by consent, originally; and this consent must be that of at least a majority of the people.[2]

Since no person possesses any inherent right to govern, or rule over, the rest; and since the few cannot possess, naturally power enough to subdue the many; the majority of the people, and, much more the whole body, possess all the powers, which any society, state, or nation, possesses in relation to its own immediate concerns.

This power which every independent state or nation, (however constituted, or by whatever name distinguished, whether it be called an empire, kingdom, or republic and whether the government be in its form a monarchy, aristocracy, or democracy, or a mixture or corruption of all them,) possesses in relation to its own immediate concerns, is unlimited, and unlimitable, so long as the nation or state retains its independence; there being no power upon earth, whilst that remains, which can control, or direct the operations, or will, of the state in those respects.

This unlimitable power, is that supreme, irresistible, absolute, uncontrollable authority, which by political writers in general, is denominated the SOVEREIGNTY;[3] and which is by most of them, supposed to be vested in the government, or administrative authority, of the state: but, which, we contend, resides only in the people; is inherent in them; and unalienable from them.[4]

Except in very small states, where the government is administered by the people themselves, in

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person, the exercise of the sovereign power is confined to the establishment of the constitution of the state, or the amendment of its defects, or to the correction of the abuses of the government.

The constitution of a state is, properly, that instrument by which the government, or administrative authority of the state, is created: its powers defined, their extent limited; the duties of the public functionaries prescribed; and the principles, according to which the government is to be administered, delineated.[5]

The GOVERNMENT or administrative authority of the state, is that portion, only of the sovereignty, which is by the constitution entrusted to the public functionaries: these are the agents and servants of the people.

Legitimate government can therefore be derived only from the voluntary grant of the people, and exercised for their benefit.

The sovereignty, though always potentially existing in the people of every independent nation, or state, is in most of them, usurped by, and confounded with, the government. Hence in England it is said to be vested in the parliament: in France, before the revolution, and still, in Spain, Russia, Turkey and other absolute monarchies, in the crown, or monarch; in Venice, until the late conquest of that state, in the doge, and senate, etc.

As the sovereign power has no limits to its authority, so has the government of a state no rights, but such as are purely derivative, and limited; the union of the SOVEREIGNTY of a state with the GOVERNMENT, constitutes a state of USURPATION and absolute TYRANNY, over the PEOPLE.

In the United States of America the people have retained the sovereignty in their own hands: they have in each state distributed the government, or administrative authority of the state, into two distinct branches, internal, and external; the former of these, they have confided, with some few exceptions, to the state government; the latter to the federal government.

Since the union of the sovereignty with the government, constitutes a state of absolute power, or tyranny, over the people, every attempt to effect such an union is treason against the sovereignty, in the actors; and every extension of the administrative authority beyond its just constitutional limits, is absolutely an act of usurpation in the government, of that sovereignty, which the people have reserved to themselves.

These few preliminary remarks will be somewhat enlarged upon in the sequel.

Section I.

Government, considered as the administrative authority of a state, or body politic, may, in general, be regarded as coeval with civil society, itself: Since the agreement or contract by which each individual may be supposed to have agreed with all the rest, that they should unite into one society or body, to be governed in all their common interests, by common consent, would probably be immediately followed by the decree, or designation, made by the whole people, of the form or plan of power, which is what we now understand by the constitution of the state; as also of the persons, to whom the administration of those powers should, in the first instance be confided. Considered in this light, government and civil society may be regarded as, generally, inseparable; the one ordinarily resulting from the other: but this is not universally the case; man in a state of nature has no governor but himself: in savage life, which approaches nearly to that state, government is scarcely perceptible. In the epoch of a national revolution, man is, as it were, again remitted to a state of nature: in this case civil society exists, though the constitution or bond of union be dissolved,

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and the government or administrative authority of the state be suspended, or annihilated. But this suspension is generally of short duration: and even if an annihilation of the government takes place, it is but momentary: were it otherwise, civil society must perish also.

Even during the suspension, or annihilation of government, the laws of nature and of moral obligation, which are in their nature indissoluble, continue in force in civil society. Hence social rights and obligations, also, are respected, even when there is no government to enforce their observance. This principle, during state convulsions, supplies the absence of regular government: but it cannot long supply its place; government, therefore, either permanent or temporary, results from a state of civilized society.

As the natural end and sole purpose of all civil power is the general good of the whole body, in which the governors, or public functionaries, themselves are necessarily included as a part, so, that civil power alone can be justly assumed, or claimed by any governor, or public functionary, which is delegated to him by the constitution of the state, as necessary, or conducive to the prosperity of the whole body united; what is not so delegated is unjust upon whatever pretense it is assumed. Any contract or consent conveying useless or pernicious powers is invalid, as being founded on an error about the nature of the thing conveyed, and its tendency to the end proposed.[6]

The most natural method of constituting, or continuing civil power must, since the general use of letters, be some deed, or instrument of convention, between those who set about to establish a civil society or state, to serve as an evidence of their common intentions in forming such an association; to limit the powers which they meant to confer upon their public functionaries, and agents: and to prescribe the mode by which those agents shall be from time to time appointed, and the powers confided to them administered.[7] And if it should happen that time and experience may demonstrate that the people have adopted, or consented to a pernicious plan; whose destructive tendency they have discovered; and now see their error; taking that plan to tend to their good, which they find has the most opposite tendency; they are free from its obligation, and may insist upon a new model of polity.[8]

These speculative notions may be regarded as having received the most solemn sanction in the United States of America; the supreme national council of which has, on the most important occasion, which has ever occurred since the first settlement of these states by the present race of men, declared, "that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to abolish it, and to institute a new government, laying its foundations upon such principles, and organizing its powers in such form, as to them shall seem most "likely to effect their safety and happiness."[9] Such is the language of that congress which dissolved the union between Great Britain and America. Few are the governments of the world, ancient or modern, whose foundations have been laid upon these principles. Fraud, usurpation, and conquest have been, generally, substituted in their stead.

When a government is founded upon the voluntary consent, and agreement of a people uniting themselves together for their common benefit, the people, or nation, collectively taken, is free, although the administration of the government should happen to be oppressive, and to a certain degree, even tyrannical; since it is in the power of the people to alter, or abolish it, whenever they shall think proper; and to institute such new government as may seem most likely to effect their safety and happiness. But if the government be founded in fear, constraint, or force, although the

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administration should happen to be mild, the people, being deprived of the sovereignty, are reduced to a state of civil slavery. Should the administration, in this case, become tyrannical, they are without redress. Submission, punishment, or a successful revolt, are the only alternatives.

It is easy to perceive that a government originally founded upon consent, and compact, may by gradual usurpations on the part of the public functionaries, change its type, altogether, and become a government of force. In this case the people are as completely enslaved as if the original foundations of the government had been laid by conquest.

Thus, the nature of a government, so far as respects the freedom of the people, may be considered as depending upon the nature of the bond of their union. If the bond of union be the voluntary consent of the people, the government may be pronounced to be free; where constraint and fear constitute that bond, the government is no longer the government of the people, and consequently they are enslaved.

And, as the nature of the government, whether free, or the reverse, depends upon the nature of the bond of union, whether it be the effect of a voluntary compact, and consent, or of constraint, and compulsion; so the form of any government, depends altogether upon the manner in which the efficient force, and administrative authority of the state is distributed, and administered. But, if the efficient force or administrative authority be, altogether, unlimited; as if it extends so far as to change the constitution, itself, the government, whatever be its form, is absolute and despotic: the people in this case are annihilated. – Their regeneration can only be effected by a revolution.

On the contrary, when the constitution is founded in voluntary compact, and consent, and imposes limits to the efficient force of the government, or administrative authority, the people are still the sovereign; the government is the mere creature of their will; and those who administer it are their agents and servants.

From hence it will appear that the nature of any government does not depend upon the checks and balances which may be provided by the constitution, since they respect the form of the government, only; but it depends upon the nature and extent of those powers which the people have reserved to themselves, as the Sovereign; or rather, upon the extent of those, which they have delegated to the government; or, which the government in the course of its administration may have usurped. An usurped government may be no less a government of checks and balances, than a government founded in voluntary consent and compact: witness the government of England, where the parliament according to the theory of their constitution (and not the people,) is the sovereign. The checks and balances of that Government have been the topic of applause among all those who are opposed alike to the government of the people, or of an absolute monarch. But no people can ever be free, whose government is founded upon the usurpation of their sovereign rights; for by the act of usurpation, the sovereignty is transferred from the people, in whom alone it can legitimately reside, to those who by that act have manifested a determination to oppress them.

Section II.

"How the several forms of government we now see in the world at first actually began," says the learned commentator,[10] "is a matter of great uncertainty, and has occasioned infinite disputes." The celebrated author of the Rights of Man observes[11] that the origin of all governments may be comprehended under three heads; superstition, power, and the common rights of man. The first were governments of priestcraft, through the medium of oracles; the second being founded in power, the sword assumed the name of a scepter; the third in compact; each individual in his own personal, and sovereign right entering into the compact, each with the other, to establish a government. A late

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political writer in England,[12] remarks, that all the governments that now exist in the world, except the United States of America, have been fortuitously formed. They are the produce of chance, not the work of art. They have been altered, impaired, improved, and destroyed by accidental circumstances, beyond the foresight, or control of wisdom. Their parts thrown up against present emergencies, form no systematic whole. These fortuitous governments cannot be supposed to derive their existence from the free consent of the people; they are fruits of internal violence and struggles, between parties contending for the sovereignty; or of fraudulent and gradual usurpations of power by those to whom the people have entrusted the administration of the government, or of successful ambition, aided by the operation and influence of standing armies. A democratic government, however organized, must, on the contrary, be founded in general consent and compact, the most natural and the only legitimate method of constituting or continuing civil power, as was observed elsewhere. It is the great, and, I had almost said, the peculiar happiness of the people of the United States, that their constitutions, respectively, rest upon this foundation.

Section III.

The fundamental regulation that determines the manner in which the public authority is to be executed, is what forms the constitution of the state. In this is seen the form by which the nation acts in quality of a body politic: how, and by whom the people ought to be governed, and what are the laws and duties of the governors.[13]

From this definition of a constitution, given us by Vattel, we might reasonably be led to expect, that in every nation not reduced to the unconditional obedience of a despotic prince, there might be found some traces, at least, of the original compact of society, entered into by the people at the first institution of the state. Yet it seems to be the opinion of the learned commentator that such an original compact had perhaps in no instance been expressed in that manner. But it is difficult not to imagine that such an original contract must have been actually entered into, and even, formally expressed, in every state where government has been established upon the principles of democracy. The various revolutions in the ancient states of Greece were often attended with the establishment of that species of government: The original constitution of Venice was a pure democracy; and the constitutions of several of the Swiss cantons partake also, in a great degree, of the same character. Can we conceive such regulations to have been established without being in some degree formally expressed? That the evidences of them have not been handed down to us is not, I apprehend, a sufficient reason for rejecting the opinion that they have had existence. If, therefore, the opinion of the learned commentator be, that there never was an instance in which government had been instituted by voluntary compact, and consent of the people of any state, it would seem that there is room to doubt the correctness of such an opinion. If, on the contrary, the opinion be referred to the primitive act of associating by individuals totally unconnected in society, before, I shall not controvert it any further.

For it is evident that the foundations of the state or body politic of any nation may have been laid for centuries before the existing constitution, or form of government of such state. In England, the foundation of the state, (such as it has been from the time of the Heptarchy,) is agreed to have been laid by Alfred. And from that period till the union with Scotland, in the days of Queen Anne, the state remained unchanged: but the government during the same period was incessantly changing. Before the conquest it seems to have resembled a moderate, or limited monarchy. From that period it seems to have been, alternately, an absolute monarchy, a feudal aristocracy, an irregular oligarchy, and a government compounded, as at present, of three different estates, alternately, vying with each other for the superiority, until it has finally settled in the crown. The foundations of the American States were laid in their respective colonial charters: with the revolution they ceased to be colonies,

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and became independent and sovereign republics, under a democratic form of government. When they became members of a confederacy, united for their mutual defense against a common enemy, they renounced the exercise of a part of their sovereign rights; and in adopting the present constitution of the United States, they have formed a closer, and more intimate union than before; yet still retaining the character of distinct, sovereign, independent states. In all these permutations of their constitutions or forms of government, the states, or body politic of each of the members of the American confederacy, have remained the same, or nearly the same, as before the revolution.

Thus, as has been already mentioned, society may not only exist, though government be dissolved; but the state, or body politic, may remain the same, whilst the government is changeable. Whenever the form of government is fixed, the constitution of the state is said to be established; and this, as has been observed before, may be effected either by fraud, or by force; or by a temporary compromise between contending parties; or, by the general, and voluntary consent of the people. In the two first cases, the constitution is merely constructive, according to the will and pleasure of those who have usurped, and continue to exercise the supreme power. In the third case likewise, it is in general, merely constructive; each party contending for whatever power it has not expressly yielded up to the other; or which it thinks it has power to resume, or to secure to itself. Where the constitution is established by voluntary, and general consent, the people, and the public functionaries employed by them to administer the government, may be apprized of their several, and respective rights and duties: and the same voluntary, and general consent is equally necessary to every change in the constitution, as to its original establishment. The constitution may indeed provide a mode within itself for its amendment; but this very provision is founded in the previous consent of the people, that such a mode shall supercede the necessity of an immediate resumption of the sovereign power, into their own hands, for the purpose of amending the constitution; but if the government has any agency in proposing, or establishing amendments, whenever that becomes corrupt, the people will probably find the necessity of a resumption of the sovereignty, in order to correct the abuses, and vices of the government.

And herein, I apprehend, consists the only distinction between limited and unlimited governments. If the constitution be founded upon the previous act of the people, the government is limited. If it have any other foundation, it is merely constructive, and the government arrogates to itself the sole right of making such a construction of it, as may suit with its own views, designs, and interests: and when this right can be successfully exercised, the government becomes absolute and despotic. In like manner, if in a limited government the public functionaries exceed the limits which the constitution prescribes to their powers, every such act is an act of usurpation in the government, and, as such, treason against the sovereignty of the people, which is thus endeavored to be subverted, and transferred to the usurpers.

Inseparably connected with this distinction between limited and unlimited governments, is the responsibility of the public functionaries, and the want of such responsibility. Every delegated authority implies a trust; responsibility follows as the shadow does its substance. But where there is no responsibility, authority is no longer a trust, but an act of usurpation. And every act of usurpation is either an act of treason, or an act of warfare.

Legitimate government, then, can be established only by the voluntary consent of the society, who by mutual compact with each other grant certain specified powers, to such agents as they may from time to time choose, to administer the government thus established, and their agents are responsible to the society for the manner in which they may discharge the trust delegated to them. The instrument by which the government is thus established, and the powers, or more properly the duties, of the public functionaries and agents, are defined and limited, is the visible constitution of the state.

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For it has been well observed by the author of the Rights of Man,[14] "that a constitution is not a thing in name only, but in fact. It has not an ideal, but a real existence; and whenever it cannot be produced in a visible form there is none. A constitution is a thing antecedent to a government, and a government, is only the creature of a constitution. It is not the act of the government but of the people constituting the government. It is the body of elements to which you can refer, and quote article by article; and which contains the principles on which the government shall be established, the manner in which it shall be organized; the powers it shall have; the mode of elections; the duration of the legislative body, etc."[15] Hence every attempt in any government to change the constitution (otherwise than in that mode which the constitution may prescribe) is in fact a subversion of the foundations of its own authority.

The acquiescence of the people of a state under any usurped authority for any length of time, can never deprive them of the right of resuming the sovereign power into their own hands, whenever they think fit, or are able to do so, since that right is perfectly unalienable. Nor can it be supposed, with any shadow of reason, that in a government established by the authority of the people, it could ever be their intention to deprive themselves of the means of correcting any defects which experience may point out or of applying a remedy to abuses which unfaithful agents may practice to their injury. The sovereign power therefore always resides ultimately, and in contemplation, in the people, whatever be the form of the government: yet the practical exercise of the sovereignty is almost universally usurped by those who administer the government, whatever may have been its original foundation.

It is the proper object of a written constitution not only to restrain the several branches of the government, viz. the legislative, executive, and judiciary departments, within their proper limits, respectively, but to prohibit the branches, united, from any attempt to invade that portion of the sovereign power which the people have not delegated to their public functionaries and agents, but have reserved, unalienably, to themselves.

A written constitution has moreover the peculiar advantage of serving as a beacon to apprize the people when their rights and liberties, are invaded, or in danger.

It has been before remarked, that the constitutions of the several United States of America, rest upon the ground of general consent, and compact, between the individuals of each state respectively. To this it may be added, that in every state in the union (Connecticut and Rhode-Island excepted) their constitutions have been formally expressed in a visible form, or writing, and have been established by the suffrages of the people, in that form, since the revolution.

The federal government of the United States rests likewise upon a similar foundation; the free consent and suffrages of the people of the several states, separately, and independently taken, and expressed.

It is therefore a fundamental principle in all the American States, which cannot be impugned, or shaken; that their governments have been instituted by the common consent, and for the common benefit, protection, and security of the people, in whom all power is vested, and from whom it is derived: that their magistrates, are their trustees and servants, and at all times amenable to them: and that when any government shall be found inadequate, or contrary, to the purposes of its institution, a majority of the community has an indubitable, unalienable and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.

Section IV.

Political writers in general seem to be agreed that the several forms of government, which now exist,

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may be reduced to three; viz. 1st. the democratic; or that in which the body of the nation keeps in its own hands the right of commanding: 2dly. the aristocratic; or that in which that right is referred to, or usurped by, a certain number of citizens, independent of the concurrence or consent of the remainder; and 3dly, that in which the administration of the affairs of the state is vested in a single person, which is denominated a monarchy. – These three kinds may be variously combined, and united, and when so combined and united they obtain the general appellation of mixed governments; and sometimes of limited governments. Thus the Roman commonwealth, after the establishment of the tribunes of the people, contained a mixture of democracy, with aristocracy: the former being vested in the assemblies of the people; the latter in the senate: thus, also, the government of Great-Britain, in which there is supposed to be a portion of all three of these forms, is not unfrequently styled a limited monarchy.

Section V.

When the body of the people in a state keeps in its own hands the supreme power, or right of ordering all things relative to the public concerns of the state, this, as was before observed, is a democracy. And, in such a state, says Montesquieu, the people ought to do for themselves, whatever they conveniently can; and what they can not well do, themselves, they should commit to the management of ministers chosen by themselves.

A democracy, therefore, may be either a pure and simple government, in which every member of the state assists in the administration of the public affairs, in person; or it may be representative, in which the people perform that by their agents, or representatives, to the performance of which in person, either insurmountable obstacles, or very great inconveniences, are continually opposed.

1. A simple democracy must necessarily be confined to a very small extent of territory: for if it be the duty of every citizen to attend the public deliberations and councils; to make laws; to administer justice: to consult and provide for the protection and security of the state against foreign enemies; or to compose domestic factions and strife; this will be impracticable if the territory of the state be extensive; and, moreover, the important business of agriculture, every species of industry, and the necessary attention to the domestic concerns of each individual, must be neglected; and where this continues to be the case for any considerable length of time, the state must inevitably perish.

Where the limits of a state are so confined as that the people can assemble as often as may be requisite, for the administration of the public concerns from every part of the state, such state must have too small a population to protect itself against the hostile designs and attacks of powerful, or ambitious neighbors; or, too small a territory to support the number of its inhabitants; either of which circumstances must continually endanger it's safety and independence.

A pure democracy seems, therefore, to be compatible only with the first rudiments of society, and civil government; or with the circumstances and situation of a people detached from the rest of the world; as the inhabitants of St. Marino, in Italy, are said to be, by the inaccessible cliffs of the mountain, whose summit they inhabit. And it may be doubted (for reasons that will hereafter be mentioned), whether there ever has been such a form of civil government established among civilized nations. Perhaps nothing can be found so nearly approaching to it, as in the history of the Aborigines of this continent, as given us by the author of the history of Vermont.[16] The form and manner of the Indian government, as that historian informs us, was the most simple that can be contrived or imagined. – There was no king, nobility, lords, or house of representatives, among them. The whole tribe assembled together in their public councils: their most aged men were the depositories of what may be gathered from experience, observation, and a knowledge of their former transactions. By them their debates and consultations were chiefly carried on. Their councils were

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slow, solemn and deliberate, every circumstance that could be foreseen was taken into consideration. The whole was a scene of consultation and advice. And the advice had no other force or authority, than what it derived from its supposed wisdom, fitness and propriety.

The strength, or power of the government, adds this author, is placed wholly in the public sentiment. The chief has no authority to enforce his counsels, or compel obedience to his measures. He is fed and clothed like the rest of the tribe; his house and furniture is the same as that of others; there is no appearance or mark of distinction; no ceremony, or form of induction into office; no ensigns, or tokens of superiority, or power. In every external circumstance, the chiefs are upon a level with the rest of the tribe; and that only which gives weight and authority to their advice, is the public opinion of their superior wisdom and experience. Their laws stand upon the same foundation. There was no written law, record, or rule of conduct. – No public precedent, established courts, forms or modes of proceeding. The causes and occasions of contentions were few, and they did not much affect the tribe. And when the chiefs interposed in the concerns of individuals, it was not to compel but only to counsel and advise them. The public opinion pointed out what was right; and an offender who had been deeply guilty fled from the tribe, etc.

Were we not (after the example of the ancient Greeks and Romans) in the habit of considering all those nations who are not seduced by the allurements of polished life, as barbarians, and savages, should we not esteem this picture of society, as the dream of a poet, describing the golden age, rather than a just representation of the actual state of a people, whom we despise for their ignorance; and of mankind, in those situations where the poisonous effects of artificial refinement have not yet manifested themselves.

And here it may not be amiss to mention another objection that is frequently made to a democratic government; because, if such an objection exists, it can only apply to such an one as we have just described. It is this; that all power being concentrated in the people, whenever the whole people assemble to deliberate upon any matter, there lies no appeal from their decision, however hasty or ill-advised it may be, there being no law, nor constitution to limit or control their determinations. Consequently they may revoke to day, what they established yesterday; and to-morrow, may adopt a new rule, different from either, which, in it's turn, may be again superceded the day after. Hence, a perpetual fluctuation of councils is inseparable from a pure democracy.

Another objection, which is also frequently urged against this species of government is, that it is, more than any other, subject to be agitated by violent commotions excited by turbulent and factious men, who aim at grasping all the power of the state into their own hands, and sacrifice every obstacle to the attainment of their nefarious ends.

As the first of these objections applies only to a pure, or simple democracy, such as has been above described, it may be time enough to answer it, when we find ourselves in danger of falling into such a form of government. But I am inclined to suppose, that the objection would be altogether without force, where the state of society among those about to establish a new form of government may happen to be such, as that no other inconvenience, (which might be apprehended from such a form of government) should constitute an objection to its adoption. For where there is such a separation from the rest of the world, and such a simplicity of manners, united to the existence of a very small society, as to recommend the adoption of a government perfectly, and simply, democratic, we may venture to affirm that no very great inconvenience need be apprehended from in stability of counsels. And with regard to the evils to be apprehended from violent commotions, we shall hereafter see, that they mark the period when the democracy is subverted, or in imminent danger of it, rather than that in which it flourishes: and such commotions are equally incident to other

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governments during the period of their decline, as to democracies; and in such governments they are likewise more violent, and more fatal.

2. But all the disadvantages of a pure, or simple democracy, such as we have hitherto been speaking of, may, I apprehend, be effectually guarded against, by one that is representative: that is, in which the people administer the government by means of their agents, or representatives, chosen from time to time by themselves, and removable from the trust reposed in them whenever they cease to possess the public confidence, in their wisdom, integrity, or patriotism.[17]

It is not necessary that the limits of a representative democracy should be so confined, as to expose it to the danger of famine on the one hand, or to the incursions and attacks of powerful and ambitious nations on the other: no interruption need be given to agriculture and other necessary occupations; the constitution of the state may be permanently fixed, by the people, and the duties and functions of their representatives and agents so distributed and limited, as that the laws of the state, and not the versatile will of a giddy multitude, shall always prevail.

Section VI.

Governments, says an American writer, may be variously modified on the democratic principle. That which possesses the most energy, and at the same time best guards its principles, is the most perfect. A democratic government ought to have the most perfect energy; because there can be no excuse for disobedience to an authority which is delegated by the community at large, and only held during pleasure. But in communicating energy without gradual and cautious experiment, there is danger of communicating with it, the power of fencing in the government, and changing its principles. This was the danger apprehended by many, at the time of adopting the present federal constitution. Nor was it a groundless apprehension, says the writer, to whom I am indebted for these remarks. The democratic principle being at that time, as it were, forlorn, destitute, and despised by the world, was in danger of being laughed out of countenance even in this country, and of being banished from it as a thing of too mean an origin to be admitted into polished societies.

I repeat it, says the same writer, that a democratic government ought to possess the most perfect energy; without which, true freedom, and the real and essential rights of man, are without protection. Many maxims taken from other governments are inapplicable to ours, and therefore with respect to us, are erroneous. All monarchies, however modified, are governments of usurpation, or prescription. In the exercise of their authority, the interest and pleasure of the governing party are more considered, than the general welfare: of course, the more energetic such authority is, the greater is the oppression felt from it. In governments by compact, where, of course, the authority is legitimate, and exercised for the general good, the reverse is true. Energy in such a government, is the best support that freedom can desire; and freedom is more perfect in proportion to the degree of energy. – If the laws of a democracy prove unwholesome in their effects, it is because the members of the legislature have erred in their judgment, as the best and wisest men are liable to do; in which case, they will soon correct the error: or because they have been improperly chosen, in which case, it depends on the people to correct it, at the next election. In a democracy a legislator, as well as every other public functionary, is responsible to the community for the uprightness of his conduct. If he concurs in an unconstitutional act, he is guilty of usurpation, and contempt of the sovereign authority, which has forbidden him to pass the bounds prescribed by the constitution. He has violated his oath, and the most sacred of all duties. To omit him at the next election is not an adequate punishment for such a crime. Abuse of power is despotism, and the democracy that does not guard against it, is defective. If in any department of government, a man may abuse, or exceed his powers, without fear of punishment, the right of one man is at the mercy of another, and freedom

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in such a government, has no existence.

It is indispensably necessary to the very existence of this species of democracy, that there be a perfect equality of rights among the citizens: the unqualified use of the term equality has furnished the enemies of democracy with a pretext to charge it with the most destructive principles. By equality, in a democracy, is to be understood, equality of civil rights, and not of condition. Equality of rights necessarily produces inequality of possessions; because, by the laws of nature and of equality, every man has a right to use his faculties, in an honest way, and the fruits of his labor, thus acquired, are his own. But, some men have more strength than others; some more health; some more industry; and some more skill and ingenuity, than others; and according to these, and other circumstances the products of their labor must be various, and their property must become unequal. The rights of property must be sacred, and must be protected; otherwise there could be no exertion of either ingenuity or industry, and consequently nothing but extreme poverty, misery, and brutal ignorance.

It is further indispensably necessary to the very existence of this species of democracy, that the agents of the people be chosen by themselves; that in this choice, the most inflexible integrity, be regarded as an indispensable constituent; and where that is found, it is but reasonable to be satisfied with something beyond mediocrity, in other qualities. A sound judgment united with an unfeigned zeal for the public weal, will be more certain of promoting and procuring it, than the most brilliant talents which have not the foundation of integrity for their support, and the stimulus of an active zeal for the public good, for its advancement. Besides, if none but men of the first talents were to be employed as public agents, even where no superiority of talents may be required, such a circumstance would inevitably discourage modest merit from offering its services, or accepting an offer of the public confidence, on any occasion: and such a discouragement would soon operate to substitute the glare of superficial talents, for the solid worth of integrity, sound judgment, and love of the public weal.

In this species of democracy, it is further indispensably necessary to its preservation, that the constitution be fixed, that the duties of the public functionaries be defined, and limited, both as to their objects, and their duration; and that they should be at all times responsible to the people for their conduct. The constitution, being the act of the people, and the compact, according to which they have agreed with each other, that the government which they have established shall be administered, is a law to the government, and a sacred reverence, for it is an indispensable requisite in the character and conduct of every public agent. A profound obedience to the laws, and due submission to the magistrate entrusted with their execution, is equally indispensable on the part of every citizen of the commonwealth, in order to preserve the principles of this government from corruption. Neglect of the principles of the constitution by the public functionary is a substitution of aristocracy, for a representative democracy: such a person no longer regards himself as the trustee, and agent of the people, but as a ruler whose authority is independent of the people, to whom he holds himself in no manner accountable; and he so degenerates into an usurper and a tyrant. On the other hand, when any individual can with impunity defy the magistrate, or disregard the laws, the sinews of the government are destroyed, and the government itself is annihilated. As distant as heaven is from earth, says Montesquieu, is the true spirit of equality from that of extreme equality. The former does not consist in managing so that every body should command, or that no one should be commanded; but in obeying and commanding our equals.

The constitution of Athens, as established by Solon, was in some measure representative;[18] there was a senate, consisting of five hundred deputies who were annually elected; so were the archons, and other magistrates of the republic. But the whole body of the people likewise assembled, both

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ordinarily, on stated days, and also on extraordinary occasions. By the constitution it was provided that the people should ratify or reject all the decrees of the senate; but should make no decree which had not first passed the senate. This regulation in process of time was so far disregarded, as, that amendments to the decrees of the senate were at first proposed; which being acquiesced in, other decrees, afterwards, were substituted in stead of those of the senate. This innovation in the constitution changed the nature of the government entirely, and introduced all the mischiefs of faction, corruption and anarchy; the people delivered themselves over to the influence of their vicious and corrupt orators, and intriguing demagogues; and the event finally proved that the smallest innovations are capable of subverting the constitution of a state.

Thus while a democracy may be pronounced to be the only legitimate government, and that form of government, alone, which is compatible with the freedom of the nation, and the happiness of the individual, we may perceive that it is on every side surrounded by enemies, ready to sap the foundation, convulse the frame, and totally destroy the fabric. In such a government a sacred veneration for the principles of the constitution, a perfect obedience to the laws, an unremitting vigilance on the part of the people over the conduct of their agents, and the strictest attention to the morals and principles of such as they elect into every office, legislative, executive, or judiciary, seem indispensably necessary to constitute, and to preserve a sufficient barrier against its numerous foes.

The enemies of a democratic government fail not on all occasions to magnify, and to multiply, at the same time, all the disadvantages of this species of government, just as some curious opticians have contrived lenses, which represent the same object, magnified, in an hundred different places, at once. They are ready to mention on all occasions the tumults at Athens, and at Rome (which last was in no sense whatever a democracy,) and they repeat the banishment of Aristides, the imprisonment and fine of Miltiades, and the death of Socrates, with so much indignation, that one might almost suppose they were the only examples to be found in history, where virtuous men had ever been oppressed by a government; or where cruelty had ever been exercised towards the innocent. But cruelty and even violence in a republic, are very different in their effects from cruelty, or violence in a monarch. In a republic ten thousand people, or the whole state, combine to oppress one man: in the other case, one individual inflicts torture upon a whole nation, or the whole human race. Not to mention the tyrants who have deluged their territories with the blood of their own subjects, and whose names are held in detestation by the whole human race, Alexander of Macedon, the favorite of historians, both ancient and modern, crucified two thousand Tyrians round the walls of their city, because they would not submit to him as a conqueror, but offered to receive him as a friend, and ally; and the same abominable tragedy was afterwards repeated by him at Gaza.[19] In the scale of good and evil, is it better that a whole nation should be sometimes unjust, and even cruel, to a Socrates, or a Miltiades, or that one man should possess the power of tyrannizing over the whole human race?

But in America, such scenes of violence, tumult, and commotion, as convulsed and finally destroyed the republics of Athens and Rome, can never be apprehended, whilst we remain, as at present, an agricultural people, dispersed over an immense territory, equal to the support of more than ten times our present population. Nothing can be more inconsistent with the habits and interest of the farmer and the husbandman, than frequent and numerous assemblies of the people. In a country, whose population does not amount to one able bodied militia man for each mile square, would it not be absurdity in the extreme, to pretend, that the same dangers are to be apprehended, as in those ancient cities; or in the modern capitals of France, or England, whose inhabitants, respectively, may be estimated as equal to the population of the largest state in the American confederacy? Or can we expect the same readiness in an independent yeomanry to excite, or to favor popular commotions,

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as in the Athenian populace, hired by their demagogues to attend the public meetings; or bribed, like the degenerate citizens of Rome, when they contented themselves with demanding from their rulers, bread, and the exhibition of public games, as all they required? Those who pretend to draw any parallel between those ancient republics, and the American states, must either be totally ignorant, or guilty of wilful misrepresentation. Attica was a small but an immensely populous state: the people had arrived at the summit of luxurious refinement, indolence, and corruption. The public orators were often secretly in the pay of the factious demagogues, contending for pre-eminence, within the state; or, of its enemies, without. The delusions of eloquence were constantly, and successfully employed to beguile an enervated and infatuated people to their destruction. The multitude were on all occasions agitated by the breath of their orators, as the waves of the sea by the wind. The Roman metropolis, on the other hand, was a military city, in which every citizen was a soldier, and a sovereign; for Rome was not the head of the republic, but the mistress of the empire, and of the globe. Her citizens may be regarded as the lords of the human race; in the forum they tyrannized over the rest of the world, and in the campus martins, over each other, A Marius, a Scylla, an Anthony, and an Octavius, were by turns their idols, and their scourges. Who can perceive the most distant resemblance between either of these republics, and the states of New-England, of Pennsylvania, of the Carolina's, or Virginia? Who will venture to compare those of Delaware, Georgia, Kentucky, or Tennessee, to them? But the improvements which the representative system has received in America, will, I trust, prove an effectual guard against those scenes of violence, which have stained the annals of the ancient republics; without weakening, or in any degree impairing the public force, and energy, on the one hand, or endangering the liberties of the people, on the other; this leads us to a short digression concerning:

Section VII.

The analysis and separation of the several powers of government; which if not a discovery reserved for the eighteenth century, bids fair to be practically understood, more perfectly than in earlier times. It consists in the just distribution, of the several distinct functions, and duties, of the public agents, according to their respective natures.

The essential parts of civil power may not improperly be divided into the internal, or such as are to be exercised among the citizens of a state, within the state itself, and the external, or such as may be exercised towards foreign nations, or different and independent states: the design of civil government being, both to promote peace and happiness, with an undisturbed enjoyment of all their rights, to the citizens of the state, by good order at home; and to defend the whole body, and all its members from any foreign injuries; and to procure them any advantages that may be obtained by a prudent conduct towards foreigners. These powers, which in all great empires, and monarchies, and even in smaller states, are generally united in one and the same man, or body of men, according to the system adopted by the states of the American confederacy, are, as was before observed, separated from each other; the former branch, being with some exceptions, confided to the state-governments, the latter to the federal government.

The former branch of these powers, or that which is to be exercised within the state, are, shortly, these. 1st. The power of directing the actions of the citizens by laws requiring whatever is requisite for this end, and prohibiting the contrary by penalties; determining and limiting more precisely the several rights of men, appointing the proper methods for securing, transferring, or conveying them, as the general interest may require, and even limiting their use of them, in certain cases, for the same general purpose. 2dly. Another power of the same class is that of appointing in what manner, and what proportion each one shall contribute towards the public expenses out of his private fortune, or private gains, by paying taxes, as the state of the people will admit. These two branches of power

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are commonly called legislative; and in this state, and I believe in every other in the union, they are confided to two distinct bodies of men chosen at stated periods by the people themselves, one of which is called the house of delegates, or representatives, the other the senate; the first being generally vested with the initiative authority, or right of commencing all laws; the other, that of amending, ratifying, or rejecting. Both bodies being absolutely independent of each other.

The power of jurisdiction in all cases of controversy between the citizens of the state about their rights, by applying the general laws to them; and of trying, and enforcing the penalties of the laws, against all such as are guilty of crimes which disturb the public peace and tranquility, constitutes a second subordinate branch of those powers which are to be exercised within the state; and this power is vested, partly in persons selected for their superior knowledge of the laws of the state, whose province it is to pronounce what the law is in each particular case, and who hold their office during good behavior, who are styled judges; and partly by persons indifferently chosen on the spot, to decide upon the matters of fact which are disputed in each case, who are denominated juries; being sworn well and truly to decide between the parties. And without their unanimous verdict, or consent, no person can be condemned of any crime. This is commonly called the judiciary department. And in this state no person can be at the same time a legislator, and a judge, or a member of the executive department of the government, of which it now remains to speak.

The power of appointing inferior magistrates (that of appointing the judges of the superior courts being by the constitution of this state vested in the legislature) and ministerial officers to take care of the execution both of the ordinary laws, and of the special orders of the state, given by the proper departments; and of collecting the public revenue; paying the public creditors; defraying the public charges; and commanding, and directing the public force, pursuant to the laws and constitution of the state, is ordinarily called the executive department: and in this state, this subordinate branch of internal powers, is confided to the discretion of another distinct body, composed of the governor, and the executive council, or council of state; by whose advice the governor administers the executive functions according to the laws of the commonwealth.

The external powers, or such as are to be exercised towards foreign, or other independent states, are these two; the first that of making war for defense of the state, and for this purpose arming and training the citizens to military service; and appointing proper officers to conduct them; erecting necessary fortifications; and establishing a naval force: And the second, that of making treaties, whether such as fix the terms of peace after a war, or such as may procure allies or confederates to assist in it, or such as without any view to war may procure, or confirm to a state and it's citizens, any other advantages by commerce, hospitality, or improvement in arts; and for this purpose the power and right of sending ambassadors, or deputies to concert such treaties with those of other nations. – To which we may add, thirdly, the power of deciding amicably any controversies which may possibly arise between different states, members of the same confederacy; all of which powers some authors include under one general name, viz. the federative; and all these, and some others of pretty extensive operation are vested in the federal government of the United States. The first appertain generally to the congress, composed like the state legislature, of two bodies, the one chosen by the people; the other appointed by the state legislatures. The second subordinate class belongs to the executive department, or president of the United States, assisted with the advice and consent of the senate. The third subordinate branch appertains to the federal judiciary; the judges of which, like those of the state, hold their offices during good behavior, though differently appointed, viz. by the president and senate, instead of the legislative body as in this state.

Power thus divided, subdivided, and distributed into so many separate channels, can scarcely ever produce the same violent and destructive effects, as where it rushes down in one single torrent,

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overwhelming and sweeping away whatever it encounters in its passage.

This analysis and separation is perfectly impracticable in a simple democracy, and is equally irreconcilable to the principles of monarchy; for in both these the sovereign power seems to be indivisible, and exerts itself every where, and on all occasions: In the former, the people being at once legislator, judge, and executive magistrate, and acted upon by the same impulse, they may at the same time make a law, and condemn the previous violation of it; and, as in the case of Socrates, in the same moment wreak their vengeance on the victim of their fury. But no such case can happen in an extensive confederacy, composed of states possessing respectively a representative form of government, and in which the constitution is fixed, the limits of power are defined and ascertained, and uniform laws, and modes of proceeding are prescribed to be observed in every case, according to its nature, before it occurs.

Thus, the sovereignty of the people, and the responsibility of their representatives and agents, being the fundamental principles of a representative democracy, however organized, or in other words, however the several powers of government may be distributed, or by whomsoever they may be exercised, the censorial power of the people, which is in effect a branch of the sovereign power, itself, may be immediately exercised upon that representative or agent who forgets his responsibility. It is this powerful control, which without a resumption of the sovereign power into the hands of the people, as is sometimes necessary for the reformation of the constitution, preserves the several branches of the government within their due limits: for the people where they are as vigilant, and attentive to their rights as they ought to be, will be sure to take part against those who would usurp either the rights of the people, or the proper functions of a different agent; and thus by their weight restore the constitutional balance. On the other hand, where such vigilance and attention to their just rights is wanting on the part of the people, the progress of usurpation is often as little perceived as that of a star, rising in the east whilst the sun is in the meridian. It reaches the zenith before the departure of day discovers it's ascent. But wherever there is a due vigilance on the part of the people, not only the errors or vices of the administration, but any defects in the fundamental principles of the government are more readily discovered in a representative democracy, than in any other form of government. This sometimes produces parties, but they are never violent until a general spirit of encroachment, or of corruption, is discovered to exist in the public functionaries and agents; then indeed more violent parties arise, and such as may endanger the public happiness. But they are engendered, and fostered by the government, and not as is falsely supposed, by the people. The latter are always more disposed to submission, than to encroachment, and often distrust their own judgments rather than suspect the integrity of their representative, or agent: a delusion from which they seldom recover until it is almost too late.

If any possible device can ensure happiness to the state, and security to the individual, it must be the establishment of this important principle of responsibility in the public agents; and its union with that other important principle, the separation and division of the powers of the government. Bold and desperate must that representative be who dares openly to violate his duty, where he knows himself amenable to the people for such a breach of trust. And wicked arid corrupt must be that administration, all the parts of which unite in one conspiracy against the peace and happiness of the people collectively, and the security of every individual of the community.

The limitation of power; the frequency of elections, by the body of the people; the capacity of every individual citizen to be elected to any public office, to which his talents and integrity may recommend him; and the responsibility of every public agent to his constituents, the people, are the distinguishing features of a representative democracy; and whilst the people preserve a proper sense of the value of such a form of government, will effectually guard it against the snares, intrigues, and

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encroachments of its counterfeit, and most dangerous enemy, (aristocracy) of which we shall now proceed to speak.

Section VIII.

An aristocracy is that form of government in which the supreme power is vested in a small number of persons. It may be absolute, or limited; absolute, where it is not founded in the consent and compact of the society, over which the government is established; or limited, where that consent has been given, and the constitution and its powers have been fixed, and limited, at the time of such consent; but in which the other important characters of a representative democracy have not been preserved. It may likewise be temporary; as where the members of the supreme council, or senate, sit there only for a certain term, and then retire to their former condition: or perpetual, during their lives. It may likewise be hereditary; where the representatives of certain families (distinguished by the flattering epithet of the well-born,) are senators by birth: or elective, where either at certain periods the whole senate is chosen, or vacancies are supplied by election. And this election may be either popular: as where the body of the people choose the person whom they may think proper to advance to the senatorial dignity; which is also called creation, where the person so chosen is advanced from the plebeian to the senatorial order; or it may be made by the whole senatorial order, from among themselves; or by the senate itself, out of the members of the senatorial order: in which case it has been styled co-optation: or by the senate itself out of the order of plebeians; in which case, as in one before mentioned, it obtains the name of creation.

This form of government is capable of such an approximation, and resemblance, in its external form, to a representative democracy, that the one is frequently mistaken for the other. The discriminating features of a representative democracy, as we have before observed, are the limitation of power; the frequency of elections, by the whole body of the people; the capacity of every citizen of the state to be elected to any public office, to which his talents and integrity may recommend him; and the responsibility of the public agent to the people, for his conduct. If all, or either of these characters be wanting in the constitution of the state, it is an aristocracy, though it should be founded upon the consent of the people: if either of these characters be wanting in the mode of administering the government, it then becomes an aristocracy founded upon fraud and usurpation. Seldom has such a government failed to spring up, from the immediate ruins of monarchy: never, perhaps, has it hitherto failed to undermine and subvert a government founded on the principles of a democracy. There is not in nature a spirit more subtle than aristocracy; nothing more unconfinable, nothing whose operations are more constant, more imperceptible, or more certain of success; nothing less apt to alarm in infancy; nothing more terrible at maturity.

> — *Malum quo non aliud velocius ullum;*
> *Mobilitate viget, viresque acquirit eundo;*
> *Parva metu primo; mox sese attollit in auras,*
> *Ingrediturque solo et caput inter nubila condit.*
> VIRG.

In aristocracies where the whole power is lodged in a senate, or council of men of eminent stations or fortunes, one may sometimes expect sufficient wisdom and political abilities to discern and accomplish whatever the interest of the state may require. But there is no security against factions, seditions, and civil wars; much less can this form secure fidelity to the public interest. The views of a corrupt senate will be the aggrandizing of themselves, their families, and their posterity, by all oppressions of the people. In hereditary senates these evils are certain; and the majority of such bodies may even want a competent share of talents to discharge the duties of their stations. Among

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men born in high stations of wealth and power, ambition, vanity, insolence, and an unsociable contempt of the lower orders, as if they were not of the same species, or were not fellow-citizens with them, too frequently prevail. And these high stations afford many occasions of corruption, by sloth, luxury, and debauchery, the general fore-runners and attendants of the basest venality. An unmixed hereditary aristocracy, if not the worst, must be among the very worst forms of government, since it engenders every species of evil in a government, without producing any countervailing benefit, or advantage.

In a council of senators elected for life, by the people, or by any popular interest, there is more reason to expect both wisdom and fidelity, than in the case of an hereditary aristocracy: but here the cogent tie of responsibility is wanting; and without that, the ambitious views of enlarging their powers, and their wealth, will supercede all ideas of gratitude, or fidelity to those to whom they owe their elevation.

When new members are admitted into the senatorial order by an election, in which the right of suffrage is confined to such as have already obtained an admission into that order; or where the right of admission into the senate itself is vested in that body; the senate will infallibly become a dangerous cabal, (without any of the advantages desirable in civil polity,) and attempt to make their office hereditary. When senators are entitled to the privileges of that station in consequence of possessing a certain degree of wealth, the burdens of the state will, without exception, be thrown upon the poorer classes of the people. Thus aristocracy, whatever foundation it may be raised upon, will always prove a most iniquitous and oppressive form of government.

In absolute monarchies, and in perfect democracies, the seeds of aristocracy are contained in wealth; but they do not germinate so long as these governments remain unmixed: for power is not attached to riches in the former, they. being hidden from the sight there, lest they should tempt the grasp of the sovereign: in the latter, they minister to domestic luxury, or furnish the means of secret corruption only. The moment that wealth becomes influential, the principle of democracy is corrupted; when it is allied with power, the democracy itself is subverted; when this alliance becomes hereditary in any state, the democratic principle may be regarded as annihilated.

But the most easy and successful mode in which an aristocracy commences, or advances, consists in the secret and gradual abuse of the confidence of the people, in a representative democracy. Slight, and sometimes even imperceptible innovations, occasional usurpations, founded upon the pretended emergency of the occasion; or upon former unconstitutional precedents; the introduction of the doctrines of constructive grants of power; of the duty of self-preservation in a government, however constituted, or however limited; of the right of eminent domain, (or in other words, absolute power,) in all governments; these, with the stale pretense of the dangers to be apprehended from the giddy multitude in democratic governments, and a thousand other pretexts and arguments of the same stamp, form the ladder by which the agents of the people mount over the heads of their constituents, and finally ascend to that pinnacle of authority and power, from whence they behold those who have raised them with contempt, and treat them with indignation and insult. The only preventative lies in the vigilance of the people. Where the people are too numerous, or too much dispersed to deliberate upon the conduct of their public agents, or too supine to watch over that conduct, the representative will soon render himself paramount to, and independent of, his constituents; and then the people may bid a long farewell to all their happiness.

The first form of government established at Venice, was founded upon principles perfectly democratic. Magistrates were chosen by a general assembly of the people; and their power continued only for one year. This simple form of government (we are told by Doctor Moore,[20] whose inquires

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and researches upon this subject afford an useful, and an awful lesson to all democratic states;) remained uncorrupted for one hundred and fifty years. Upwards of three hundred years were afterwards employed in gradual, and almost imperceptible changes in the government, and encroachments upon the rights of the people, before that system of terror, which finally rendered the Venetian government the most tyrannical and formidable to its own citizens that the world has ever known, was completed by the establishment of the state inquisition. From that period the most complete despotism has with unremitting rigor been exerted not only over the actions, but over the minds, of every citizen of that miserable state. A word, a look, nay silence itself, may be interpreted to be treasonable, in a government whose maxim is, "that it is better that an innocent person should suffer from an ill grounded suspicion, than the government should be endangered by any scrutiny into its conduct."

Should it be inquired how such important changes can possibly be effected where the supreme power is vested in the people, as in the American States, we may give the answer in the words of De Lolme.[21] The combination of those who share either in the actual exercise of the public power, or in its advantages, do not allow themselves to sit down in inaction. They wake, while the people sleep. Entirely taken up with the thoughts of their own power, they live but to increase it. Deeply versed in the management of public business, they see at once all the possible consequences of measures. And, as they have the exclusive direction of the springs of government, they give rise, at pleasure, to every incident that may influence the minds of a multitude who are not on their guard; ever active in turning to their advantage every circumstance that happens, they equally avail themselves of the tractableness of the people during public calamities, and its heedlessness in times of prosperity. By presenting in their speeches arguments and facts, which there is no opportunity of examining, they lead the people into gross, and yet decisive errors. In confirmation of these observations he cites two instances from the history of his own country, which have occurred within the present century; and which may serve to show how slight a movement of the political machine, may effect a total change in its operations. In Geneva in the year 1707 a law was enacted that a general assembly of the people, should be held every five years to treat of the affairs of the republic, but the magistrates who dreaded those assemblies soon obtained from the citizens themselves, the repeal of the law; and the first resolution of the people, in the first of these periodical assemblies, in the year 1712, was to abolish them for ever. The profound secrecy with which the magistrates prepared their proposals to the citizens on that subject, and the sudden manner in which the latter, when assembled, were acquainted with it, and made to give their votes upon it; and the consternation of the people when the result was proclaimed has confirmed many in the opinion that some unfair means were used. The whole transaction has been kept secret to this day: but the common opinion is, that the magistrates had privately instructed the secretaries in whose ear the citizens were to whisper their suffrages; when a citizen said "approbation, he was to be considered as approving the proposal of the magistrates; when he said "rejection," it was to be considered that he meant to reject the periodical assemblies. – In the year 1738 the citizens enacted at once into laws a small code of forty-four articles, by one single line of which they bound themselves forever to elect the four syndicts, or chiefs of the council of twenty-five out of the members of the same council; whereas they were before free in their choice. They, at that time, suffered the word approved to be slipped into a law; the consequence of which was to render the magistrates absolute masters of the legislature. So watchful, so active, so persevering, so noxious, so incompatible with the principles of a democratic government, are those of aristocracy, that we may venture to pronounce it the most dangerous enemy to a free government. If a single germ of aristocracy be once ingrafted upon a republican government, the stock will soon cease to bear any other branches.

In an aristocracy, says Montesquieu,[22] the republic is in the body of the nobles; and the people are

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nothing at all.

Section IX.

Monarchy is that form of government in which all the parts of the supreme power are committed to one person. And such a government may be either despotic, absolute, and unlimited;

or limited. In the former case the administration is vested altogether in the prince, without any check, or restriction whatsoever. In this government, according to Montesquieu, the prince is all in all. The people were all equal, and their equality is the most abject slavery. The principle of this kind of government is fear generated in ignorance.[23] Submission constitutes the only security which the people enjoy: and the safety of the tyrant is alike the result of their terrors, and their ignorance.

In this government the will of the prince is the only law, manners and customs, says Montesquieu, supply the place of general laws, and the will of the prince constitutes the law in particular cases. Hence in a despotic government there are no laws which can be properly so called: laws are established: manners are inspired; these proceed from a general spirit, those, from a particular institution. It is a capital maxim, that the manners and customs of a despotic empire should never be changed; for nothing would more speedily produce a revolution.

In China, the fundamental laws of the empire are spoken of; the emperor presumes not to change them: but on particular occasions he dispenses with them. They are binding upon all the world but himself; and so far binding even upon him, that he leaves them to his successor, to dispense with, as he had done before him.

A limited monarchy (if indeed such a form of government can be any where found) is one where by some original laws in the very constitution or conveyance of power, the quantity of it is determined, and limits set to it, with reservations of certain public rights of the people, not entrusted to the prince; and yet no court or council, constituted which does not derive its power from him. How far the government established over the Israelites in the person of Saul – when Samuel their prophet "told the people the manner of the kingdom, and wrote it in a book, and laid it up before the Lord," may have furnished a model for this species of monarchy, is foreign from our present inquiry.

Baron Montesquieu distinguishes that species of monarchy in which there are intermediate, subordinate, and dependent powers, likewise, from the absolute or despotic kind, above-mentioned: yet he acknowledges that even in this, the prince, is the source of all power, civil and political; but that he governs by fundamental laws. "And these," says he,[24] "necessarily suppose the intermediate channels through which the power flows. The most natural, intermediate, and subordinate power is that of the nobility. No nobility, no monarch, but there may be a despotic prince."

But I incline to refer this latter form of government to the class of mixed governments, rather than to the simple monarchical form. It partakes, however, of both; wherever the prince alone is the source of all power, the government is really absolute, in spite of forms. Though the establishment of different ranks, and orders may vary the condition of the people, whereby the burdens of government are unequally borne, yet this does not alter the nature of the government, unless there be some certain powers annexed to those different ranks, or some of them, which may on certain occasions control or check the administration of the monarch. Where no such incidental powers exist, the government is still absolute in the person of the prince: and wherever they do exist, their existence constitutes a mixed government. In Spain, since the suppression of the cortes, the monarchy is absolute; yet there is in Spain a splendid nobility, whose condition is far above the rest of the people, but, who, possess no power in respect to the operations of the government In France, before the late revolution; in Russia, in Prussia, and in Sweden under the government of its late

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monarch, this was also the case. In all. these countries the prince is supposed to govern by fixed laws; yet in all of them, I apprehend he was absolute. In England, the nobility form a separate branch of the supreme legislature; the power of the crown is according to the theory of that government, limited thereby; and this constitutes the English government, what is ordinarily styled, a limited monarchy, but more properly a mixed government. Baron Montesquieu, at the same moment that he is speaking of that species of monarchy in which there are intermediate, subordinate, and dependent powers, subjoins; "that the prince is the source of all power political and civil." I am at a loss to conceive how the power of such a prince can be said to be limited. He considers indeed the ecclesiastical power in Spain and Portugal, as forming a barrier against the torrent of arbitrary power in those countries: but the ecclesiastical power can scarcely be considered as a dependent power on the crown in either of these kingdoms. It for a long time maintained a superiority over the civil power, in those, and most other countries in Europe; and even at this day, it might hazard a revolution in either of those two kingdoms, if the monarch should attempt to treat it as a subordinate, dependent power.

It must, however, be confessed, that there is a wide difference between those governments, where liberty has never been known to exist, or has been long banished, as in Turkey, and in most of the Asiatic, and African states, and those, where absolute authority has been acquired by gradual usurpations, or, violent exertions, made at particular epochs, to suppress those branches of the government, which, in mixed governments, are supposed to form some check upon the supreme executive authority: as was the case in the suppression of the cortes, or assembly of the nobles, in Spain, by Charles V. Of the states general, and provincial parliaments, in France, by Louis XIII. And of the diet of the States, and the senate of Sweden, by the late king Gustavus III. In these last cases, the laws relating to property being previously established, and the privileges of the several orders and ranks of persons, understood, and admitted by general custom, and implied consent, the assumption of power by the prince, was directed to the abolition of public, rather than private rights. In such states, the business of legislation is ordinarily confined to a single subject, that of revenue. The ancient laws on all other subjects remaining unaltered, the people seem to possess some rights: whereas in the Turkish and Asiatic governments, the subject is held to be the slave of the sovereign and his property is held at his master's will. In the European monarchies, on the other hand, the higher orders, or nobility often, possess very extensive powers over the commonalty, or peasantry, as they are frequently styled, without interfering with, or in any manner diminishing the authority of the government over either; but, on the contrary, strengthening and supporting it on every occasion, where its oppressions might incline the people to resistance, if they possessed the means of making it. And this may serve to explain the maxim, "no nobility, no monarch." The foundations of this species of monarchy are to be sought for, in the ancient feudal governments, the prince having by degrees usurped, and annihilated all those privileges which might possibly interfere with his own authority; yet leaving the nobility in possession of such as might enable them to maintain a superiority over the people, without danger to the throne. Such was the state of France under Louis XIV, and his successors.

If this kind of monarchy be considered as limited, it proceeds not so much from the nature of the government, as from the character of the nation, previous to its establishment. If the prince from an apprehension of rousing that spirit of liberty, which has been smothered, rather than extinguished, pursues moderate measures, the people are flattered into a notion, that this circumstance is owing, equally, to the excellence of their government, and, to the benignity of their monarch. The distinction between the character of the prince, and the nature of the government, is soon lost sight of. Hence that profound veneration, that enthusiastic predilection for their own government, which is found almost universally, to prevail in all nations. The moderation of Augustus Caesar, after he

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was established in the empire of Rome, contributed not less to the annihilation of the spirit of liberty, in the nation, than his own previous tyranny, and that of his successors, did, to the enjoyment of it. The same moderation in the late king of Sweden's administration, after subverting the constitution, was calculated to obliterate the remembrance of that transaction, and even to persuade the nation that they were more free, than before he became absolute. His posterity will probably evince to them the change in their condition.

This species of monarchy being usually founded upon usurpation, rather than conquest, the prince does not always exert his authority to the utmost extent; but reserves such an exercise of it for extraordinary emergencies. When they occur, and the people feel new oppressions, if the spirit of liberty be not wholly extinguished among them, such oppressions are regarded as usurpations. From hence it happens that these governments are neither so durable, nor so tranquil, as those more rigorous despotisms, which are founded in conquest, and in which the spirit of liberty has been long since annihilated. In these last, the people, being already reduced to the most abject slavery, are incapable of distinguishing between one act of tyranny and another: they are divested of all power of resistance; and therefore acquiesce in any new burdens which their cruel task-masters may impose, without presuming to murmur, or to complain: but where the people are not yet reduced to such an abject state, a series of oppressions, heaped upon them from time to time, irritate and inflame their minds, much more than such an instantaneous accumulation of injuries, as would amount to a total privation of liberty at once. Reiterated oppressions, though comparatively slight, have often the same effect as superficial wounds; a number of which are often more painful than a single one, that is mortal. The irritation of temper among the people, thus produced, generally manifests itself by open opposition, with the first favorable occasion; the suppression of such an opposition renders the government more absolute, despotic, and tyrannical: on the other hand its success overturns, or changes the nature of, the government. Such appears to have been the origin and progress of the late revolution in France.[25]

The distinction of ranks in this kind of government contributes not, as we have already observed, to impose any check upon the government, in favor of the people, in general. The nobility, are, according to Montesquieu, at once the slaves of the monarch, and the despots of the people. Their privileges have no relation to the government, otherwise than to exempt them from the utmost severity of those oppressions, which are indiscriminately heaped upon the lower orders; but they are great, as they respect the lower orders. An admission into the higher class gains an exemption from that intermediate oppression, which these orders exercise over the inferior ranks of the people. This produces a stimulus which Montesquieu has dignified with the epithet honor; which, as he informs us, is the vital principle of this kind of monarchy, and excites men to aspire to preferments, and to distinguishing titles. The term honor, thus understood, conveys no very favorable impression to the ear of a republican.

As, in a simple monarchy, the nation is as it were consecrated in the person of the prince, the luster of the throne is often mistaken for the prosperity of the nation. Does a prince maintain an immense army in his territories; are the ports of his dominions filled with a powerful navy; does he not only inspire his neighbors with the terror of his arms, but even overawe remote nations by the greatness of his power: is he always on the watch from some specious cause, or pretext for a quarrel; does he ransack the records of nations to discover some obsolete claim to their territories; does he seize upon the dominions, or usurp the sovereignty of some weaker state; does he carry fire and sword into every quarter; does desolation mark the footsteps of his ambition; and the misery, or extermination of the human race point out the progress of his successes? such a prince has arrived at the pinnacle of glory: and his frauds, avarice, injustice, cruelties, usurpation, and tyranny, are lost amidst the

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luster of his diadem; and, together with the groans, execrations and curses of the victims to his ambition, are consigned to oblivion by the partial pen of the historian. – Let the most partial admirers of the most renowned princes of antiquity, or of modern ages call this an exaggerated picture of a flourishing monarchy! In a mixed hereditary monarchy the features may be somewhat softened; but they are still the features of an enemy to the human race, if we may judge from some of the fairest examples of that species of government.

Section X.

From an union of the principles of these three simple forms of government, or the combination of any two of them, arises what political writers denominate a mixed, or complex form of government. These complex forms are innumerable, according as monarchy, either hereditary or elective, is combined with some of the several sorts of aristocracies, or democracies, or with both. And further important diversities may arise according as the several essential parts of the supreme power are entrusted, differently, with the prince, the senate, or the popular assembly; or according to the mode in which the prince, or either of those co-ordinate assemblies may themselves, be constituted. As whether the prince, or the members of the senate, be hereditary or elective, and if elective, for what periods, and out of what bodies, they may be elected; and by whom, and in what manner such election may be made. And again, by whom the popular assemblies shall be elected; for what periods; and whether any, and what qualifications in respect to estate, shall be required either in the electors, or in the representative.

Political writers seem to have differed in opinion respecting these kinds of mixed governments; for whilst some of them appear to regard such forms of government as corruptions of the simple forms, others have bestowed the most exalted encomiums on them, as uniting the advantages, and avoiding the inconveniences inseparable from each of them, singly. It is obvious, says Doctor Hutchinson,[26] that when by any plan of polity these four advantages can be obtained, wisdom in discerning, the fittest measures for the general interest; fidelity, with expedition and secrecy in the determination and execution of them; and concord, and unity; a nation must have all that happiness which any plan of polity can give it; as sufficient wisdom in the governors will discover the most effectual means, and fidelity will choose them; by expedition and secrecy they will be most effectually executed, and unity will prevent one of the greatest evils, civil wars, and seditions. The great necessity of taking sufficient precaution against these mischiefs of factions and civil wars, leads most writers in politics to another obvious maxim, viz. that the several parts of the supreme power if they are lodged by any complex plan in different subjects, some granted to a prince, others to a senate, and others to a popular assembly, there must in such case be some *nexus imperii*, or political bond, that they may not be able, or incline to act separately, and in opposition to each other. Without this, two supreme powers may be constituted in the same state, which may give frequent occasions to civil wars. This would be the case if both the senate, and popular assembly, claimed, separately, and independently, the legislative power; as it happened in Rome, after the tribunes held assemblies of the plebeians, without authority of the senate, and obtained that the decrees of the plebeians should have the force of laws, while the senate insisted upon the like force to their decrees. The like was the case in many nations of Europe, while the ecclesiastical state pretended to make obligatory laws, and exercise certain jurisdictions, independently of the civil. If therefore the several essential parts of the supreme power are distributed among different persons, or courts, they must have a strong bond of union. If a prince has the executive, and the power of peace and war, while another body has the legislative, the power of raising tributes must be at least necessarily shared with the legislative council, that it never may be the prince's interest to make war without their concurrence: and the prince must have a share in the legislative. Without such bonds, laws might be enacted which the prince would not

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execute, or wars entered into which the nation would not support. – But there is no such necessity, adds the same writer, that all the parts of the supreme power should be committed either to one person, or to one council: And the other interests of the state may require that they should be divided.

It is evident, from the case here supposed, that this ingenuous writer had the British constitution (in which there is an hereditary prince, in whom the supreme executive authority, in. eluding the power of peace and war, is vested,) in his eye, when he wrote this passage, evidently calculated to justify that principle in the British constitution, that the regal character must possess some share in the legislature; as otherwise it might happen, that laws might be enacted, which he, being responsible to no one for his conduct, would not execute. That constitution must indeed be radically defective, where the executive authority may safely refuse to execute the law. But it may be doubted whether this defect is at all remedied, by allowing to the executive magistrate, not only an absolute negative over every act of the legislature, but in fact an initiative authority within the legislature itself: and this initiative has been so long sanctioned by practice, that it is now considered as the peculiar province of the principal minister of the crown,[27] to bring forward every specific proposition for a tax that may be made in the house of commons; to whom the initiative might, in this case, is said to belong, exclusively not only of the crown, but even of the house of lords, or second branch of the legislature. But to return to our subject.

Dr. Hutchinson[28] concludes, that none of the simple forms can be safe for a society. That if those deserve to be called the regular forms which are wisely adapted to the true ends of civil polity, all the simple forms are to be called rather rude and imperfect. That complex forms, made up of all three, will be found the best, and most regular, according to the general doctrine, both of ancients and moderns.

It was observed in another place, that governments may be variously modified upon the democratic principle: and it is perhaps susceptible of proof, that a representative democracy is more capable of such a modification, as may unite all the real advantages of the three simple forms of government, without hazarding the inconveniences actually inseparable from either, singly, than any other state, or body politic whatsoever.

The professed design, and obvious advantages of these mixed governments, is said to consist in the union of the public virtue and goodness of intention, to be found in popular assemblies, with the superior wisdom usually ascribed to a select council, composed of the most experienced citizens; and the strength, energy, and union of a government committed to the hands of a single person.

The benefits of the democratic, or popular branch, strictly speaking, may be preserved by a popular assembly, chosen annually, by the people of convenient districts, in fair and equal proportions, from among themselves; wherein the right of electing, and of being elected, shall be extended to every citizen having a sufficient evidence of a permanent common interest with, and attachment to the community: which assembly should possess the initiative right in the establishment of all laws, and more especially such as may impose or create any burden upon the state, or its citizens. To preserve this branch from falling under the influence of men of wealth, an agrarian system should be established, to prevent the accumulation of wealth in the hands of a few, and the establishment of patronage and dependence among the yeomanry or farmers, by reducing them from the state of absolute proprietors of their farms, to that of tenants or vassals, over whom, their rich landlords may acquire a kind of feudal authority and control. The best mode of obviating such an accumulation seems to be the partibility of estates among all the children, or collateral relations of persons dying intestate, and the absolute prohibition of all perpetuities in lands. If the members of this assembly

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be rendered incapable of holding, or accepting any lucrative office which may be created by the legislature, or filled by the choice of any other department of the government, their purity, integrity, and independence, will be unimpaired and unsuspected. They will not impose burdens which they must share in bearing, nor will they create offices, and increase emoluments, of which no part can arrive to themselves. They will not forfeit the confidence of their constituents by an abuse of the power confided to them, nor will they desire to extend those powers which another may be called upon the next year to exercise in their stead. If they have the power of nomination to office, in some of the more important ministerial and judiciary departments, in such mode as to give to the senate the power of selecting a smaller number from the whole number of persons nominated; and to the executive department, the final choice between those whom the senate may prefer; it might be expected that offices filled in such a mode, would be bestowed on persons eminent for their integrity, capacity, and diligence. If they were vested with a kind of censorial power likewise, or the right of impeaching such of the public agents as may betray their trust, and endanger the public happiness, such an assembly might be supposed to unite in it all the advantages which could be expected from a general assembly of the people in a democratic state.

If there be a second council, composed of fewer members, more advanced in age, and chosen from larger districts, by electors chosen for that especial purpose in the smaller districts by the people themselves, such a council may be presumed likely to possess more wisdom than any hereditary counselors, and as much, both of wisdom, integrity, and of weight among the people, as any similar council constituted in any other mode: if one third, or one fourth of the members should in continual rotation go out, every third or fourth year, there would always remain a sufficient number who may be supposed to have acquired an intimate acquaintance with the nature of the business they would have to transact; whilst the short period of three or four years, at the end of which they must vacate their seats, and either return to the level of the rest of their fellow citizens, or owe their re-election to a general approbation of their conduct, would induce them constantly to bear in mind their duty to the public. – If no personal privileges were annexed to their station; and they, as well as the members of the popular assembly, were incapable of election to any other office; it would Insure an honest independence of conduct, unswayed by hopes, and unawed by fears, from any other branch of the government. If to such a council every act of the initiative or popular assembly, were necessarily submitted for their amendment, approbation, or rejection, it might be presumed that no laws would be enacted, the nature and consequence of which had not been fully considered and digested, before they should become obligatory upon the people. If in those cases where the popular assemblies might have the power of nomination to office, the character of those recommended by popular favor were to undergo a scrutiny in such a council, and the number of candidates were reduced to two, or at most three, out of whom the final appointment should be made, the demagogues of faction would probably be excluded from office, in favor of those citizens, whose virtues and talents might give them a just title to a preference. A senate thus constituted, and restricted, might also, perhaps, be safely entrusted with the power of trying impeachments; in those cases, at least, where a member of the supreme judicial court, should incur the notice of the censorial power of the popular assembly: In all other cases, I should presume, that the judicial courts, would be the proper tribunals for such trials. In no simple aristocracy could a council as wise, as virtuous, and as faithful, be found.

The regal, or executive power of the state, might upon the same principles be lodged either in the hands of a single magistrate; or in such a magistrate with the advice and consent of a council, composed of a few select citizens, eminently distinguished for their fidelity, patriotism, wisdom, and experience, in the affairs of the state. The best mode of choosing such an executive body would probably be, by electors chosen from among the people, in several convenient districts, whose power

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should extend to that business, alone. If the chief magistrate be chosen in this manner, and for a short period; if after a certain period he be ineligible, for some years; if his council, (where such is assigned him) be composed of persons chosen in a similar manner, and going out by rotation at the end of two or three years, after their election; if they be precluded from any other lucrative office, during the period for which they may be elected; if they be liable to the censorial power of the popular assembly, and when removed from office return to the condition of private citizens; such an executive, on all necessary occasions, would possess all the energy, secrecy, unanimity, and dispatch to be found in a monarchy, without any danger of becoming the tyrants of the people, instead of their servants and agents. And a government so constituted would probably unite in itself every advantage which theorists ascribe to any complex, or mixed form of government, whatsoever.

But such a government would be a REPRESENTATIVE DEMOCRACY, and not a MIXED GOVERNMENT, of that nature which those writers prefer. For it is the essence of this latter species of government, that the several powers, which, together, share the administration, or as it is ordinarily called, the supreme power, or sovereignty, should be, (in theory, at least) entirely independent of each other. Thus in England, we are told that the legislature of the kingdom (in which the absolute rights of sovereignty, (or *jura summi imperii*) are said to reside) is entrusted to three distinct powers, entirely independent of each other; viz. the king, in whom the supreme executive power is also lodged; the house of lords, composed of an aristocratical assembly of persons, selected for their piety, their birth, their wisdom, their valor, or their property; and thirdly, the house of commons, freely chosen from the people among themselves, which makes it a kind of democracy; as this aggregate body, actuated by different springs, and attentive to different interests, composes the British parliament, and has the supreme disposal of every thing; there can no inconvenience be attempted by either of these branches," says judge Blackstone, "but will be withstood by one of the other two; each branch being armed with a negative power, sufficient to repel any innovation which it shall think inexpedient."[29]

Such is the outline of the far-famed British constitution, as sketched by the masterly pen of judge Blackstone, whose able commentary, and high wrought panegyric, upon it; together with the elaborate researches, and encomiums of De Lolme; and the elegant eulogium of president Montesquieu, are well deserving the attentive perusal of the student. And, if to all these, the suffrage of a late exalted character in the government of the United States can afford any additional luster, the British constitution may be selected, not only as the most perfect model of these kinds of MIXED governments, but as the most stupendous monument of human wisdom.

It would far exceed the proposed limits of this essay to enter into a minute examination of its structure, and to point out the essential difference between its theoretical excellencies, and its practical defects, corruptions, and radical departures from those very principles, which have been supposed to constitute that superiority and pre-eminence, which these and other writers have ordinarily ascribed to it. But the following observations from the pen of a native, whose stile and manner evince a superiority both of genius and discernment, whilst they leave no doubt upon the mind, that he had seen and felt all that he describes, may lead us to conclude, that the practical abuses, corruptions, and oppressions of that government, are at least equal to the theoretical pre-eminence of its constitution.

"It is perhaps susceptible of proof," says this nervous writer,[30] "that these governments of balance and control have never existed but in the visions of theorists. The fairest example will be the constitution of England. If it can be proved that the two members of the legislature who pretend to control each other are ruled by the same class of men, the control must be granted to be imaginary. That opposition of interest which is supposed to preclude all conspiracy against the people can no

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longer exist. That this is the state of England, the most superficial observation must evince. The great proprietors, tided and untitled, possess the whole force of both houses of parliament, that is not immediately dependent on the crown.[31] The peers have a great influence in the house of commons. All political parties are formed by a confederacy of the members of both houses. The court party by the influence of the crown, acting equally in both, supported by a part of the independent aristocracy: The opposition by the remainder of the aristocracy, whether commoners, or lords. Here is every symptom of collusion: no vestige of control. The only case where it could arise, is where the interest of the peerage, is distinct from that of the other great proprietors."

"Who can, without indignation," adds the same writer,[32] "hear the house of commons of England called a popular representative? A more insolent and preposterous abuse of language is not to be found in the vocabulary of tyrants. The criterion that distinguishes laws from dictates, freedom from servitude, rightful government from usurpation, the law being an expression of the general will is wanting. This is the grievance which the admirers of the revolution in 1688, desire to remedy according to its principles. This is that perennial source of corruption, which has increased, is increasing, and ought to be diminished. If the general interest is not the object of the government, it is, it must be, because the general will does not govern. We are boldly challenged to produce our proofs: our complaints are asserted to be chimerical, and the excellence of our government is inferred from its beneficial effects. Most unfortunately for us, most unfortunately for our country, these proofs are too ready, and too numerous. We find them in that monumental debt, the bequest of wasteful, and profligate wars, which wrings from the peasant something of his hard-earned pittance; which already has punished the industry of the useful and upright manufacturer, by robbing him of the asylum of his house, and the judgment of his peers: to which the madness of political quixotism adds a million for every farthing that the pomp of ministerial empiricism pays; and which menaces our children with convulsions and calamities, of which no age has seen the parallel. We find them in the bloody roll of persecuting statutes that are still suffered to stain our code; a list so execrable, that were there no monument to be preserved of what England was in the eighteenth century, but her statute-book, she might be deemed still plunged in the deepest gloom of superstitious barbarism. We find them in the ignominious exclusion of great bodies of our fellow citizens from political trusts, by tests which reward falsehood, and punish probity; which profane the rites of the religion they pretend to guard, and usurp the dominion of the God, they profess to revere. We find them in the growing corruptions of those who administer the government, in the venality of a house of commons which has become only a cumbrous and expensive chamber for registering ministerial edicts – in the increase of a nobility arrived to a degradation, by the profusion and prostitution of honors, which the most zealous partisans of democracy would have spared them. We find them, above all, in the rapid progress which has been made to silence the great organ of public opinion, the Press, which is the true control on ministers and parliaments, who might else, with impunity, trample on the impotent formalities, that form the pretended bulwark of our freedom. – The mutual control, the well-poised balance of the several members of our legislature, are the visions of theoretical, or the pretexts of practical politicians. It is a government not of check, but of conspiracy – a conspiracy which can only be repressed by the energy of popular opinion."

If this be a true picture of the government of Great Britain (and whether it is or not, I shall leave it to others to inquire and determine,) the epoch can not be far distant, which Judge Blackstone hints at in the introduction to his commentaries.[33] If ever it should happen" says that enlightened author "that the independence of any one of the three branches of the legislature should be lost, or that it should become subservient to the views of either of the other two, there would soon be an end of the constitution." In which case, according to Sir Matthew Hale,[34] the subjects of that kingdom are left without all manner of remedy.

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Such, then, being the history of the British constitution, the most perfect model of these MIXED governments, (as agreed on all hands by their admirers, and advocates,) that the world ever saw, we may apply to them generally, the observations of an excellent politician[35] of the last century. "If all the parts of the state do not with their utmost power promote the public good; if the prince has other aims than the safety and welfare of his country; if such as represent the people do not preserve their courage and integrity; if the nation's treasure is wasted; if ministers are allowed to undermine the constitution with impunity; if judges are suffered to pervert justice, and wrest the law; then is a mixed government the greatest tyranny in the world: it is tyranny established by law; and the people are bound in fetters of their own making. A tyranny that governs by the sword, has few friends but men of the sword; but a legal tyranny (where the people are only called to confirm iniquity with their own voices) has on its side the rich, the timid, the lazy, those that know law, and get by it, ambitious churchmen, and all whose livelihood depends upon the quiet posture of affairs: and the persons here described compose the influencing part of most nations; so that such a tyranny is hardly to be shaken off."

Section XI.

I cannot better conclude what relates to the several kinds of government of which we have been speaking, whether simple, or complex, than by a summary of their several characters, corruptions, and transitions from one to another, for which I am indebted to the pen of a most intimate friend,[36] from whom I have borrowed several passages in the preceding part of this essay.

> "In a democratic government all authority is derived from the people at large, held only during their pleasure, and exercised only for their benefit. The constitution is a social covenant entered into by express consent of the people upon the footing of the most perfect equality with respect to civil liberty. No man has any privilege above his fellow-citizens, except whilst in office, and even then, none but what they have thought proper to vest in him solely for the purpose of supporting him in the effectual performance of his duty to the public.
>
> "In every other form of government, authority is acquired more by usurpation than by appointment of the people; it serves to give dignity and grandeur to a few, and to degrade the rest; and it is exercised more for the benefit of the rulers, than of the nation. The constitution is established upon a compromise of differences betwixt two or more contending parties, each, according to the means it possesses, extorting from the others every concession that can possibly be obtained, without the smallest regard to justice, or the common rights of mankind. It is a truce, by which the people are always compelled to surrender some, and generally a very large portion of their freedom; and of course they have a right to reclaim it, whenever more favorable circumstances put it in their power. If the prince, at the head of an armed force, reduces them to unconditional submission, he becomes a despotic monarch, and the people are in the most deplorable state of slavery. They have no longer the presumption to imagine themselves created for any other purpose than to be subservient to his will, and to administer to his pleasures and ambition. They even think it an honor to be made the base instruments of his tyranny. They look up to him with a reverential awe surpassing what they feel for the almighty parent of the universe. Such is the servility of man degraded by oppression.
>
> "If the people retain still some resources which may render the issue of the contest doubtful, the prince for his own safety, most humanely grants them some privileges, and is then a limited monarch. They are often deluded into an opinion that what liberties they

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enjoy are entirely derived from his bounty; and taught to consider themselves as the happiest of mankind in having a sovereign who graciously condescends to allow them the possession of what happily he had not the power to wrest out of their hands.

"A despotic government is often both quiet and durable, because the tyrant, having an army at command, is thereby enabled to keep the people in awe and subjection, and to deprive them of all opportunity of communicating their complaints, or deliberating on the means of relief. Conspiracies happen often among the troops, the reigning prince is murdered, or dethroned, but another tyrant takes his place, and the nation remains in peaceable servitude, scarcely sensible of the re volution. – When the government is less despotic, the people have more both of power and inclination to resist oppression. They are not so thoroughly stripped of the means of defense, they have more opportunity of concerting measures, and their mental faculties retain more of their natural activity. Such a government must generally be contentious and changeable. The rulers can not be long satisfied with a limitation of prerogative, or the people with the abridgment of their privileges. The same is also true in all MIXED governments, the component, or balancing powers being ever at variance, until corruption, intrigue, or faction, establishes in one branch, a permanent superiority and influence over the others, or finally destroys them.

"Often it happens that the contest for power is betwixt the prince and nobles, the people having been previously enslaved. In this case the form of government is variable so far as relates to the prince and nobility; but the slavery of the people is lasting. This happens in all feudal governments.

"Sometimes the dispute is betwixt the bulk of the people, and a few leading men, who having been honored with the confidence of their fellow-citizens, betray their trust, grasp at power, and endeavor to establish themselves in permanent superiority. Their success constitutes an aristocracy, which is generally a most oppressive government, although often for the sake of blinding the people, it is dignified with the name of a republic. Indeed every constitution, that has hitherto existed under that name, has partaken more or less of the nature of an aristocracy; and it is this aristocratical leaven that has generally occasioned disorders and tumults in every republican government; and has so far brought the name into disrepute, (even in America, where the sovereignty is confessedly in the people,) that it is becoming a received opinion, that a commonwealth, in proportion as it approaches to democracy, wants those springs of efficacious authority, which are necessary to the production of regularity and good order, and degenerates into anarchy and confusion. This is commonly imputed to the capricious humor of the people, who are said to run riot with too much liberty, to be always unreasonable in their demands, and never satisfied, but when ruled with a rod of iron.

"These are the common place arguments against a democratic constitution. They are the pleas of ambition to introduce aristocracy, monarchy, and every species of tyranny and oppression. Unfortunate indeed for the liberties of mankind, if it be true, that to render them orderly, it is necessary to render them slaves. However generally this position may have been admitted, we may venture to deny that it is an inference fairly drawn from experience. Without better proof than has been adduced, we cannot justly admit that the people at large are capricious or unreasonable, or that a democratic government will be productive of disorder or tumult. The blame in such cases is indeed generally laid on the people, but it is easy to see that the charge is unjust. So far from being unreasonable in their demands, there is perhaps no one instance in history, where they have ventured at

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> once to push their claims to the full extent of reason, and to make an ample demand of justice. They rarely complain at once of more than one or two grievances. When these are removed, they become sensible of others. In proportion as they acquire more freedom, they gain more strength of mind, and independence of spirit. They see further into the nature and extent of their own rights, and call louder for a restoration of them. This is called turbulence and caprice, but is in reality only a requisition of justice; which being either refused, or but partially and unwillingly granted, it is to the oppressors, and not the oppressed, that the mischief is to be imputed.
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> "It is thus, I apprehend, and no otherwise," continues the same writer, "that a government approaching to democracy is apt to be disorderly. The people have a right to complain, so long as they are robbed of any portion of their freedom; and if their complaints are not heard, they have a right to use any method of enfranchising themselves. On the contrary, I am inclined to believe, that in general the people are pretty easily satisfied when no injustice is intended towards them; and if it be allowed to reason a priori in such a case, I conclude that a real democracy, as it is the only equitable constitution, so it would be of all the most happy, and perhaps, of all the most quiet and orderly."

I shall conclude this summary with remarking, that if ever there was a country in which a fair experiment could be made of the efficacy, advantages, duration, and happiness to be derived from a democratic government, that country is United America.

Section XII.

Political bodies, whether great or small, if they are constituted by a people formerly independent, and under no civil subjection, or by those who justly claim independency from any civil power they were formerly subject to, have the civil supremacy in themselves, and are in a state of equal right and liberty with respect to all other states, whether great or small. No regard is to be had in this matter to names; whether the body politic be called a kingdom, an empire, a principality, a dukedom, a country, a republic, or free town. If it can exercise justly all the essential parts of civil power, within itself, independently of any other person or body politic, and no other has any right to rescind or annul its acts, it has the civil supremacy, how small soever it's territory may be, or the number of it's people, and has all the rights of an independent state.[37]

This independency of states, and their being distinct political bodies from each other, is not obstructed by any alliance or confederacies whatsoever, about exercising jointly any parts of the supreme power; such as those of peace and war, in leagues offensive and defensive. Two states, notwithstanding such treaties, are separate bodies and independent.[38]

They are then, only, deemed politically united when some one person, or council, is constituted with a right to exercise some essential powers for both, and to hinder either from exercising them separately. If any person or council is empowered to exercise all these essential powers for both, they are then one state:[39] such is the state of England and Scotland, since the act of union made at the beginning of the eighteenth century, whereby the two kingdoms were incorporated into one, all parts of the supreme power of both kingdoms being thenceforward united and vested in the three estates of the realm of Great Britain: by which entire coalition, though both kingdoms retain their ancient laws and usages in many respects, they are as effectually united and incorporated, as the several petty kingdoms, which composed the heptarchy, were before that period.[40]

But when only a portion of the supreme civil power is vested in one person, or council for both, such as that of peace and war, or of deciding controversies between different states, or their subjects,

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whilst each state within itself exercises other parts of the supreme power, independently of all the others; in this case they are called systems of states: which Burlamaqui defines to be an assemblage of perfect governments, strictly united by some common bond, so that they seem to make but a single body with respect to those affairs which interest them in common, though each preserves its sovereignty full and entire, independently of all the others. – And in this case, he adds, the confederate states engage to each other only to exercise with common consent, certain parts of the sovereignty, especially those which relate to their mutual defense, against foreign enemies. But each of the confederates retains an entire liberty of exercising as it thinks proper, those parts of the sovereignty, which are not mentioned in the treaty of union, as parts that ought to be exercised in common.[41] And of this nature is the American confederacy, in which each state has resigned the exercise of certain parts of the supreme civil power which they possessed before (except in common with the other states included in the confederacy) reserving to themselves all their former powers, which are not delegated to the United States by the common bond of union.

A visible distinction, and not less important than obvious, occurs to our observation in comparing these different kinds of union. The kingdoms of England and Scotland are united into one kingdom; and the two contracting states by such an incorporate union are, in the opinion of Judge Blackstone, totally annihilated, without any power of revival; and a third arises from their conjunction, in which all the rights of sovereignty, and particularly that of legislation, are vested. From whence he expresses a doubt whether any infringements of the fundamental and essential conditions of the union, would of itself dissolve the union of those kingdoms, though he readily admits, that in the case of a federate alliance, such an infringement would certainly rescind the compact between the confederate states.[42] In the United States of America, on the contrary, each state retains its own antecedent form of government; its own laws, subject to the alteration and control of its own legislature, only; its own executive officers, and council of state: its own courts of judicature, its own judges; its own magistrates, civil officers, and officers of the militia; and, in short, its own civil state, or body politic, in every respect whatsoever. And by the express declaration of the twelfth article of the amendments to the constitution, 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. In Great-Britain, a new civil state is created by the annihilation of two antecedent civil states; in the American States, a general federal council, and administrative, is provided, for the joint exercise of such of their several powers, as can be more conveniently exercised in that mode, than any other; leaving their civil state unaltered; and all the other powers, which the states antecedently possessed, to be exercised by them, respectively, as if no union, or connection, were established between them.

The ancient Achaia seems to have been a confederacy founded upon a similar plan; each of those little states had its distinct possessions, territories, and boundaries; each had its senate, or assembly, ifs magistrates and judges; and every state sent deputies to the general convention, and had equal weight in all determinations. And most of the neighboring states, which, moved, by fear of danger, acceded to this confederacy, had reason to felicitate themselves. The republic of Lycia was a confederacy of towns, which they ranged into three classes, according to their respective importance. To the cities of the first rank, they allowed three votes, each, in the general council, to those of the second two, and to those of the third one. – The assembly of the Amphictyons, that assembly whose councils enabled Greece to withstand the power of the Persian monarchy, and whose decisions were held in such veneration that their sentences were seldom, or never, disputed, was composed of deputies from the several states of Greece, in number twelve, each of which sent to this grand council one, two, or three delegates, according to their respective importance. The Helvetic confederacy consists in the union of several republics. They have a common assembly, in which all matters interesting to the whole community are debated; whatever is there determined by a majority,

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binds the whole; they all agree in making peace, and declaring war; and the laws and customs, which prevail throughout the Swiss cantons, are, excepting the difference of religion between the Protestant, and Popish cantons, nearly the same. There are, however, some important differences both in constitution, and administration.[43]

The United Provinces of the Netherlands before their late revolution, maintained a common confederacy; each province possessing a constitution and internal government of its own, independent of the others: this government is called the states of that province; and the delegates from them formed the states-general, in whom the sovereignty of the whole confederacy was vested; but though a province might send two or more delegates, yet such province had no more than one voice in every resolution; and before that resolution could have the force of a law, it must have been approved by every province. – The council of state consisted likewise of deputies from the several provinces; but its constitution was different from that of the states-general; it was composed of twelve deputies, (some of the states sending two, and some one, only), who voted by persons, and not by provinces, as in the states-general. Their business was to prepare estimates, and ways and means, for raising the revenue, as well as other matters that were to be laid before the states-general.[44]

It is very probable, says the president Montesquieu,[45] that mankind would have at length been obliged to live constantly under the government of a single person, had they not contrived a constitution, (such as we are now speaking of) that has all the internal advantages of a republican, together with the external force of a monarchical, government. It was these associations, he adds, that contributed so long to the prosperity of Greece. By these the Romans attacked the universe, and by these only the universe withstood their power: for when Rome was arrived to her highest pitch of grandeur, it was the associations beyond the Danube, and the Rhine, associations formed by terror, (such was the foundation of the American confederacy) that enabled the barbarians to resist her.

A confederate government, according to the same author, ought to be composed of states of the same nature, especially of the republican kind. The spirit of monarchy is war and the enlargement of empire and dominion: Peace and moderation is the spirit of a republic. These two kinds of government cannot naturally subsist in a confederate republic. Greece was undone as soon as the kings of Macedon obtained a seat among the Amphictyons. The confederate republic of Germany, composed of princes and free towns, subsists by means of a chief, who is in some measure the magistrate, and in some the monarch of the union.

These confederacies by which several states are united together by a perpetual league of alliance, are chiefly founded upon this circumstance, that each particular people choose to remain their own masters, and yet are not strong enough to make head against a common enemy. The purport of such an agreement usually is, that they shall not exercise some part of the sovereignty there specified, without the general consent of each other. For the leagues to which these systems of states owe their rise seem distinguished from others (so frequent among different states) chiefly by this consideration; that in the latter, each confederate people determine themselves by their own judgment to certain mutual performances, yet so that in all other respects they design not in the least to make the exercise of that part of the sovereignty, whence those performances proceed, dependent on the consent of their allies, or to retrench any thing from their full and unlimited power of governing their own states. Thus we see that ordinary treaties propose, for the most part as their aim, only some particular advantage of the states thus transacting; their interests happening at present to fall in with each other; but do not produce any lasting union as to the chief management of affairs.[46] Such was the treaty of alliance between America and France in the year 1778, by which among other

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articles it was agreed, that neither of the two parties should conclude either truce or peace with Great Britain without the formal consent of the other first obtained; and whereby they mutually engaged not to lay down their arms until the independence of the United States should be formally or tacitly assured by the treaty or treaties which should terminate the war. Whereas in these confederacies of which we are now speaking, the contrary is observable; they being established with this design, that the several states shall forever link their safety one with another, and, in order to this mutual defense, shall engage themselves not to exercise certain parts of their sovereign power, otherwise than by a common agreement, and approbation.[47] Such were the stipulations, among others, contained in the articles of confederation and perpetual union between the American states, by which it was agreed, that no state should without the consent of the United States in congress assembled send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty with, any king, prince, or state: nor keep up any vessels of war, or body of forces, in time of peace; nor engage in any war, without the consent of the United States in congress assembled, unless actually invaded; nor grant commissions to any ships of war, or letters of marque and reprisal, except after a declaration of war, by the United States in congress assembled; with several others:[48] yet each state respectively retains its sovereignty, freedom, and independence, and every power, jurisdiction and right which is not expressly delegated to the United States in congress assembled.[49] The promises made in these two cases here compared run very differently: in the former thus: "I will join you in this particular war, as a confederate, and the manner of our attacking the enemy shall be concerted by our common advice; nor will we desist from the war, till the particular end thereof, the establishment of the independence of the United States be obtained." In the latter thus: "none of us who have entered into this alliance will make use of our right, as to the affairs of war and peace, except by the general consent of the whole confederacy." We observed before, that these unions submit only some certain parts of the sovereignty to mutual direction. For it seems hardly possible that the affairs of different states should have so close a connection, as that all and each of them should look on it as their interest to have no part of the chief government exercised without the general concurrence. The most convenient method, therefore, seems to be, that the particular states reserve to themselves all those branches of the supreme authority, the management of which can have little or no influence, on the affairs of the rest.[50] Thus the American states, have reserved to themselves the uncontrolled right of framing, establishing, and revoking their civil laws, and the administration of justice according to them, in all cases whatsoever, in which they have not specifically consented to the jurisdiction of the United States. But as to all affairs, on which the safety, peace, and happiness of the federal union, has a joint dependence, these says Pufendorf, ought in reason to be adjusted by a common constitution.[51] This does not, however, says Barbeyrac,[52] hinder but each confederated state may provide for its particular safety, by repressing its rebellious subjects. And herewith the present constitution of the United States fully agrees. For although congress are bound to guarantee to every state in the union a republican form of government, and to protect each of them against invasion; and also against domestic violence: yet this last is only to be done where the legislature, or executive of the state (where the legislature cannot be convened) shall make the application. Nor does any thing in the constitution prohibit any state from keeping troops, or ships of war, except in time of peace; nor from engaging in war, if it be either actually invaded, or in such imminent danger as not to admit of delay.[53] Yet where no such invasion, or imminent danger exists, the engaging in war, whether offensive or defensive; and after that peace, as the result and issue of war, are among those things, which can not be undertaken, or adjusted, but by the common consent of the confederacy. To which we may add, with Pufendorf, taxes and subsidies as they contribute, and are necessary, to the mutual support; and alliances with foreign states, as they may promote the common safety. It falls under the same head of duties, that in case any dispute arise among the confederates themselves, the other members who are

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unconcerned shall immediately interpose their mediation, and not suffer the controversy to come to blows.[54] Or the confederates may establish some common tribunal by which their differences may be decided, such as the Amphictyonic council among the Grecian states; or as the supreme court of the United States, which has original jurisdiction by the federal constitution, in all cases of controversy between two or more states. As for those other matters, which seem not so necessary to be transacted in common, (among which Pufendorf reckons negotiations of traffic, such as taxes, for the particular use of any single state, the constituting of magistrates, the enacting laws, the power of life and death over their respective citizens, or subjects, the ecclesiastical authority, where such an authority is permitted, and the like; there is no reason, but that they may be left to the pleasure of each distinct government: though at the same time particular states ought to manage their privileges as that they shall cause no disturbance in the general union. – Whence it is evident, that one or more of the allies cannot be hindered by the rest, from exercising, according to their own judgment, such parts of the civil administration, as are not in the compact of union, referred to the common direction.[55] And this, with the exception of commercial treaties (which, for very cogent reasons, were by the common consent surrendered by the respective states, to the general confederacy,) may be considered as sketching the general outline of the American union.

Since, in these systems, it is necessary that there should be a communication of certain affairs expressed in the compact of union; and since this cannot be conveniently done by letters; and since, even where this could be done, delays might be attended with great prejudice, or inconvenience to the confederacy, a determinate time and place ought to be settled for the holding assemblies and one or more persons appointed, who shall have power to call the states together, in case of any extraordinary business, which will not admit of delay. Though it seems a much more compendious method to fix a standing council, made up of persons deputed by the several confederates, who shall dispatch business according to the tenor of their commission; and, to whom the ministers of the confederacy in foreign parts, shall give an immediate account of their proceedings, and who shall treat with the ambassadors of other nations, and conclude business in the general name of the confederates; but shall determine nothing that exceeds the bounds of their commission. How far the power of this council of delegates extends, is to be gathered from the words of the compact itself, or from the warrant under which they act. This is certain; that the power whatever it be, is not their own, but derived to them from those whom they represent; and although the decrees, which they publish, pass solely under their own name, yet the whole force and authority of them flows from the states, themselves, by whose consent such a council has been erected: so that the deputies are no more than ministers of the confederate states, and are altogether as unable to enjoin any thing by their own proper authority, as an ambassador is to command and govern his master.[56]

Section XIII.

The dissolution of these systems happens, when all the confederates by mutual consent, or some of them, voluntarily abandon the confederacy, and govern their own states apart, or a part of them form a different league and confederacy among each other, and withdraw themselves from the confederacy with the rest. Such was the proceeding on the part of those of the American states which first adopted the present constitution of the United States, and established a form of federal government, essentially different from that which was first established by the articles of confederation, leaving the states of Rhode Island and North Carolina, both of which, at first, rejected the new constitution, to themselves. This was an evident breach of that article of the confederation,[57] which stipulated that those "articles should be inviolably observed by every state, and that the union should be perpetual; nor should any alteration at any time thereafter be made in any of them, unless such alteration be agreed to in the congress of the United States, and be afterwards confirmed by the

legislatures of every state." Yet the seceding states, as they may be not improperly termed, did not hesitate, as soon as nine states had ratified the new constitution, to supersede the former federal government, and establish a new form, more consonant to their opinion of what was necessary to the preservation and prosperity of the federal union. But although by this act the seceding states subverted the former federal government, yet the obligations of the articles of confederacy as a treaty of perpetual alliance, offensive and defensive, between all the parties thereto, no doubt remained; and if North Carolina and Rhode Island had never acceded to the new form of government, that circumstance, I conceive, could never have lessened the obligation upon the other states to perform those stipulations on their parts which the states, who were unwilling to change the form of the federal government, had by virtue of those articles a right to demand and insist upon. For the inadequacy of the form of government established by those articles could not be charged upon one state more than another, nor had North Carolina or Rhode Island committed any breach of them; the seceding states therefore had no cause of complaint against them. On the contrary, these states being still willing to adhere to the terms of the confederacy, had the right of complaining, if there could be any right to complain of the conduct of states endeavoring to meliorate their own condition, by establishing a different form of government. But the seceding states were certainly justified upon that principle; and from the duty which every state is acknowledged to owe to itself, and its own citizens, by doing whatsoever may best contribute to advance its own happiness and prosperity; and much more, what may be necessary to the preservation of its existence as a state.[58] Nor must we forget that solemn declaration to which everyone of the confederate states assented[59] – that whenever any form of government is destructive of the ends of its institution, it is the right of the people to alter or abolish it, and to institute new government. Consequently whenever the people of any state, or number of states, discovered the inadequacy of the first form of federal government to promote or preserve their independence, happiness, and union, they only exerted that natural right in rejecting it, and adopting another, which all had unanimously assented to, and of which no force or compact can deprive the people of any state, whenever they see the necessity, and possess the power to do it. And since the seceding states, by establishing a new constitution and form of federal government among themselves, without the consent of the rest, have shown that they consider the right to do so whenever the occasion may, in their opinion, require it, as unquestionable; we may infer that that right has not been diminished by any new compact which they may since have entered into, since none could be more solemn or explicit than the first, nor more binding upon the contracting parties. Their obligation, therefore, to preserve the present constitution, is not greater than their former obligations were, to adhere to the articles of the confederation; each state possessing the same right of withdrawing itself from the confederacy without the consent of the rest, as any number of them do, or ever did, possess. Prudence, indeed, will dictate, that governments established by compact should not be changed for light or transient causes; but should a long train of abuses and usurpations, pursuing invariably the same object, evince a design in any one of the confederates to usurp a dominion over the rest; or, if those who are entrusted to administer the government, which the confederates have for their mutual convenience established, should manifest a design to invade their sovereignty, and extend their own power beyond the terms of compact, to the detriment of the states respectively, and to reduce them to a state of obedience, and finally to establish themselves in a state of permanent superiority, it then becomes not only the right, but the duty of the states respectively, to throw off such government, and to provide new guards for their future security.[60] To deny this, would be to deny to sovereign independent states, the power which, as colonies, and dependent territories, they have mutually agreed they had a right to exercise, and did actually exercise, when they shook off the government of England, first, and adopted the present constitution of the United States, in the second instance.

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Another case from which a dissolution of these confederacies may follow, may be, where from any accident, or want of concert among the confederate states, the legislative or executive authority of the federal government may happen to be suspended, so as that no legislature or executive magistrate can, for a long space of time, succeed to and exercise the functions of the former. As if a majority of the states should refuse any longer to choose representatives, or to supply the vacancies in the senate, in either of these cases it would seem that the legislature would be destroyed; on the other hand, if it should happen that no president should be chosen at the period when a president ought to be elected, here there would be a suspension both of the legislature and the executive, inasmuch as the president is an essential constituent part of the legislative body, since all bills, before they become law, must be submitted to him for his approbation. Now whenever the administration of any government is wholly suspended, a dissolution of the government follows of course; for, as Mr. Locke observes, whenever there is no remaining power[61] within the community to direct the public force, or provide for the necessities of the public, there certainly is no government left; where laws cannot be executed at all, it is all one as if there were no laws. And if this be a sufficient reason for the dissolution of civil government, the reason is much stronger why it should amount to a dissolution of a federal government; whose existence is infinitely of less consequence, than the former. Civil society, and civil government its cement and support, may well subsist without the aid of federal government, but they are so intimately blended, with each other, that civil society is in danger, the moment that civil government is exposed to hazard: it may, indeed, survive for a little time; as the pulsations of the heart are known to continue after every other vital function is suspended; but if they be not speedily restored, the whole animal frame perishes together.

Intestine wars are another cause which must necessarily break these unions, unless upon the establishment of peace, the league be also revived. A man must be far gone in Utopian speculations, says the author of the Federalist,[62] who can seriously doubt, that if the American States should either be wholly disunited, or only united in partial confederacies, the subdivisions into which they might be thrown, would have frequent and violent contests with each other. And as the prevention of such contests, was among the most cogent reasons to induce the adoption of the union, so ought it to be among the most powerful, to prevent a dissolution of it.

Conquest, where the conqueror happens to possess himself of one or two, or more of the confederate states, is another mode by which these confederacies may be dissolved; for the conqueror in this case, acquires no manner of right over those states that remain, nor can he demand to be admitted into the confederacy, by virtue of the league which engaged the conquered states to the others, for, says Pufendorf,[63] the alliance must always be presumed to expire, when any one people are brought under a foreign yoke, or are made an accession of another kingdom; because the league being made between free states, considered in that capacity, whenever this condition fails, the league must fail with it. But the American confederacy did not act upon these principles, when the states of Georgia and South Carolina were actually conquered by the British arms, and the British government was re-established in them. The rest of the confederates did not abandon them in this situation, but continued the contest until Great Britain agreed to acknowledge those states, as well as the rest of their confederates, free and independent states. An example which I trust the members of that confederacy will hold in reverence for ever, even, though the guarantee of a republican form of government contained in the present federal constitution should be wholly forgotten.

On the other hand, these systems do more closely unite, and are incorporated into the same civil state, either, if all the confederates, by a voluntary submission, incorporate themselves together, under the entire rule and government of some one person, or council, in all things; as in the union between England and Scotland before mentioned: or if some one state, which has the advantage of

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strength and power, reduces the rest to the condition of dependent provinces. And lastly, if some particular man invade the sovereign command, through the favor of the soldiers, the esteem of the commonalty, or the strength of a prevailing faction.[64] From which last source more danger may be apprehended to the American Confederacy, than from all the rest.

Section XIV.

Having in the preceding section considered the several modes by which a system, or confederacy of states may be dissolved. I shall add a few words only concerning the dissolution of civil government, which, according to Mr. Locke,[65] and other writers, may happen either by conquest, and tearing up the roots of society at once, or by the public functionaries who are entrusted with the administration of the government, abusing, or betraying their trusts, and instead of consulting the happiness of the people, endeavoring to establish a model and form of government different from that which they have been entrusted to administer. All which may be summed up in the words of the American declaration of independence, "that whenever any form of government becomes destructive of those ends for which it is instituted, it is the right of the people to alter, or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their happiness and safety. Prudence indeed will dictate that governments long established, should not be changed for light, or transient causes. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security.

I shall now proceed to offer to the student a view of the constitution of the commonwealth of Virginia, after which I shall go on to consider that of the United States, from which a more correct view will be obtained of the nature of the American governments, in general, than could be given in a general essay upon the nature of the several kinds of government.

NOTES

1. Vattel B. 1. c. 1.

2. See Rousseau's Social Compact.

3. 1. Blacks Com. 49.

4. "Power in the people," says Mr. Burgh, "is like light in the sun, native, original, inherent, and unlimited, by any thing human. In government it may be compared to the reflected light of the moon; for it is only borrowed, delegated and limited by the intention of the people, whose it is, and to whom governors are to consider themselves as responsible, while the people are responsible only to GOD, themselves being the losers, if they pursue a false scheme of politics." Political Disquisitions, vol 1. c. 2.

5. Paine's Rights of Man, part X. p. 42. Albany Edition.

6. Hutchinson's Mor. Phil. vol. 2. 221.

7. Ibid. 226. 227.

8. Ibid. 232.

9. Declaration of American Independence.

10. 1. Vol. 48.

11. Page 40. Albany Edition.

12. Mackintosh on the French Revolution, pa. 115, 3d London edition.

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13. Vattel, B. 1. c. 3. §. 27.

14. Page 42. Albany Edition.

15. What (says Judge Patterson, 2. Dallas, 308.) is a constitution? It is the form of government, delineated by the mighty hand of the people in which certain first principles of fundamental laws are established. The constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the legislature, and can be revoked or altered only by the authority that made it. The life-giving principle and the death-doing stroke must proceed from the same hand. What are legislatures? Creatures of the constitutions: They derive their power from the constitution: It is their commission, and therefore all their acts must be conformable thereto, or they will be void. The constitution is the work or will of the people themselves, in their original sovereign, and unlimited capacity. Law is the work or will of the legislature in their derivation and subordinate capacity. The one is the work of the Creator, the other of the creature. The constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move. In short the constitution is the sun of the political system, around which all legislative, executive, and judicial bodies must revolve. Whatever may be the case in other countries, yet in this there can be no doubt, that every act of the legislature, repugnant to the constitution is absolutely void.

16. Page 139.

17. It has been said, that to call a government "a representative democracy, is a contradiction in terms, and as improper as to call it a democratic aristocracy.". – Swift's Laws of Connecticut, vol. 1, 21. – With all deference to this opinion, I would ask, whom do these representatives represent? If they represent themselves, only, then I grant the government is not a representative democracy, but an elective oligarchy, or if you please, a democratic aristocracy: in which the people have indeed no power but to "choose their rulers.". – But if these representatives represent their constituents, that is, the people; then is their authority not their own, but the authority of the people; and a government administered either directly or indirectly by the authority of the people is a democracy, as is agreed on all hands: if administered by the people themselves, then is it a simple democracy; but if the people appoint some few from among themselves to represent them, then I conceive such a government play, with the strictest propriety, be called a representative democracy.

18. Travels of Anacharsis. vol. 2. c. 14.

19. Robertson's History of Greece.

20. Travels into Italy.

21. P. 186. 187. 188 Phila. Edi.

22. B. 8. c. 5.

23. Spirit of Laws. B. 3. c. 9. 10. B. 5. c. 14.

24. B. 2. c. 4.

25. St. Estienne.

26. Hutch. Moral Phil. vol. 2. 244.

27. See 1 Black. Com. p. 308.

28. Hutch. Mor. Phil. vol. 2. 258.

29. Blackstone's Commentaries, vol. 1. 51.

30. Mackintosh's Defence of the French Revolution, pa. 264.

31. Ibid. 337.

32. "It was reckoned, there were 232 members of the first parliament of George the first who had places, pensions, or titles: besides a great many brothers, and heirs apparent, of the nobility, or persons otherwise likely to be under undue influence; the number of which was not below fifty, which added together makes 282. A frightful majority," says Mr. Burgh, "on the side of the court. And there is no reason, he adds, to suppose the Augean stable is generally clearer now, than it was then." Pol. Disq. vol. 2. 44.

33. Blacks. Com. vol. 1. 51.

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34. Of Parliaments, 49.

35. Davenant. – 11. 300. (quoted in Burgh's Pol. Disq. vol. 3. 4.)

36. T. T. T. formerly a delegate in congress from South Carolina, and after wards a member of the house of representatives in congress, from the same state.

37. Hutcheson's Moral Phil. vol. 2. 239. Vattel. B. 1. c. 1. § 4.

38. Ibid. Vattel. Ib. § 10.

39. Ibid.

40. By the act of union, 5 Ann. c. 8. it is declared that the kingdoms of England and Scotland shall be united into one kingdom by the name of Great Britain: That the united kingdom shall be represented by one parliament: That the succession to the monarchy of G. B. shall be the same as was before settled with regard to England. The laws relating to trade, customs, and excise, shall be the same in Scotland, as in England. But all the other laws of Scotland shall remain in force but alterable by the parliament of Great Britain. – v. 1. Black. Com. 96.

41. Burlamaqui B. 2. part 2. c. 1. §. 40. 44.

42. See Black. Com. vol. 1. p. 96. 97. and 98. in notes.

43. Burgh's Pol. Disq. B. 1. c. 4.

44. Guthrie's Geography, article Netherlands.

45. B. 9. c. 13.

46. Pufendorf's L. n. & b. B. 7. c. 5.

47. Ibid. B. 7. c. 5.

48. Articles of confederation and perpetual union between the United States of America, Art. 6.

49. Ibidem, Art. 2.

50. Pufendorf, B. 7. c. 5.

51. Pufendorf B. 7. c. 5.

52. Ibidem, in notis.

53. C.U.S. Art. 4. & 2.

54. Pufendorf, B. 7. c. 5

55. Pufendorf, B. 7. c. 5.

56. Pufendorf, B. 7. c. 5.

57. Article 13.

58. See Vattel, B. 1. c. 2. and the other writers on government, generally.

59. Declaration of Independence.

60. Declaration of Independence.

61. On civil government. c. 19.

62. Federalist No. 6.

63. B. 7. c. 5.

64. Ibid.

65. On civil government. c. 19. a work with which every American ought to be perfectly acquainted.

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NOTE C

Of the Constitution of Virginia

THE constitution of this commonwealth was formed at a time, when the spirit of equality was at its utmost height, and under circumstances which contributed greatly to augment that natural jealousy of executive power, to which all free states are prone, and for which, the convention then saw the most just and cogent reasons. The ancient models of republican governments could not be perfectly adapted to the situation, circumstances and extent of the country, nor to the genius of its inhabitants. The peaceable character of an agricultural people did not incline them to adopt the martial institutions of the Roman or Spartan republics: nor did the extent of their country, or the small number of its inhabitants in proportion to that extent, invite or permit them to embrace those of the Athenian or other populous republics of Greece. An habitual predilection for what has been usually styled the democratic part of the British constitution, prompted an experiment, to graft a scion from that branch of the government of their parent state, upon a pure republican stock: and to ensure it's vigor and success, they carefully lopped off from it every germ of monarchy, and feudal aristocracy. The framers of the constitution were well aware, that the splendor of a government is one thing, and the happiness of the people another; that if not wholly incompatible, and in direct opposition, they are often in an inverse proportion to each other. The page of history contains but few annals of nations, whose distinguished happiness it has been to enjoy a state of peace. The attention of the historian is not attracted by the calm scenes of peace and tranquillity, in which, only, is real happiness to be found: these are deemed unworthy of recording and transmitting to future ages, whilst scenes of tumult, oppression, bloodshed, and desolation, gratify both the historian and the eager curiosity of his reader, at the expense of millions of victims to ambition, tyranny, treachery, and revenge, too often disguised and even concentrated, under the specious epithet of glory. – From a just estimate of these things, the convention drew this important conclusion. "That government, is, or ought to be instituted for the common benefit, protection and security of the people; and that form of government is best, which is capable of producing the greatest degree of happiness and safety."[1] Proceeding upon this maxim as the foundation of that government they were about to establish, they produced a constitution, from which, whatever might tend to gratify the ambition of the governors, was utterly banished, to make room for the more important considerations of the peace, happiness, and security of the people to be governed. They had learned from the history and example of their mother country, that limitations of the executive authority were nugatory, if that authority be united with the legislative, or if the judiciary be subservient to it or united with either. Hence they made this deduction: "That the legislative, executive, and judiciary departments should be separate and distinct, so that neither exercise the powers properly belonging to the other; nor any one exercise more than one of them at the same time."[2] The colonial constitution had been particularly defective and exceptionable in this respect. The governor and the members of the colonial council, who were appointed and held their places at the pleasure of the crown, united in their own persons the executive authority of the colony, two branches of the legislature thereof, and the character of judges of the highest court of criminal and civil jurisdiction, both at law and in equity; and moreover in ecclesiastical causes, also: – a concentration of power capable of producing the utmost extremity of civil oppression and tyranny. – The influence of the executive department in England, over the other branches of the legislature, as well as the subordinate parts of government, and the formidable strides and encroachments made by it, under the name of PREROGATIVE, induced them further to declare, "That the governor of this commonwealth shall not, under any pretense, exercise any power or prerogative, by virtue of any law, statute, or custom of England."[3] But "that he shall, with the advice of the council of state, exercise the executive

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powers of government according to the laws of the commonwealth."[4] This declaration instantly leveled the barriers of distinction between the legislative authority, and that of the executive, rendering the former completely paramount to the latter; except, perhaps, in one or two cases, accidentally specified in the constitution. The want of a proper barrier between the several powers of the government as contemplated in the theory of the constitution, has left both the executive and judiciary departments, in the opinion of Mr. Jefferson,[5] dependent on the legislative for their subsistence in office, and some of them, for their continuance in it. "If, therefore," in his opinion, "the legislative assumes executive and judiciary powers, no opposition is likely to be made; nor if made, can it be effectual; because in that case they may put their proceedings, in the form of an act of assembly, which will render them obligatory on the other branches."[6] This, as it relates to the executive department, is practically, and perhaps constitutionally, true. But more than one instance might be adduced where the judiciary department have doubted, or denied the obligation of an act of the legislature, because contrary to the constitution.[7] Still, however, I am of opinion, with him, that the constitution has not provided those barriers which may be deemed indispensably necessary to prevent the several departments from transcending their legal limits, without being effectually checked and restrained by the others. And, with him, I very cordially lament the omission, and deprecate the ill consequences which at no very remote period may result from it. Those which have already manifested themselves, as arising from that source, some of which he has pointed out, as happening within his own observation and experience,[8] are of such a magnitude, as to render it a matter of serious inquiry and concern to all who advocate the principle of the separation of the several departments of government, whether we can be safe until the proper barriers are provided. – The abstract terms of legislative, executive and judiciary powers, do not always apply with sufficient precision to enable us to determine to what department any particular case may be most peculiarly appropriate. The legislative power may generally be well enough understood to mean, the power of making, framing and enacting general rules for the government of any community; the judiciary power, may be understood to mean the power of making the application of those rules to all cases of litigation. But the executive power seems not altogether susceptible of so definite a distinction, as the latter, and as its powers in all the governments of Europe, partake of the legislative character, and are called upon to carry into effect those of the judiciary[9] likewise, it might be very difficult to ascertain its constitutional limits, or those of the legislature, with respect to it. In the intercourse with foreign nations, as has been remarked elsewhere, the distinction between such as may be strictly legislative or strictly executive is not altogether obvious. Is a declaration of war, or a treaty of peace, amity or commerce, the province of the one or the other? In England the legislature has nothing to do with these measures: in the federal constitution, the first has been arranged under the legislative department, the second under that of the executive. It required a specific enumeration of the rights and duties of each of these branches of the federal government, to ascertain whose province it is to act in these cases: without such an enumeration, there might have been a perpetual contest between them; and no doubt arguments sufficiently specious and numerous might have been produced in favor of the pretensions of both; and very justly is it remarked by Mr. Jefferson, that the direction of the executive of Virginia during the whole time of the session of the legislature has become habitual and familiar to the latter.[10] True it is, that the inconveniences of this conduct, in times of profound peace and tranquility, are neither so obvious, nor so numerous or dangerous, as in times of war or difficulty; but it should be remembered that when such times arrive, there is little leisure for reformation, however requisite. It is also matter of consolation, that even in such times, the powers vested in the federal government, may in a great measure shelter us from the storms to which the very great defects in our state constitution must inevitably have exposed us, but for the many advantageous arrangements which have been made in the constitution of the United States.

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If by any fatal event the federal union should happen to be dissolved, or broken, there is not a state in the confederacy, that would sooner feel the total inadequacy of its constitution, to support its liberty and independence, as a state, than Virginia.

But however unsuccessful the convention may have been in these respects, of which we have been speaking, the constitution will appear, upon a candid investigation, to be fully commensurate in times of peace, to the security and protection of the citizen from domestic violence or oppression either in his person, or his property. Still, however, we must agree with the enlightened author of the Notes on Virginia, in most of his strictures on its defects, and in a cordial wish that they may be radically cured: and this more especially as the opinion of the same gentleman "that the ordinary legislature may alter the constitution itself,"[11] has occasioned a great number of his fellow-citizens to doubt the validity of that constitution under which they live. An opinion, however, in which the author of these pages cannot concur, for reasons which he has more than once been constrained publicly to deliver, on the most solemn occasions; some of which he will take the liberty of repeating in this place.

Not only the colony of Virginia, but the whole American continent had witnessed, for a series of years, the rapid strides of usurpation and oppression on the part of Great Britain, when the commencement of hostilities on the nineteenth of April, and their repetition on the 17th of June, 1775, left no possible doubt of the full determination of the government of that nation to reduce the American colonies to unconditional obedience, by the sword. The governor of this colony had withdrawn himself from the seat of government, and was preparing to commence the like scenes here, when the American congress on the sixth of July in the same year, published to the world a declaration, setting forth the causes and necessity of their taking up arms; in which they declared, "that exerting the utmost energy of those powers, which their beneficent creator had graciously bestowed upon them, the arms which they had been by their enemies compelled to assume, they would in defiance of every hazard, with unabating firmness and perseverance, employ for the preservation of their liberties; being with one mind resolved to die freemen rather than to live slaves."

True it is that in this declaration they disavowed any design of separating from Great Britain, and establishing independent states. But the decided tone of that declaration, and the no less determined conduct and resolutions of the British government, seconded by repeated aggressions in every part of the colonies, and by an act of parliament and royal proclamation declaring the colonies in a state of rebellion, authorizing the seizure of the persons and property of their inhabitants, and putting them out of the king's protection, left no room to doubt that the appeal to arms thus made on both sides, must very shortly drive the colonies to submission or a declaration of independence. Every one regarded the former of these alternatives with disdain; and long before the approach of the period for electing members to the succeeding convention to be held in May, all hope of reconciliation was swallowed up in the torrents of blood, which had already flowed on both sides: formidable preparations were making on both sides for a vigorous prosecution of the war, and the most awful denunciations were continually repeated on the part of our enraged enemies: anxiety and apprehension invaded every breast; every public assembly, every religious congregation, every scene of social intercourse or of domestic privacy and retirement was a scene of deliberation on the public calamity, and impending danger. The question of independence was discussed In the public newspapers and at every public meeting; and the sense of their respective constituents must have been generally known to the members of the convention, before the period of assembling. Instructions to them were in many instances published in the newspapers, containing an explicit

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declaration of the wishes of the people, that independence, their last hope and refuge should be immediately declared. The public mind, if we may judge from all these circumstances, was fully prepared for the important event that was approaching. – Former conventions were appointed not for any special purpose but "to adopt such modes of consulting and providing for the general safety as might seem most conducive to that great end;"[12] that which met in May, 1776, might be considered as already instructed in the course they were to pursue.[13] Few wished and none expected that our subordination to the crown of Great Britain could exist any longer than was absolutely necessary to collect the sense of the people upon the subject; and the unanimous vote of the convention upon the question at so early a period of the session, proves beyond all doubt, that the members must have left their respective counties fully prepared to give the assent of their constituents to a final separation from their mother country. But a power to demolish the fabric of government then existing, without authority to erect a new one could not be presumed. Though the chains of dependence must be broken, the bonds of society and civil government must yet be preserved; and a new organization of the powers of government, must instantly take place to prevent those evils which the absence of government must inevitably produce. If the wants and fears of individuals be the first and most cogent motives which impel men to form civil government, never was there an occasion when those motives could have a more powerful operation; since the moment of disunion would certainty be the moment of destruction. It would therefore have been absurdity in the extreme, in the convention, to suppose it to be the sense of their constituents, that they might cast off their dependence upon Great Britain, and annihilate the government exercised under its authority, without establishing another in its stead; thus leaving the people wholly without government, at the moment when the utmost exertions of a regular and well organized government, were required for the preservation, not of their liberties only, but their lives also, from the hand of the executioner. The constitution of the state must therefore, be considered as the act of the people, equally as the dissolution of the former government; both being not only in form, but in effect, from the nature and necessity of the case, one and the same act. To question the validity of the one is to deny that of the other; the powers necessary to both being the same, and the one a consequence unavoidably and indispensably flowing from the other.

But this subject deserves to be considered in another light: it will be remembered by all who are conversant with the use and progress of the late glorious revolution; that the measures which led to its final consummation; and which for the most part originated in the legal and constitutional assemblies of the several colonies, made but a small progress in those channels, particularly in this state. The dissolution of the constitutional assemblies by the governors appointed by the crown, obliged the people to resort to other modes of deliberating for the common good. Hence the first introduction of conventions; bodies neither authorized by nor known to the constitutional government; bodies, on the contrary, which the officers of the constitutional go-governments considered as altogether illegal, and wanted not the inclination to treat as such. Nevertheless, they met, deliberated, and resolved, for the common good. They were the people assembled by their deputies, not a legal, or constitutional assembly or part of the government as then organized. Hence they were not, nor could they be deemed the ordinary legislature; that body being composed of the governor, appointed by the crown, the council, appointed in the same manner, and the burgesses chosen by the people, sitting in different chambers, in different characters, and under different authorities; whilst the convention was composed of a single body, having neither the character of a governor, council, or even a legitimate representative among them. It consisted of the people themselves assembled by their delegates, to whom the care of the common weal was unboundedly confided. The ordinance under which the last convention was chosen,[14] declaring, "That by the

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unhappy differences subsisting between Great Britain and this colony, the usual meetings of the general assembly, deliberations on the situation of the country, and making provision for the exigencies of government in a constitutional way, are altogether obstructed; for which reason it has become indispensably necessary for the oppressed people of this country, at a crisis so alarming, to adopt such other mode of consulting and providing for the general safety as may seem most conducive to that great end." This is the voice of the people looking forward to scenes of danger, and to a crisis pregnant with the fate of their country. THE SAFETY OF THE PEOPLE, the supreme law of nations and of society, was thus confided without bounds or limits, to the wisdom, patriotism and integrity of the convention.

The distinction between the convention and the ordinary legislature, may be still further proved, from the different manner in which they were assembled. The power of convening the legal assemblies, on the ordinary and constitutional legislature of the colony resided wholly in the executive. The members of the legislature could neither be chosen, without writs issued by its authority, nor assemble when chosen, but in obedience to a summons from the same authority. They might be prorogued, or dissolved, at the pleasure of the representative of the crown, who possessed a negative upon all their proceedings. Conventions, on the contrary, were chosen and assembled either in pursuance of recommendations from their own body, or from the congress, or by the discretion and common consent of the people. It was equally beyond the power of the constitutional executive to dissolve them, as it was against his interest or inclination to convene them. They were held even whilst a legal assembly existed. Witness the convention held in Richmond in March, 1775, after which period the constitutional assembly was convened by Lord Dunmore, and met and continued their session several weeks in Williamsburg. This assembly adjourned to some day in the following October; from thence to some day in March; and then to the sixth day of May, 1776, when forty five members being a quorum of the house to proceed to business, met pursuant to their last adjournment: "But it being their opinion, that the people could not now be legally represented according to the ancient constitution which had been subvened by the king, lords, and commons of Great Britain, and consequently dissolved, they unanimously dissolved themselves accordingly."[15] No other legal assembly was ever afterwards chosen or convened under the authority of the British government.

The convention then was not the ordinary legislature of Virginia: nor could it be regarded in that light; for two ordinary legislatures existing in the same state, at the same time, with equal or concurrent powers, is a phenomenon which it is believed the people of this country never intended to exhibit. The convention was either nothing at all, or something superior to an ordinary legislature. It was the great body of the people assembled in the persons of their deputies, to consult for the common good, and to act IN ALL THINGS FOR THE SAFETY OF THE PEOPLE.

This venerable body assembled in Williamsburg, on the first Monday in May, 1776. The president, in an address from the chair, observed, "that they were assembled at a time truly critical, when subjects of the most important and interesting nature, required their serious attention. That the administration of justice and almost all the powers of government had been suspended for near two years, and that it became them to reflect whether we could longer sustain the great struggle we were making in that situation."

On the 15th day of May, (a day ever to be remembered in Virginia), the convention made the following solemn declaration, and came to several resolutions thereupon:

"Forasmuch as all the endeavors of the united colonies, by the most decent representations

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> and petitions to the king and parliament of Great Britain to restore peace and security to America under the British government and a re-union with that people upon just and liberal terms, instead of a redress of grievances, have produced, from an imperious and vindictive administration, increased insult, oppression, and a vigorous attempt to affect our total destruction. By a late act of parliament all the colonies are declared to be in rebellion, and out of the protection of the British crown, our properties are subjected to confiscation, our people when captivated, compelled to join in the murder and plunder of their relations, and countrymen, and all former rapines and oppression of Americans declared legal and just; fleets and armies are raised, and the aid of foreign troops engaged to assist their destructive purposes. The kings representative in this colony, has not only withheld the powers of government from operating for our safety, but having retired on board an armed ship, is carrying on a piratical and savage war against us, tempting our slaves by every artifice to resort to him, and training and employing them against their masters. In this state of extreme danger we have no alternative left, but abject submission to the will of those overbearing tyrants, or a TOTAL SEPARATION, from the crown and government of Great Britain, uniting and exerting the strength of all America for defense and forming alliances with foreign powers for commerce and aid in war. Wherefore, appealing to the searcher of hearts for the sincerity of former declarations, expressing our desire to preserve the connection with that nation, and that we are driven from that inclination by their wicked councils and the eternal laws of self-preservation;
>
> "Resolved unanimously; that the delegates appointed to represent this colony in general congress, be instructed to propose to that respectable body to declare the united colonies, free and independent states, absolved from all allegiance to, or dependence upon the crown or parliament of Great Britain: and that they give the assent of this colony to such declaration and to whatever measures may be thought proper and necessary by congress, for forming foreign alliance, and a confederacy of the colonies at such time and in such manner, as to them shall seem best; provided that the power of forming governments for, and the regulations of the internal concerns of each colony, be left to the respective colonial legislatures.
>
> "Resolved unanimously; that a committee be appointed to prepare a declaration of rights, and such a plan of government as will be most likely to maintain peace and order in this colony, and secure substantial and equal liberty to the people."[16]

A committee was thereupon immediately appointed, consisting of twenty-eight members, by which drafts were accordingly prepared, reported and discussed by the convention. The bill of rights passed on the twelfth of June, and the constitution UNANIMOUSLY on the 29th, of the same month. A governor for the commonwealth, and the members of the privy council were appointed on the same day, pursuant to the provisions made in the last article of the constitution. On the fifth day of July, (the day after the declaration of independence was agreed to, in the general congress at Philadelphia) the governor and members of the privy council took their respective oaths of office, as prescribed by an ordinance passed on the fourth day of the same month, and then the convention adjourned; leaving the government of the commonwealth of Virginia, as an independent state, completely organized, as such.[17]

From these circumstances, it must be evident that the constitution of Virginia, was neither the momentary production of Violent or of factious men, but the result of more than six weeks deliberate consultation, and consideration, among men well informed of the sentiments and wishes of their

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respective constituents. It may be regarded as the unanimous voice of the people, proclaiming to the world their resolution to be free; and to institute such a government, as in their opinion was most likely to produce peace, happiness, and safety, both to the community and to the individual. "The revolution of 1688, says Judge Blackstone,[18] was not a defeasance of the succession and a new limitation of the crown, by the king and two houses of parliament; it was the act of the nation alone, upon a conviction that there was no king in being." And the ingenious Mackintosh remarks, "that the national assembly of France was assembled as an ordinary legislature under existing laws. They were transformed by events into a national convention, and vested with power to organize a new government. It is in vain to demand the legal instrument that changed their constitution and extended their powers. Great revolutions are too immense for technical formality. All the sanction that can be hoped from such events, is the voice of the people, however informally and irregularly expressed."[19] Our case was much stronger than either of those mentioned by these writers. The convention parliament assembled in England in 1688, bore some resemblance, at least, to the ordinary legislature of that kingdom: and the national assembly of France was constitutionally assembled under the authority of the government which it subverted. The convention of Virginia, had not the shadow of a legal, or, constitutional form about it. It derived its existence and authority from a higher source; a power which can supersede all law, dispense with all forms; and whenever it pleases annul one constitution; and set up another; namely the people in their sovereign, unlimited and unlimitable authority and capacity.

If any arguments were necessary to prove, that the convention were fully satisfied, that they complied with the wishes and intentions of their constituents, and that this was in fact the case, we need only advert to the circumstance of their unanimous vote given for a separation and the establishment of a new form of government, after a debate of two days, only, on the eighth day of their session; and a similar vote given six weeks after, upon the question whether the present constitution should pass. If the people had not approved of the measure, would not addresses or instructions have been poured in upon the convention from all parts of the colony? Most assuredly they would. The unanimous vote in favor of the constitution is the most unequivocal proof that the people not only saw and approved what was doing, but had, however informally, made known their sentiments to their deputies before they left their respective counties. That the convention intended not a mere temporary form of government, but one as permanent as the republic they were engaged in establishing, may be collected from several parts of the instrument itself, but more especially from the twenty-first article, in the following words: "The territories contained within the charters erecting the colonies of Maryland, Pennsylvania, North and South Carolina, are hereby ceded, released, and forever confirmed to the people of those colonies, respectively, with all the rights of property, jurisdiction and government and all other rights whatsoever which might at any time heretofore have been claimed by Virginia, except the free navigation and use of the rivers Potomac and Pohomoke, with the property of the Virginia shores or strands, bordering on either of the said rivers, and all improvements which have been or shall be made thereon. The western and northern extent of Virginia shall, in all other respects, stand as fixed by the charter of king James the first, in the year 1609, and by the public treaty of peace between the courts of Great-Britain and France in the year 1763, unless by the act of the legislature one or more territories shall hereafter be laid off, and GOVERNMENTS ESTABLISHED westward of the Allegheny mountains."

To what I have said, I shall subjoin a part of the argument of Judge Nelson, as delivered upon this question in the general court, November 16,1793, in the case of Kamper against Hawkins.

"A constitution is that by which the powers of government are limited. It is to the

governor, or rather to the departments of government, what a law is to individuals – nay it is not only a rule of action to the branches of government, but it is that from which their existence flows, and by which their powers (or portions of the right to govern) which may have been committed to them are prescribed. It is their commission – nay it is their creator.

"The present question is, whether an act of the legislature contrary to it be valid.

"This is the paper[20] by which the delegates and representatives of the people, viewing with concern the deplorable situation to which this country must have been reduced, unless some regular, adequate mode of civil polity had been speedily adopted, did ordain and declare the future form of government to be as there set forth.

"This is the paper which divides the government into three distinct departments, with one exception.

"This is the very paper under which there are two branches of legislature now assembled.

"This is the very paper under which they are to meet once a year, or oftener.

"This is the very paper which gives them the stile of the GENERAL ASSEMBLY of VIRGINIA.

"This is the very paper that calls one the house of delegates, and the other the senate.

"This is the very paper which declares that the former shall consist of two representatives from each county, chosen by the freeholders; which fixes the number of the senators to twenty-four; which defines the number which shall compose a house of senate, under which the state is to be divided into twenty-four districts; which declares that each county shall vote for a senator, who, besides other qualifications, shall be twenty-five years of age; that a comparison of the polls shall be made by the sheriffs, who are to return the person having the greatest number of votes; that a certain number are to be displaced in rotation; that writs may issue from each house for supplying vacancies; and,

"That all laws shall originate in the house of delegates, subject to amendment by the senate, except money bills.

"I ask then, whether the legislature do not sit under this constitution?

"The answer in the affirmative, to me is inevitable.

"But it may be objected, that although the legislature would be bound by a fundamental regulation, made by a convention or other body, delegated expressly for such a purpose, the body who formed this, not having been thus specially appointed, this act possesses not sufficient sanctity, but is an act, equal only to those of the ordinary legislature, because some acts passed in the same session are confessedly so.

"Here let it be remembered, that the question is not whether the people can change it; but whether the legislature can do so?

"The people have received this as a constitution. The magistrates and officers, down to a constable, (for even the mode of his appointment is directed therein) have been appointed under it.

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> "The people have felt it's operation and acquiesced: it is confessedly their assent which gives validity to a constitution.
>
> "Who then can change it?
>
> "I answer – the people alone.
>
> "But it has been supposed that the legislature can do this.
>
> "To decide this question, I have already stated that the legislature derive their existence from the constitution.
>
> "And can the legislature impugn that character, under which they claim to be a legislature? I apprehend not."[21]

To my understanding and judgment nothing can be more conclusive than this argument. I shall therefore here conclude the subject, with this remark; that both the judiciary and the legislature have on several occasions recognized the authority of the constitution as such, on, several solemn occasions:[22] therefore, until it shall be altered in some authoritative and constitutional way, we are bound to respect it, as the immediate act of the people, and as such obligatory not only upon the other branches of the government, but upon the legislature also. Quitting therefore the unpleasant theme of inquiring into unfounded encroachments of one of the departments of government upon the other, I shall now proceed to some examination of their several constitutions, rights and duties.

I. The legislative department consists of two distinct branches; the house of delegates and the senate; these together constitute the general assembly of Virginia, without any admixture of the consent or assent of the executive, as before the revolution, to any of their acts.

1. The house of delegates consists of two representatives, chosen for each county, annually, of such men as actually reside in and are freeholders of the same, or duly qualified according to law; and one representative for the city of Williamsburg, and one for the borough of Norfolk, and a representative for each of such other cities and boroughs as may be allowed particular representation by the legislature; but when a city or borough shall so decrease as that the number of persons having the right of suffrage shall, for seven years successively, be less than half the number of votes in some one county, it shall thenceforth cease to send a representative to the assembly.[23]

The right of suffrage, in the election of members of both houses, is to remain as then exercised,[24] art. 7. This clause has occasioned some doubt, and probably a violation of the constitution. The ordinance of July, 1775, c. 4. under which the members of the convention were chosen, and to which they probably meant to refer, declares, that the freeholders of every county, who are by law properly qualified to vote for burgesses, shall have the privilege of choosing annually two of the most fit and able men being freeholders of such county respectively; and the freeholders of the several and respective corporations, and town of James City, and others by law qualified to vote for a citizen or burgess, shall have the liberty of electing one delegate; and the landholders of the district of West Augusta shall be considered as a distinct county, and have the liberty of sending two delegates to represent them in general convention. And inasmuch as the inhabitants of the county of Fincastle, and district of West Augusta, although long possessed of their lands under surveys, entries, or orders of council, have few of them obtained patents for the same which have been obstructed without any default in them: it is further ordained that every free white man, who at the time of elections for delegates in the said county or district, shall have been for one year preceding, in possession of twenty-five acres of land, with a house or plantation thereon, or one hundred acres of land, without

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a house or plantation, in such county or district, claiming an estate for life at least in his own right, or in right of his wife, shall have a vote, or be capable of being chosen a delegate, although no legal title in the land shall have been conveyed to such possessor: and that no person shall be permitted to vote at any election who is not qualified so to do.[25]

As this ordinance confines the right of suffrage to such persons as were by law qualified to vote for burgesses, we must consult the laws then in force to ascertain and determine this right.

The act of 1705, c. 1. §. 1. and 6. declares that the freeholders of every county that then was, or thereafter should be in Virginia, shall forever have the privilege and liberty of electing two of the most fit and able men of their county, respectively, to represent them in the general assembly; and that every person having an estate real for his own life or the life of another, shall be accounted a freeholder within the meaning of that act. And by the act of 1723. c. 4. §. 23. (Edi. 1733), It is enacted and declared that no free negro, mulatto, or Indian whatsoever, shall thereafter have any vote at the election of burgesses, or any other election whatsoever.

The act of 1735. c. 1. after reciting, that divers frauds had of late been practiced to create and multiply votes, by making leases of small and inconsiderable parcels of land, upon feigned considerations, and by sub-dividing lots of ground in towns in prejudice of the rights of true freeholders, declares that no person whatsoever shall thereafter have a right to vote at any election for any county, who has not an estate of freehold, or other greater estate, in one hundred acres of land, at least, if no settlement be made upon it, or twenty-five acres, with a house or plantation in his possession or in the possession of his tenant for years, in the same county: but if any person shall have such an estate in one hundred acres of land uninhabited, lying in two or more counties, he shall have the right to vote in that county only where the greater quantity may lie, although the same do not amount to one hundred acres, in either county: And that all estates and conveyances whatsoever, made to any person in any fraudulent or collusive manner, on purpose to qualify him to vote, shall be null and void to all intents and purposes whatsoever; and every person making or executing, devising or preparing such conveyance; or by color thereof, voting at any election, is subject to a penalty of forty pounds: – And that no person shall vote at any election in respect, or in right of any lands or tenements whereof he has not been in possession one whole year, next before the teste of the writ for such election, unless the same came to him within that time, by descent, marriage, marriage settlement, or devise: – But that nothing in that act should be construed to hinder any person to vote at such elections, in right of any houses, lands, or tenements in any city or town laid out and established by act of assembly, so as such person be a freeholder in any house and lot, or a house and part of a lot: but where the interest in any such house and lot or part of a lot is divided among several persons, no more than one single voice shall be admitted for the same. – And where lands are held by several joint-tenants or tenants in common, no more than one single voice shall be admitted in right thereof, unless the quantity be sufficient to allot to each, one hundred acres at least; if the same be uninhabited, or twenty-five acres with a house and plantation thereon: and the person offering to vote, if required, must swear to his qualification accordingly before he is admitted to poll.

The qualifications of electors for a burgess for the city of Williamsburg as fixed by its charter, and by the act of 1742, ch. 2,[26] are, that the voter shall have an estate of freehold in one whole lot of land within the said city; and that there be standing upon the same a house of such dimensions as is required by law for saving such lot, in tenantable repair, at the time of giving the vote; that in case of joint-tenants, etc. no more than one vote shall be given: or such voter must have a visible estate of fifty pounds current money, at the least, and have actually resided therein, twelve months next

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before the election, or have served five years as an apprentice to some trade within the city, have obtained a certificate thereof from the court of hustings; and also be an inhabitant and house-keeper therein at the time of giving his vote: and no servant by indenture or otherwise shall be allowed to give any vote in right of being an inhabitant. The qualifications of voters in the borough of Norfolk, as fixed also by its charter, and by the act of 1752, c. 7. are the same in all respects, except that a freehold estate in half a lot of land, with a house thereon of like dimensions, is declared a sufficient qualification.[27]

Upon this footing did the right of suffrage stand at the time of establishing the constitution, and upon this footing, I presume, it ought now to stand. The act of 1769, c. 1. by which it was intended to reduce the qualifications of electors in right of unsettled lands to fifty acres, instead of one hundred; and the possession thereof, to avoid the presumption of fraud, to six months instead of one year, was suspended by a clause thereof, until the royal assent should be obtained:[28] but it never was obtained, so that we may be authorized in presuming that the several antecedent acts before mentioned, were in full force when the constitution was adopted. Whether from oversight or intention the act of 1785. c. 55. (Edi. 1794. c. 17,) pursues the act of 1769. c. 1. in both respects, so that it seems worthy of the attention and inquiry of the legislature, whether the elections of members to the general assembly, may not be authorized and conducted in a manner contrary to the constitution.

The author of the Notes on Virginia observes "that a majority of the men in the state, who pay and fight for its support are unrepresented in the legislature, the roll of freeholders entitled to vote not including generally the half of those on the militia or of the tax gatherers."[29] I am strongly inclined to doubt the justice of this conjecture, for such I presume it to be, as no accurate comparison can probably be made, between the number of freeholders, and of those upon the rolls of the militia, or the tax-gatherers' books. Except on some great occasion where a contest may happen, between influential persons, the whole body of freeholders in a county, rarely, perhaps, never, attend. The returns are not made to the clerk of the house of delegates so as to enable one readily to ascertain their number. Free negroes and mulattoes are excluded from elections; they are now excluded from the militia rolls, and very few of their names appear upon the tax-gatherers' books. The adult sons of freeholders who are still under the age of twenty-one years, are indeed subject to be called upon in the militia, but their names appear not upon the tax-gatherers' books. – The overseers and managers upon the plantations of more opulent persons, were formerly excluded from the militia: now indeed they are liable to be called upon for that service; but their numbers of late years have greatly diminished, and not a few of them are men who possess freeholds of their own. Tenants for years, or at will, are rarely to be met with, except within the precincts of the Northern Neck; and even there, those who occupy rented lands, have generally leases for term of lives, instead of years. Very few persons over the age of twenty-one years, remain long unmarried in Virginia; and the acquisition of a wife is ordinarily attended with that of a farm, sufficient to entitle the owner to a vote. In the western part of the state, overseers are almost unknown, and even below the Blue Ridge, there are probably ten farmers that manage their own estates for one that employs an overseer. I am therefore entirely at a loss to conjecture upon what grounds the author founds his opinion. His next objection is more easily understood.

"Among those who share the representation, the shares are very unequal. Thus the county of Warwick with only one hundred fighting men, has an equal representation with the county of Loudon, which has 1746, so that every man in Warwick has as much influence in the government as seventeen men in Loudon." Warwick, however, pays four hundred and eleven dollars, yearly, into the treasury, whilst the counties of Monongalia, Harrison, Randolph, and Lee, pay four hundred and

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one dollars and twenty-six cents only to the public revenue. If Loudon should complain of the undue influence of the number of men in Warwick, these counties, at least cannot complain of its exemption from taxes, since they have four times as many representatives, and pay less into the treasury than Warwick, or even than the little depopulated city of Williamsburg.[30] There is not then such a disparity between benefits and burdens, in the different parts of the state, perhaps, as might at first have been conjectured from the instance produced; nor does that disparity arise so much from the excess of representation, in the counties lying between the sea-coast and the falls of the rivers, as in the excess in the counties in the western part of the state.

The fairest way of adjusting the proportions of benefits and burdens in the state, seems to be by combining pecuniary ability and burdens with such as are merely personal. In a peaceable commonwealth, pecuniary burdens are likely to be the greatest. In time of peace there are no personal burdens beyond the ordinary repairs of roads or other trifling labor; the whole burden of government is altogether pecuniary. In time of war personal duties are required; but pecuniary burdens must increase as they increase, and often be continued after they cease. Witness the debt contracted during the revolutionary war, which we are still paying after twenty years of peace, and may continue to pay for a century, or perhaps forever. Besides, if they who pay nothing, or very little, are entrusted with the imposition of burdens, of which they are to feel no part, there is too much reason, from the experience of all ages and countries, to apprehend that they may be regardless of the burden they impose; especially if the question should relate to the compensation to be made to themselves, or their own immediate constituents, similarly circumstanced for their personal services. A scale of representation adjusted according to the number of fighting men, only, (the idea which suggests itself from the view of Mr. Jefferson's table)[31] would, probably be one of the most exceptionable that could be adopted; since in peace they would be exempted from all burdens, whatsoever, and in war, might throw the burden both of men and money, upon the weaker part, of the state, which must consequently have the minority in the public councils. Is it not from a consciousness of the justice of this principle, that Virginia with all her sister states in the southern part of the union, have insisted, and obtained, that their representation should not be fixed in proportion to the fighting men in the union, (which would have enabled the northern states to give law to the confederacy,) but according to a census differing very widely from such a scale of representation? and if the principle be sound in the one case, what is it that renders it less so, in the other?

Since the period when the notes on Virginia were written the act for equalizing the land tax, (Oct. 1782, c. 19. edi. 1785, p. 177,) in the several parts of the state was passed, and carried into effect; and is now the invariable standard by which the landholders in different parts of the state are taxed. The counties of Brunswick, Amelia, Cumberland, Goochland, Hanover, Spottsylvania, Stafford, Prince William, and Fairfax, and all the counties eastward thereof, compose the first class, and the lands therein are rated at a general average often shillings per acre: the counties westward of these and below the blue ridge of mountains (except Pittsylvania and Henry,) together with the rich and fertile counties of Frederick, Berkeley, and Jefferson, compose the second class, and the lands therein are rated at a general average of seven shillings and sixpence per acre, only, although the lands in that class in general, are confessedly superior to those, in general, in the first. The counties of Pittsylvania, Henry, Patrick, Franklin, Botetourt, Rockbridge, Augusta, Rockingham, Shenandoah, Hardy and Hampshire, compose the third class, and the lands therein are rated at a general average of five shillings and sixpence per acre; the counties westward of these, now amounting to eighteen in number, compose the fourth class, and the lands therein, are rated at a general average of three shillings per acre. Whenever, therefore, a landholder in the western parts

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of the state pays three shillings, or one nearer the center pays five shillings and sixpence, or seven shillings and sixpence land tax, the landholder in the first class pays ten shillings, for the same quantity of land; this class moreover pays near three fifths of the slave tax; an inspection of the following table will show the number of counties in each class. – Paying an equal land tax, the counties in each class, respectively, may be considered as having so far a common interest; those which have few or no slaves among them, and those which have a great many, may likewise be supposed to have a common interest with each other, according as either of these circumstances preponderate. The number of slaves in the third and fourth classes were no more than 21,738, when the last census was taken, whilst those in the first and second classes amounted to 324,058. Lands and slaves have ever been the subjects of the productive revenues of the state, and will probably so remain. – In the first class there were 196,542 slaves, at the time of the first census: the number by the late census appears to be 213,075. This proportion of the state must therefore always sustain the great load of pecuniary burdens imposed in the state. An inspection of the following table, formed from authentic documents,[32] will show where the inequality of representation in the state legislature really falls at this day. The counties are divided into classes, according to the act for equalizing the land tax; first class paying ten shillings per acre land tax when the second pays seven shillings and sixpence; the third five shillings and sixpence, and the fourth three shillings, as before mentioned.

Classes	Number of counties	Actual number of delegates	Free white males between 16 and 45 years	Total taxes paid in 1794, in Dollars	Slaves	Proportions; if a scale of representation be made		
						By fighting men only	By taxes only	By a combination of both
1st Class	43	89	37,619	74,520	213,075	71	107	89
2d Class	20	40	31, 601	39,020	110,983	60	56	58
3d Class	11	22	15,544	11,622	15,406	30	17	23½
4th Class	18	36	13,845	4,635	6,332	26	7	16½
TOTAL	92	187	98,609	129,797	345,796	187	187	187

From this table it appears, that if it be admitted that a proportion combined of the personal and pecuniary burdens borne by the several parts of the state, be considered as the proper and just scale of representation, the first class has numerically its proper number at present, whilst the fourth class has more than double its proper proportion; the second class by such an arrangement would gain nearly half as many more than it now has; and the third class one member, if the fraction be given to the fourth class; or two, if the fraction be given to the third.[33]

Since an inequality in the representation actually exists, it is very fortunate that it falls upon so large a portion of the middle part of the state; the weight of that portion is sufficient on any occasion, where local and party contests may prevail between the representatives from the eastern and western extremes, to turn the scale against either which may show a disposition to injure or oppress the other.

Here, I must beg leave to make a short digression, upon the subject of the last arrangement of the counties into districts to choose representatives to congress. As congress possesses the power of taxation even more extensively than the state legislature, it might have been expected that some regard would have been paid to the quota of taxes paid in the several districts, since in case of direct

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taxes being imposed by congress, it is not improbable this operation would coincide with that of the state taxes: but so little attention, if any, did the general assembly pay to this consideration, that the district composed of the counties of Monongalia, Brooke, Ohio, Harrison, Wood, and Randolph, having 4427 militia only, and paying 593 dollars 57 cents taxes only, sends a member to congress as well as the counties of Loudon, Fairfax, and Prince William, which have 5505 militia, and pays 6770 dollars taxes to the state. The inequality is still greater in some other districts.[34]

Mr. Jefferson's next complaint against the constitution of the house of delegates in Virginia, is, "that it exercises the power of determining the quorum of its own body;" an objection in which I most cordially agree with him. I am even of opinion, that not less than two-thirds of either house should constitute a quorum to do business; and that the assent of the majority of the whole number of delegates, and of the whole number of senators, should be required to the final passage of any law, though a majority of the members present might be sufficient for its passage through the preparatory stages. Every act of the legislature would then be the act of a majority of all the representatives of the people, whereas, at present, one more than the fourth part of either house may be sufficient to pass a law. Thus, forty-eight members in the house of delegates, and seven in the senate, may now give law to a state whose legislature consists of two hundred and eleven members. Such a regulation would be a great security against hasty and ill advised, or ill digested laws, and would give stability to such as may be made; nor could there be even a speculative doubt, in such a case, that the will of the majority of the people had fairly prevailed.

2. The senate consists of twenty-four members, of whom thirteen are necessary to constitute a house to proceed to business, for whose elections the different counties are divided into twenty-four districts,[35] and each county of the respective districts once in four years, in rotation, at the time of the election of its delegates must also vote for one senator, who is actually a resident and a freeholder within the district, or duly qualified according to law, and is upwards of twenty-five years of age; the sheriffs of the several counties are to meet within five days, compare their respective polls, and return the person, having the greatest number of votes: The districts being divided into four classes, by lot, one of them is annually displaced, in rotation, and the vacancies are supplied by new elections.[36]

According to the table given by Mr. Jefferson,[37] one half of the number of senators are chosen from the counties, between the sea-coasts, and the falls of the rivers: one third of them between the falls of the rivers, and the blue-ridge of mountains; one twelfth between the blue-ridge and the Allegheny; and the remaining twelfth part between the Allegheny and the Ohio. – This disproportion is daily increasing, as the population of the western counties advances, and whenever a new constitution for the state is formed, it ought to be corrected. No practical evil, it is believed, has hitherto resulted from it; a single instance will probably be convincing. When the constitution was adopted the number of counties in Virginia was only sixty-one; and two delegates were allowed for the districts of west Augusta, comprehending, I presume, the north-western part of the state. There are now ninety-two counties, to which if we add, the eight counties formed in Kentucky before the erection of that part of Virginia into an independent state, it will appear that the senate must have given their assent to the formation of thirty-eight new counties, and consequently to an addition of seventy-six members to the house of delegates in the period of six and twenty years. Of these new counties, Henry, Madison, Fluvanna, Nottoway, Matthews and Greensville, are all that are recollected to have been made on the eastern side of the blue-ridge of mountains. The senate then do not appear to have been actuated by any narrow local policy in this respect; and we may reasonably conclude that if they had entertained any jealousy of the superior weight and influence of the house of delegates,

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they would have refused their assent to so great and rapid an extension of its members. This is not mentioned as an argument in favor of the present arrangement; it is Intended only to show, that practical evils (how justly soever to be apprehended) do not always flow from theoretical imperfections: the imperfection in this part of the constitution of the senate is probably corrected by that which denies to them the right of originating any bill;[38] and the denial of the right of making any amendment whatever to a money-bill may likewise be regarded as an additional security against any great inconvenience resulting from the unequal apportionment of the senate, so long as those parts of the constitution remain in force: whenever an amendment is to take place, it may be worth the inquiry, whether these limitations to the power of the senate ought to be continued upon the present footing; or whether they might not be more advantageously modified as in the constitution of the United States.

Mr. Jefferson remarks,[39] "that the senate is by its constitution too homogeneous with the house of delegates; being chosen by the same electors, at the same time, and out of the same subjects, the choice of course falls upon men of the same description."

As we have in fact but one class of citizens in Virginia, it might be difficult to remedy this defect in the constitution of the senate, otherwise than by some alteration in the mode of election. That which prevails in Maryland, seems to promise fairly to render the choice of senators more select than the mode prescribed by our constitution; but objections have been made, and apparently with great justice, to the power which the senate of that state possess of filling up intermediate vacancies. Senators may also be chosen from any part, of the eastern shore, in which a vacancy may happen. These imperfections are said to have produced some effects, that have been greatly complained of in that state, notwithstanding the superior advantages which elections, by special electors, might have been expected to secure. As by our constitution the senator must be a resident within the district for which he is chosen, the only amendment requisite, probably is, that he should be chosen by a number of electors, selected for that purpose in every county in the district, and chosen in the same manner as delegates are chosen: or the electors might be chosen from the whole district as senators are at present; which would give to the larger counties their proportional weight in the choice. Nine electors in each district would probably be found sufficiently numerous, and small enough to render both the choice of senators, and that of the electors themselves, as select as they could be made in the districts, respectively.

An objection to the present constitution of the senate, also arises from the very small number who compose a quorum in that body, the majority of which (seven only) may be required to reject the intemperate act of one hundred and eighty-seven members of the other house, or may control or defeat the wisest measures which may be brought forward there. So great a disproportion between the two branches of the legislature seems not to be advisable; for the many are impatient of the control of a few. It seems agreed that in free governments, the most numerous branch of the legislature ought to possess a power to originate laws; but, ought they to possess that right exclusively? Our constitution has decided this question in the affirmative, that of the United States contains a preference to the negative. I am inclined to doubt, whether, if the constitution of our senate were assimilated as a legislative body, to that of the senate of the United States; and that of the latter, to the constitution of our state senate, it would not produce an excellent improvement in both. The senate of Virginia is purely a legislative body; they are chosen immediately by the people, in the same manner as their delegates; they have perfectly the same common interest with their constituents, and with the delegates in every respect. – Why then not originate any bill, nor alter an iota of a money-bill? The senate of the United States are not the immediate representatives of the

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people, but of the states in their politic capacity; they are chosen for a longer period; they cannot be recalled; they cannot be removed by impeachment; they are, themselves judges in cases of impeachment; they form a part of the executive department; vote upon treaties, etc. and concur in all appointments to important offices. Such a body may possibly catch the contagion of executive influence: it may devise measures in concert with that department, which it may not only promote, but originate in the legislature: it may possibly do more harm than good in the attempt to amend a revenue law; especially since the constitution fixes a permanent distinction between direct and indirect taxes, which are to be apportioned, or not, among the states, as this distinction may warrant. Many objections may therefore be made to these powers in a senate of the United States, which, to me, do not seem to apply to the senate of a member of the confederacy. These objections, also, would probably be greatly diminished, If the numbers in the house of delegates were lessened, and those in the senate increased. Our present legislature consists of two hundred and eleven members: if a third, a fourth, or even a fifth part of them composed the senate, that body would probably feel a confidence in itself which may soon be wanting; especially as long as an undue apportionment of its members between the several parts of the state is supposed to exist. They would also possess in reality, more of the confidence of the people; their deliberations would be more respected, and their opposition, if necessary, to any unconstitutional, or intemperate act of the house of delegates more firm and effectual.

3. Each house chooses its own speaker, appoints its own officers, settles its own rules of proceeding (except that a quorum of the senate is fixed by the constitution) and directs writs of election for supplying intermediate vacancies.[40]

4. All laws originate in the house of delegates, but may be approved or rejected by the senate or be amended with the consent of the house of delegates, except money bills, which in no instance can be altered by the senate but must be wholly approved or rejected:[41] on these heads some remarks have already been made.

5. Either house of the general assembly may adjourn themselves, respectively.[42] This part of the constitution, for want of a provision similar to that in the constitution of the U. States, may, in case of disagreement between the two branches, produce great inconvenience.

6. The general assembly shall neither be prorogued nor adjourned by the governor during their sitting; nor dissolved by him at any time; but he shall, if necessary, either by the advice of the council of state, or on application of a majority of the house of delegates, call them before the time to which they shall stand prorogued or adjourned.[43]

The abuse of the regal prerogative of proroguing and dissolving the colonial legislature by the governors appointed by the crown, prompted this necessary precaution, to secure to the legislature, a perfect independence of the executive department; not only in respect to its existence, which formerly was made to depend upon the will of the crown or its governors; but in respect to its deliberations, which were frequently interrupted by sudden and unexpected prorogations, whenever any thing unpalatable to that department was the subject of discussion. The wanton exercise of this power gave rise to the appointment of conventions, as has been already remarked; and thus hastened the period which put an end to the power, altogether.

7. The two houses of assembly, by joint ballot, appoint the governor, the members of the privy council or council of state, judges of the supreme court of appeals and general court, judges in chancery, (judges of admiralty before the adoption of the constitution of the U. States) secretary, treasurer, and the attorney general; the judges, secretary and attorney general, to be commissioned

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by the governor and continue in office during good behavior.[44] They likewise have been in the habit of appointing all officers of the army and navy raised under the authority of the state; and militia officers, above the rank of a field officer; the appointment of militia officers of that rank, and under it, being vested in the executive department.[45] All officers which have been created by law, have also generally been filled by the general assembly.[46] This very extensive power not only gives to the legislative an influence and control over the other departments of government, which seems incompatible with the principles contained both in the bill of rights and constitution, which declare, that they ought to be separate, and distinct; but, it is to be apprehended tends to give to the individual members of the former, during every session of assembly, an influence by no means reconcilable to those principles, possessing not only a power of appointing to office, but, not unfrequently the power of removal also, by a kind of annual or triennial ostracism,[47] too many occasions occur for indulging private partiality, resentment or dislike, as well as the dictates of an intolerant party spirit. Nothing less than a miracle can be expected to produce an assembly of two hundred persons, wholly exempt from the influence of some of these passions. The house of delegates likewise possesses the power of impeaching the governor when he is out of office, and others offending against the state, by mal-administration, corruption or other means by which the safety of the state may be endangered:[48] this is a power which they have never yet exercised, and in respect to the officers of the executive department, can rarely have occasion to exercise, whilst they possess the power of removal, in the summary method above mentioned.

The strictures of Mr. Jefferson, on these manifold defects in our constitution, are above all panegyric, in the eyes of those, who wish to appreciate properly, the benefits arising from a government constructed upon the solid basis of a representative democracy, in which the powers should be so divided and balanced among the several bodies of the magistracy as that no one can transcend its legal limits, without being effectually checked and restrained by the others.[49] To the attentive perusal of the student I therefore most earnestly recommend them. – But there is one important defect in the constitution of the legislative department, which he has not noticed, viz. that the justices of the county courts are, notwithstanding the principle of separation, contemplated by the framers of the constitution, expressly declared to be eligible to either house of assembly.[50] These members unite in their own persons such a variety of powers as appears perfectly incompatible with the principles of a democracy. As legislators, they have not only the power to make laws, but moreover the appointment of the governor, members of the privy council, treasurer, secretary, judges of all the superior courts, attorney-general, register of the land-office, major-generals, brigadiers, and all other militia officers above the rank of a colonel; all officers of the army and navy in time of war; and, with a few exceptions only, all other officers under the authority of the state; not forgetting senators to the congress of the United States. As justices of the county courts, they are judges in all cases of life and death where a slave is to be tried; and of all offenses under the grade of felony[51] at common law of which a free person may be accused. They constitute an examining court, whenever a free person is brought before one of their number, accused of any crime, amounting to felony at common law, and may remand him for a final trial to the district court, or discharge him, as they think proper. They are judges without appeal, in all civil cases, where the matter in controversy is under ten dollars, and perhaps where it is under twenty dollars. They are also judges in all other civil cases arising within their county (whatever be the amount) both at common law, and in equity. They recommend militia officers under the rank of a brigadier, and nominate all sheriffs, and coroners; the former out of their own body. They open roads, build bridges, erect court-houses and prisons, and levy the expense thereof upon the county; and lastly, they recommend to the executive, the persons whom they wish to admit into their own body. They

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may be at one and the same time, members of the general assembly, (or of congress), judges of the county courts, and militia officers of any rank, whatever. So formidable an accumulation of powers in any one set of men, cannot fail, in process of time, of establishing an elective aristocracy in every county; a few generations, perhaps a few years, will convert it into an hereditary aristocracy, in fact. For, those who have power to recommend, or to appoint, to office, in so many instances, will not very long be forgetful of their own families, connections, and friends. The esprit du corps will descend from father to son, and from brother to brother: and as the number of justices in the counties is unlimited, all who have once attained to that rank, will probably be tenacious of it in their families. This then may be regarded as one of those formidable evils in our present constitution, which no future convention should permit to endanger the total subversion of the principles of our government.[52]

Mr. Jefferson in his draft of a constitution, proposes sundry limits to the power of the legislature; perhaps they do not go quite far enough; whatever may be regarded as the fundamental laws of a state ought to be fixed beyond the power of the ordinary legislature to alter; such ought all laws to be deemed which respect the rights of the citizen, or relate to the disposition of the permanent property within the state: the abolition of entails, and the establishment of the succession to estates, in parcenary, two fundamental laws of a democratic state, rest now upon legislative authority, only: they ought to receive the inviolable sanction of the constitution. The exclusion of aliens from offices of trust, or profit, or from holding lands, unless they actually reside within the state; a similar exclusion of such other description of persons, as sound policy might lead us to reject from the class of citizens; the security of equal rights to all whom such a policy might admit into the class of citizens; the independence and total separation of the several departments of the government from each other; their respective rights and duties, as they relate to each other, and to all others as far as they can be prescribed by the constitution of the state, ought to be placed above the reach of the ordinary legislature.

There is one defect in our constitution, which I shall particularly notice, and then conclude this part of our review of it. Any person who is entitled to demand against the common. wealth any right in law or equity, may petition the high court of chancery, or the district court holden in Richmond, according to the nature of his case, for redress, and such court shall proceed to do right therein.[53] But if this right or demand happens to be of a pecuniary nature, it seems to be held that the treasurer cannot pay the party entitled thereto, unless an appropriation for that purpose shall have been first made by the legislature. Thus, the party, notwithstanding the judgment or decree of the court in his favor, is still left dependent on the good will of the legislature for his redress. In other words, the legislature, if it be unjust enough to do so, may frustrate the constitutional act of the judiciary department, and keep any public creditor out of his just debt forever. This might easily be avoided, by an amendment to the constitution, declaring, that no money shall be drawn from the public treasury, but in consequence of appropriations made by law, or of the judgment or decree of one of those courts.

II. The constitution, powers, and duties of the executive department are next to be considered.

The governor is chosen annually by joint ballot of both houses of assembly: he may be continued in office three years, successively, but is ineligible for four years after he is out of office; and when out of office he may be impeached by the house of delegates: he shall with the advice of council exercise the executive powers of the government, according to the laws of the commonwealth; and shall not under any pretense exercise any power or prerogative, by virtue of any law, statute or custom of England: but he shall with the advice of council have the power of granting reprieves or

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pardons, except where the prosecution shall be carried on by the house of delegates, or the law shall otherwise particularly direct; in which cases no reprieve or pardon shall be granted, but by resolve of the house of delegates. An adequate but moderate salary shall be settled on him during his continuance in office. He may either by the advice of the council, or on application of a majority of the house of delegates, convene the legislature: he may appoint militia officers (not above the grade of a county lieutenant, I presume) "with the advice of council, or recommendations from the respective county courts": he may embody the militia with the advice of the privy council, and when embodied, shall alone have the direction of the militia under the laws of the country: he is to commission the judges of the superior courts, the secretary, and attorney general, when appointed by the general assembly, or (in case of a vacancy during the recess of the legislature) by the executive, with advice of council: He is likewise, with the advice of council, to appoint and commission justices of the peace, for the counties, such appointments to be made upon the respective recommendations of the county courts; and sheriffs and coroners, in like manner.[54]

The privy council consists of eight members chosen also by joint ballot of both houses, either from their own members, or the people at large; they annually choose a president out of their own members, who in case of the death, inability, or necessary absence of the governor "from the government," shall act as lieutenant governor. Four members constitute a quorum, and their advice and proceedings, must be entered on record and signed by the members present, (but any member may enter his dissent to any part thereof,) to be laid before the general assembly when called for by them. A sum of money appropriated for that purpose, is divided annually among the members in proportion to their attendance; two of them are removed by joint ballot of both houses at the end of three years, and are ineligible for the three next years.[55]

Such is the constitution of the executive department; and nothing surely can more strongly evince the necessity of fixing the fundamental laws of the state, in a government which professes to make the several departments of government, separate, distinct, and independent of each other, than this short view of the manner in which the executive department in Virginia, is chosen, paid, directed, and removed, by the legislative. It possesses not a single feature of independence: nothing is necessary but for the legislature to give to its mandate the form of a law (whatever be the nature of that mandate) and it acquires instantly a constitutional sanction, and obligation upon the executive. How then can the legislative, and executive departments of the government be said to be "separate and distinct, so that neither shall exercise the powers properly belonging to the other."[56] How far such a qualified negative upon all their proceedings as that which is confided to the president of the United States,[57] an election conducted upon similar principles, by electors chosen in the several senatorial districts; a perfect independence in respect to continuance in office; an incapacity to be re-elected for a period at least equal to that for which he may be elected; and a salary not to be increased or diminished during his continuance in office,[58] may render the governor something more than the minister, (I had almost said, the finger) of the legislature, may well deserve the most mature consideration of those, to whom the important task of reforming our constitution shall be confided. But until something of this sort be done, until the members of the privy council (if it should be judged expedient to continue that part of the executive,) shall be rendered equally independent of political, and of personal, influence, the executive department of this commonwealth can never be regarded as a separate, co-ordinate, and distinct branch of the government. The legislature will in fact possess and exercise all the powers of the executive. If the union of these powers in the same men or body of men be dangerous to the state, is that union less dangerous when the legislature has the executive at its devotion, than when the executive dictates to an obedient legislature? Were the complying parliaments of the Tudors, or the late national assembly of France, more formidable to

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virtue or more terrible to the human race? When the legislature is at the devotion of the executive, an uniform, systematical tyranny prevails; the legislature being in fact no more than a screen interposed between the monarch and the people, to take off the odium of his tyranny: but when the executive is at the disposal of the legislature, faction, intrigue, jealousy, resentment, hatred, revenge, and every other malignant and detestable passion manifest the extreme of human depravity and corruption, until the whole state is thrown into a paroxysm of frenzy, anarchy and confusion; from which it recovers only to submit to a single tyrant instead of an host of despots.[59] The people of Virginia must ever be equally averse to embrace either of these alternatives. Nothing but a complete reform in this part of our constitution can deliver us from the danger of one of them: especially if by any fatal mischance, the federal union should be broken, and Virginia take a rank among the nations, without first reforming her constitution. Those who deprecate the late horrid scenes in France, may then chance to find an equal subject of lamentation at home.

If the governor, from the mode of his appointment, may be considered as too much subjected to the influence and control of the legislative body, the members of the council of state cannot be more exempt from the same degree of influence: perhaps the personal independence of those members is too much exposed even to the personal influence of the individuals, who, by a kind of ostracism, are enabled to expose them to a degree of popular disgrace, by an official exile for three years. This institution owes its origin to a laudable jealousy of official influence. In its application, it is probable that such a consideration had never been thought of. In truth, the imbecility of the executive department is the best security against any undue influence arising from that quarter. No man was ever dangerous to a state who neither has, nor can have any thing in his gift. Scarce a single office in the state is at the entire disposal of the executive, for where the assembly do not appoint, the county courts recommend; not having the command of the treasury, they are equally destitute of pecuniary influence: what reason is there then for this odious, though oblique mode of inculpating men, against whom no shadow of a crime can be alleged? Surely the method of going out by rotation is infinitely preferable to a mode of removal, which must, in general, wound the feelings of those who exercise the power, as well as those who feel its effects.[60]

The council of state seems to possess whatever power to deliberate, may remain with, or be confided to the executive department: the governor can constitutionally perform no one official act without their advice, except in his capacity of commander in chief of the militia, when actually embodied; but he cannot embody them by his own authority, nor without advice of council. On the other hand, the council seem equally destitute (by the constitution) of the power of acting, as the governor of deliberating. Their president indeed, "in case of the death, inability, or necessary absence of the governor from the government," shall act as lieutenant-governor.[61] And a law of the state provides that in case of the death, or inability of both, in the recess of the general assembly, the privy councillor, whose name stands next in the list of their appointments, shall officiate as lieutenant governor; and that in the absence of the governor, such intended absence having been previously notified to them by him, and entered on their journals, if any business to be transacted at the council board necessarily requires dispatch before he can attend to it, they may proceed without him, and the act shall be as valid as if he had been present.[62]

The governor, with the advice of council, we may remember has the power of granting reprieves or pardons, except where the prosecution shall have been carried on by the house of delegates, or the law shall otherwise particularly direct; in which cases no reprieve or pardon shall be granted but by the resolve of the house of delegates.[63] The committee of revisors, appointed by the general assembly in the year 1776,[64] to prepare a code of laws adapted to a republican government, proposed

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to abolish the power of pardon in all cases, and generally to mitigate and apportion punishments according to the nature and degree of the crime. I know not upon what principle the bill was rejected, but I presume it was thought safer to continue the power of pardon, on its present footing, than to transfer it, in effect, to juries, whose lenity might too often interest them in favor of a criminal, from whom all chance of pardon might be taken away by their verdict against him. I am therefore inclined to think, that however just and proper it be for punishment to follow the crime with certainty, in all cases, yet that more offenders might escape if the power of pardon were abolished, than will ever escape by means of it. In case of treason against the commonwealth, the power of pardon is taken away from the governor by the act of 1794, c. 168,[65] nor can the executive now remit any fine or amercement assessed by a jury, or imposed by any court of record, court martial, or other power or authority authorized to assess or impose the same.[66] And in cases of impeachment, as the prosecution must be carried on by the house of delegates, the power of pardon is evidently taken away from the governor by the constitution; but under these restrictions, the power of pardon still remains with him, with the advice of the council.

Such are, in general, the powers of the executive department of the government, as provided for by the constitution; occasional acts were passed during the revolutionary war for extending them: and, in two cases, acts of indemnity[67] were passed, to screen the executive from the suits of private persons who might suppose themselves injured by some exertions of authority for the salvation of the country, but which were neither authorized by the constitution, nor by any existing law. These acts demonstrate the defects of the constitution, or the improvidence of the legislature: they do more – they show the danger to which the commonwealth may be exposed, for want of a proper arrangement of the powers of government, and the no less danger to the persons and properties of individuals, whose redress for real injuries might possibly be taken away by an act of the legislature. The validity of these acts of indemnity having never been judicially called in question, it is hard to say what respect might have been paid to them, in such a case. Perhaps the constitution of the United States, which prohibits the states from passing any ex post facto law, may be regarded as preventing the passing of such acts in future: but surely a constitution which seems to require such aid, for the protection of its best officers, against the vindictive malice of its worst citizens, or secret enemies, must be very inadequate to the purposes of a free, sovereign, and independent state. The imbecility of an executive, possessing no independent authority with respect to the public force, must in time of war, or danger, place it under the immediate direction of the legislature, which is thus transformed into a numerous executive council, annually elected. The incapacity of such a body to concert and conduct uniform measures, for such active operations as may be required for the defense of the state, is self-evident to every man of the least discernment. Nothing short of omniscience could prepare the members, before the time of assembling, to act according to the existing state of things; either the time must be lost in acquiring the necessary knowledge of these things, or ignorance, faction, and intrigue, will disconcert every measure that maybe proposed. A state thus governed would equally be exposed to internal convulsions, and to foreign insult or dominion. The expectation of forming an immediate and effectual federal government of the states, probably occasioned much of this inattention to the structure of the government so far as relates to its foreign concerns. The danger arising from this circumstance is strongly depicted by Mr. Jefferson.[68] Every man must shudder with horror at the proposal which he mentions of making a dictator: had the legislature done so, the executive in all probability must have submitted without a struggle; and the opposition of the judiciary to such an authority must have been equally ineffectual. *Inter arma silent leges*, is a maxim which will ever be peculiarly applicable to that department, though in time of peace it may be regarded as the palladium of genuine liberty. Happily for us, many of the inconveniences which

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might have been apprehended in Virginia as a sovereign state, unconnected with any other, are now in a great measure remedied by the adoption of the federal constitution, by which all those objects which respect other nations or states, are consigned to the care, attention, and regulation of the federal government; whilst those which respect the domestic happiness, interest, and advancement of the state, its internal economy, peace, and good order, form an ample field for the wisdom and patriotism of the state-legislature to exert themselves, without hazarding, as we may reasonably hope, a repetition of those dangers to which a constitution formed without a precedent, and without experience to guide its framers, at first exposed us.

In the draft for a constitution of this state, prepared by Mr. Jefferson,[69] there is an excellent delineation of the powers and duties which should be assigned to the governor, and council respectively; and with recommending it to the very attentive perusal of the student, I shall conclude my remarks on this part of the constitution.

III. The judiciary department of the government was originally vested in three superior courts, viz. the court of admiralty, the high court of chancery, general court of common law jurisdiction, and the supreme court of appeals;[70] besides the county and corporation courts, which existed antecedent to the revolution. The court of admiralty was discontinued immediately after the adoption of the constitution of the United States, by which the subjects of its jurisdiction were transferred to the federal government; and the judges were elected judges of the general court.[71] The judges of the court of appeals and of all the superior courts hold their offices during good behavior; but the constitution is silent as to the tenure of office by the justices of the county courts; the ordinance of convention "to enable the present magistrates and officers to continue the administration of justice," authorizes the executive upon complaint against any justice of the peace then in commission of misfeasance in office or disaffection to the commonwealth, to remove him from his office, if they shall be of opinion that the complaint is just.[72] An act nearly similar was also made in October, 1778, c. 5.[73] but was repealed in the year 1787, (Sess. Acts, c. 23.) "as contrary to the true spirit of the constitution" of which opinion the general court appear to have been, in the case of a magistrate who had been removed from office, by the executive under that law. The constitution declares that the judges of the superior court shall have fixed and adequate salaries; but is silent as to the justices of the inferior courts, who being eligible as members of the general assembly, seem precluded from any salary, by the same article.[74] Whatever idea of permanency, may be supposed to have been intended by the expressions in the constitution, the salaries of the judges have from time to time been changed; and though nominally less than was fixed by the acts constituting the courts respectively, may be considered at present, as rather more, than less than the standard then adopted; the duties of the offices, respectively, are probably multiplied tenfold, since that period, yet the salaries are regarded as adequate by the legislature; and from their opinion upon this subject there is no appeal. The judges are removable from office on impeachment by the house of delegates, and conviction of corruption or other misfeasance in office, according to the station of the person impeached; who, if a judge of the general court must be tried in the court of appeals; but the judges of the other courts must he tried in the general court.[75]

The separation of the judiciary power from that of the legislative, and executive, and the perfect independence of the former, seems to have been in theory, a favorite object with the people of the United States, generally, both in their respective state constitutions, and in that of the United States. But this theory has perhaps in no one instance been successfully carried into practice. In the federal constitution, which in this respect appeared to be the most perfect, this great desideratum was thought to have been attained: but experience seems to prove the contrary. Of what importance a

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successful arrangement of this part of the government, may be, in such a commonwealth as our own, connected as it is with the federal government, cannot be more satisfactorily illustrated, than we find it in the Federalist, number 78, and 79. As the observations which they contain on this subject are too valuable to be abridged, I shall give them nearly at length.

> "The standard of good behavior for the continuance in Office of the judicial magistracy, is certainly one of the most valuable of the modem improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince. In a republic it is a no less excellent barrier to the encroachment and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.
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> "Whoever attentively considers the different departments of power must perceive, that in a government, in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution: because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislative not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or the wealth of society, and can lake no resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm, even for the efficacy of its judgments.
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> "This simple view of the matter suggests several important consequences. It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power;[76] that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself, against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter: I mean so long as the judiciary remains truly distinct from both the legislative and executive. For I agree "that there is no liberty if the power of judging be not separated from the legislative and executive power."[77] And it proves in the last place that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments; as all the effects of such an union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution; and in a great measure as the citadel of the public justice and the public security.
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> "The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution, I understand one which contains certain specified exceptions to the legislative authority, such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like limitations of this kind can be preserved in practice in no other way than through the medium of courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution, void. Without this,

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all the reservations of particular rights or privileges would amount to nothing.

"Some perplexity respecting the right of the courts to pronounce legislative acts, void, because contrary to the constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the grounds on which it rests cannot be unacceptable.

"There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised is void. No legislative act, therefore, contrary to the constitution can be valid. To deny this would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do, not only what their powers do not authorize, but what they forbid.

"If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, when it is not to be collected from any particular provision in the constitution. It is not otherwise to be supposed, that the constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be regarded by the judges as a fundamental law. It therefore belongs to them, to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought of course to be preferred; or in other words the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

"Nor does this conclusion by any means suppose a superiority of the judiciary to the legislative power. It only supposes that the power of the people is superior to both: and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than by the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

"This exercise of judicial discretion in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens that there are two statutes existing at one time, clashing, in whole or in part, with each other; and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation; so far as they can by any fair construction be reconciled to each other, reason and law conspire to dictate that this should be done: when this is Impracticable it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining

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their relative validity is, that the last in order of time should be preferred to the first. But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable that between the interfering acts of an equal authority that which was the last indication of its will, should have the preference.

"But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule, as proper to be followed. They teach us, that the prior act of a superior, ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.

"It can be of no weight to say, that the courts on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL, instead of judgment, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation if it proved any thing would prove, that there ought to be no judges distinct from that body."

"If then the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges, which must be so essential to the faithful performance of so arduous a duty.

"This independence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill-humors, which the arts of designing men, or the influence of particular conjunctures sometimes disseminate among the people themselves, and which though they speedily give place to better information and more deliberate reflection, have a tendency in the mean time to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. – Yet it is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty, as faithful guardians of the constitution, where legislative invasions have been instigated by the major voice of the community.

"But it is not with a view to infractions of the constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill-humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity, and confining the operation of such laws. It not only serves to mode. rate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very

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motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our government, than but few may be aware of. The benefits of the integrity and moderation of the judiciary, have already been felt in more states than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men of every description ought to prize whatever will tend to beget or fortify that temper in the courts; as no man can be sure that he may be to-morrow, the victim of a spirit of injustice by which he may be a gainer to-day. And every man must now feel that the inevitable tendency of such a spirit, is to sap the foundation of public and private confidence, and to introduce in it's stead universal distrust and distress.

"That inflexible and uniform adherence to the rights of the constitution and of individuals which we perceive to be indispensable in the courts of justice can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would in some way or other be fatal to their necessary independence. If the power of making them was committed either to the executive or legislative, there would be danger of an improper complaisance to the branch which possessed it; if to both there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the constitution and the laws.

"There is yet a further and a weighty reason for the permanency of the judicial offices, which is deducible from the nature of the qualifications they require. It has been frequently remarked, with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duties in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents, must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is, that there can be but few men in the society, who will have sufficient skill in the laws, to qualify them for the station of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those, who unite the requisite integrity with the requisite knowledge. These considerations apprise us, that the government can have no great option between fit characters; and that a temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice, to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able and less well qualified to conduct it with utility and dignity. In the present circumstances of this country, and in those in which it is likely to be for a long time to come, the disadvantages on this score, would be greater than they may at first sight appear: but it must be confessed that they are far inferior to those which present themselves under the other aspects of the subject.

"Next to permanency in office, nothing can contribute more to the independence of the judges, than a fixed provision for their support. In the general course of human nature, a

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> power over a man's subsistence, amounts to a power over his will. And we can never hope to see realized in practice the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources, on the occasional grants of the latter. The enlightened friends to good government in every state, have seen cause to lament the want of precise and explicit precautions in the state constitutions on this head. Some of these, indeed, have declared that permanent[78] salaries should be established for the judges; but the experiment has in some instances shown, that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been evinced to be requisite. The plan of the convention has accordingly provided, that the judges of the United States, "shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office."
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> "This, all circumstances considered, is the most eligible provision that could have been devised. It will readily be understood, that the fluctuations in the value of money and in the state of society, rendered a fixed rate of compensation in the constitution inadmissible. What might be extravagant to-day, might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature, to vary its provisions in conformity to the variations in circumstances; yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse. A man may then be sure of the ground upon which he stands, and can never be deterred from his duty, by the apprehension of being placed in a less eligible situation. The clause which has been quoted combines both advantages. The salaries of judicial offices, may from time to time be altered as occasion shall require, yet so as never to lessen the allowance with which any particular judge comes into office, in respect to him.
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> "This provision for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed, that together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the constitutions of any of the states in regard to their own judges.
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> "The precautions for their responsibility, are comprised in the article respecting impeachments; they are liable to be impeached for mal-conduct by the house of representatives, and if convicted may be dismissed from office and disqualified for holding any other. This is the only provision on the point, which is consistent with the necessary independence of the judicial character, and is the only one, which we find in our own constitution in respect to our own judges."

The duties of the judiciary department, in general, form the subject of several articles in our bill of rights and constitution,[79] which contain certain fundamental rules for the direction of that department on occasions which respect the life, liberty, or property of the individual, and for his security against all attempts to injure or oppress him, either by private means, or under the color of public authority. These will be pointed out, under their proper heads, as they occur in the course of our examination of the several subjects connected with them. At present it will be sufficient to remark, that no citizen of Virginia can be prejudiced either in his person or his property, by any authority, or the abuse of any authority delegated to any branch of the government of this commonwealth, (or of the United States) so long as the judiciary departments of those governments, respectively, remain uncorrupt, and independent of legislative or executive influence or control. But whenever the reverse of this

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happens, by whatever means it may be effected (whether fear or favor) liberty will be no more, and property but a shadow.

Having in the preceding parts of this tract, suggested some hints for the amelioration of the constitutions of the legislative and executive departments, I may be pardoned for some remarks upon the judiciary department likewise, which are offered with the same view.

The nature of the judicial office demands two indispensable qualifications in a judge: an integrity not to be shaken by fear, or favor, or corruption; and a thorough knowledge of the constitution of his country, the rights of his fellow citizens, and the laws made for their protection and security: if either be wanting the wisdom of a Bacon, or the integrity of an Hale will not make up for the deficiency.

To secure the integrity of a judge he must be placed above the reach of every species of temptation; he must be without hopes and without fears, as far as relates to the tenure of his office and the continuance of his salary. That salary should not only be sufficient to place him above the temptations of avarice, or necessity, but to enable him to devote his whole time and attention to the duties of his office. If a judge be dependent upon other pursuits for a competent subsistence, he must of necessity at some times neglect either his duties, or those studies, which are necessary to qualify him for a proper discharge of them: if he be indigent and distressed in his private circumstances, his judgment may be warped in favor of the debtor to the prejudice of the creditor; or, what is infinitely worse, it may encourage the offer, (and even compel the acceptance,) of bribes, or other means of corruption. Transactions of this nature may be conducted in a manner which defies detection. If the want of an independent salary may expose a judge to such temptations from every party in whose cause he may sit, how much more to be dreaded is that influence from any other department of government, which can raise or depress him as it pleases?

In a country whose constitution and government is complicated, the laws voluminous, intricate, and not unfrequently contradictory, ability is, in point of importance, a qualification almost equally as necessary to a judge, as integrity itself. This qualification must be sought for among those gentlemen of the bar, whose long practice and experience and pre-eminent talents have singled them out, and gained the notice, esteem, and confidence of their countrymen in general. Such men will not be prevailed upon, to resign an extensive, and lucrative practice, for a scanty or precarious salary, and a laborious office: men of inferior talents, only, whose professional emoluments perhaps scarcely defray the expense of their attendance on the courts, will be the sole candidates for the imaginary independence annexed to a scanty salary. The bench, instead of commanding the respect of the bar must discover its own inferiority; and this discovery will not be confined to those whom it affects: all will see and hold in contempt the decisions of men of inferior capacity. Hence, no person will rest satisfied with, or submit to a judgment pronounced against him by judges, whose incapacity is generally admitted; Every cause must go to the supreme court of appeals, for the correction of errors supposed to have been made in every decision, nor will the final determinations of that tribunal, (for that tribunal also must in time be filled with men of the same character) satisfy the minds of unsuccessful litigants: the disgust, and contempt of the judiciary will become general, and it will be soon regarded as the rotten part of the constitution. Nor is this all – a spirit of litigation is always proportionate to the delay, as well as to the chances of success, in a law-suit; and whenever, from the operation of those causes, it becomes usual to carry all suits, by appeal, to the highest tribunal in the state, the wheels of justice must become too much clogged to perform a complete revolution. This has been exemplified already in the general court, where in a very few years, suits had so multiplied, by appeals from the county courts, and other causes; that the legislature thought it

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justified a declaration, that the delays inseparable from its constitution, were in many instances equal to a denial of justice. Such an accumulation of suits in the court of appeals would be without remedy, but by a change in the constitution itself.

If the judicial office be made an object worthy of the acceptance, and even ambition of men of the first legal talents in the state, the mode of selecting and promoting them may perhaps be improved by requiring that judges of the general court, and judges of the superior courts in chancery, should be recommended by a joint ballot of the judges of those courts and of the court of appeals, and, that the judges of the court of appeals should be selected from the judges of those courts.[80] The choice by these means would probably fall upon the most distinguished characters at the bar throughout the state: and a second selection could scarcely fail of rendering the court of appeals equally venerable and revered.

The many great objections to our present county court system were shortly mentioned in speaking of that article of the constitution which secures to the justices of those courts, the right of sitting in the legislature; it is not my purpose to enlarge upon the subject in this place, as this essay has already swelled beyond the limits which were originally proposed for it.[81]

Several miscellaneous articles in the constitution remain, which it does not seem necessary to notice at present. I shall mention one only, which relates to the unity of the state and which seems to have escaped the attention of those who are said to have been engaged in promoting a division of it; making the blue ridge of mountains the boundary.

> "The western and northern extent of Virginia (except as to the parts ceded to Maryland, Pennsylvania, North Carolina, and South Carolina) shall stand, in all respects, as fixed by the charter of King James the first, in the year one thousand six hundred and nine, and by the public treaty of peace between the courts of Great-Britain and France, in the year one thousand seven hundred and sixty three; unless by act of legislature, one or more territories shall hereafter be laid off, and governments established westward of the Allegheny mountains."[82] Under this clause of the constitution the cessions of territory heretofore made in congress, and the erection of Kentucky into an independent state, were fully authorized.[83] But whilst the constitution of the state remains unchanged, the commonwealth cannot be subdivided, or dismembered of any part of its territory, not westward of the Allegheny mountains. And the Counties, in that part of the state, it is presumed, are not in such a situation, at present, as to render the establishment of a separate government, between the Allegheny mountains and the state of Kentucky, desirable at this time.

Thus having taken a pretty comprehensive view of the constitution of the commonwealth, I shall next proceed to consider that of the United States somewhat at large; the intimate connection and union of the two governments thereby established, requiring that they should as far as possible be treated of together; each being in fact but a distinct part of one great political system, to which no perfect parallel can be found in any other country, or in the annals of any other people.

NOTES

1. Bill of Rights, art. 3.
2. Constitution of Virginia, art. 3.
3. Constitution of Virginia, art. 9.

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4. Ibidem.

5. Notes on Virginia. – 215, Paris edition.

6. Ibidem.

7. The case of the district court clerks in the court of appeals. May 12, 1788, and of Kamper vs. Hawkins in the general court, November 16, 1793.

8. Notes on Virginia, p 214. to 235. Paris edition.

9. The national judges are no more than the mouth that pronounces the words of the law. Mont. Sp. of Laws, vol. 1 p. 226.

10. Notes on Virginia, p 215.

11. Ibidem, p. 217.

12. Ordinance of convention, July 1775, c. 4.

13. Mr. Jefferson, I apprehend, is mistaken in supposing that in April, 1776, independence and the establishment of a new form of government had not been opened to the mass of the people. The idea was frequently suggested in the public newspapers, even as far back as November 10, 1775, as soon as Lord Dunmore published the king's proclamation declaring the colonies in rebellion; and his own, calling upon the people to repair to the royal standard, or to be looked upon as traitors, and dealt with according to the rules of martial law; and inviting the negroes to join his majesty's troops for the reduction of the colony to a state of obedience.

14. July, 1775, c. 4. Chancellor's Revisal, 1785, p. 30.

15. Virginia (official) Gazette, printed by A. Purdie, May 10, 1776.

16. It is worthy of remark, that on the very same day, the congress then sitting in Philadelphia, came to a resolution "recommending to the respective assemblies and conventions of the united colonies, where no government sufficient to the exigencies of their affairs had been theretofore established, to adopt such government, as should, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents, in particular, and America in general. Journals of Congress, May 15, 1776."

17. Journal of the Convention. Few copies of this important document are now to be met with; I have therefore been more copious than otherwise I should have been, in the extracts, I have made from the copy in my possession.

18. Vol. 1. 211.

19. Defense of the French revolution. p. 60.

20. See the second section of the constitution.

21. Report of the case of Kamper vs. Hawkins, in the General Court.

22. That the legislature of the commonwealth, have regarded the constitution as obligatory upon them, will appear from the preamble of an act passed in May session 1783, c 33. Revisal of 1785, p. 204, assigning as a reason for repealing a former act, that it was found to be contrary to the constitution or form of government. A second instance occurs in the acts of 1787, c. 93. which assigns the same reason for a repeal of a former law, 1783, c. 81. The repeal of the first law establishing district courts, 1787, c. 39. was a tacit acknowledgment of the same principle as contended for by the court of appeals in their remonstrance of May 12, 1783. Other instances doubtless might be adduced. It seems now settled in all the superior courts, that whenever "the constitution and an act of the legislature are in opposition, and cannot exist together, the former must control the latter." Remonstrance of the court of appeals to the general assembly, May 12, 1788.

23. C. V. art. 5. There are now (1802) ninety-two counties. The city of Richmond was allowed to have a representative by the act of 1788, c. 63. The elections are now held on the same day in every county, viz. on the fourth Wednesday in April yearly. L. V. 1788, c. 14.

24. The bill of rights, art. 6. gives us the following principle in regard to the right of suffrage: "that all men having sufficient evidence of permanent common interest with, and attachment to the community, have the right of suffrage, &c. How far the constitution may have conformed to this principle in fixing the right of suffrage as then exercised, has been a matter of much dispute and controversy, of late.

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25. See V. L. Edi. 1785, p. 30.

26. Edi. 1769. p. 122.

27. Edi. 1769. p. 287.

28. See V. L. Edi. 1785, p. 3.

29. Notes on Virginia, p. 211.

30. State of the taxes arising on land, negroes, and other property in Virginia for the year 1794, annexed to the letter from the secretary of the treasury to the speaker of the house of representatives in congress, December 19, 1796, accompanying a plan for laying and collecting direct taxes.

31. Notes on Virginia, p 212. Paris edi. It is much to be wished that the enlightened author would favor his country with a second edition, as many documents might at this time be procured, which had no existence at the time he wrote.

32. The number of white males between sixteen and forty-five, in this table, and that of slaves, are taken from the census made in the year 1801 The taxes are taken from the report of the secretary of the treasury of the United States to Congress, Dec. 19,1796, before referred to, page 403. The number of counties and representatives, from the acts of our assembly.

33. The difficulty of establishing a proportion of representation combined of the personal and pecuniary ability, or burden borne in the several parts of the state, is probably less than those who have not turned their attention to the subject may conceive; the author of these pages natters himself that it will not be thought arrogant in him to suggest one, which to him appears founded upon the most just principles, and admitting of being reduced into practice without difficulty.

A. Let the several counties in the commonwealth be arranged into districts for choosing representatives to congress, as nearly as possible, according to the census by which representatives to congress are to be apportioned among the several states.

B. Let each district be entitled to choose two senators in the manner hereafter mentioned; but in choosing senators for that district, in which the counties of Accomack and Northampton may be, let one senator be chosen who is a resident on the eastern shore, and one who is a resident on the western shore.

C. Let each district be likewise entitled to choose as many members of the house of delegates, as their several proportions of the whole number of militia (or free white males over the age of sixteen, and not more than five and forty years of age); and of the whole amount of taxes paid into the treasury of the commonwealth, annually, from the several counties in each district respectively, according to the following rate thereof, respectively; that is to say,

1. Let the whole number of militia, (according to the before-mentioned description,) who may be found within the state by the last census of the United States, preceding such arrangement, be divided by the whole number of districts for choosing members to congress; and let there be four members of the house of delegates, throughout the state, for the number of militia which the quotient may amount to; that is to say, one member of the house of delegates, for any number of militia equal to a fourth part of such quotient; two members for any number of militia equal to one-half of such quotient, and so on, in the same proportion, to be chosen in the several districts before mentioned, in proportion to the number of the militia in each district respectively, in the manner herein after mentioned.

2. Let the aggregate of taxes paid into the treasury of the commonwealth, annually, upon an average of the ten preceding years, be in like manner divided by the whole number of districts for choosing members to congress, and let there be four members of the house of delegates throughout the state, for every sum in dollars which the quotient may amount to: that is to say, one member of the house of delegates for any number or sum in dollars equal to a fourth part of such quotient, and so on in the same proportion to be chosen in the several districts, in proportion to the taxes paid by the several counties therein, to the state, upon a like average of ten preceding years.

3. Let the fractions of militia and of taxes, amounting to less than the fourth part of an unit in any district, be added together, and if their aggregate number shall amount to one-eighth part of the general quotient of militia, and of taxes, (as above mentioned) added together, let every such district be entitled to choose one additional number of the house of delegates for the same.[a]

4. The number of delegates which each district throughout the state may be entitled to choose, being thus ascertained, let each county in the several districts respectively, choose one person, residing within the same,

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> to be a member of the house of delegates for such county, in the same manner as at present. And if the number of delegates which any district may be entitled to choose, shall exceed the number of counties therein, let any city or borough within such district, which may by the present constitution, or by law, be entitled to choose a member of the house of delegates, be likewise entitled to choose a member thereof as at present. And let the remainder of the members of the house of delegates be chosen by the districts, respectively, at large, in the same manner as senators are now chosen; but let no person be chosen as a delegate from any county or district, unless he shall actually have resided within the same twelve months, at least, before his election.

This plan of representation would give forty-four members to the senate, and one hundred and seventy-six members (including fractious) to the house of delegates. The district composed of the counties of Berkeley, Jefferson, and Hampshire, would be entitled to five delegates; that of Frederick and Shenandoah to eight; that of Loudon, Fairfax, and Prince William, to nine; that of Fauquier and Culpeper to seven, that of King and Queen, King William, Essex, and Caroline, to nine; that of Henrico, Charles City, New Kent, and Hanover, to nine; that of Norfolk, Princess Anne, and Nausemond to eight, &c.

According to this plan, there would be an union of all the combinations of separate interests, that the nature of our country, population, and state of society seem to admit. The senate being arranged according to the census, may be considered as representing the whole population of the state in a just proportion. The several counties will retain the advantages of an immediate representation from each respectively, as at present; whilst the members from the districts respectively, will represent the strength and wealth of their respective districts in just and equal proportions. If the senate be elected for four years, as at present, one-fourth of its members vacating their seats annually; and, if the members of the house of delegates who are chosen from the districts at large, be elected for two years, and those from the counties for one only, as at present, it would seem to promise an union of all the advantages of frequent changes, and of permanent bodies, in our state legislature. And if no person were eligible as a delegate until the age of twenty-five years, nor as a senator, until thirty, it might be expected that there would be a greater number of men of experience in the legislature than at present.

a. To ascertain the whole number of delegates which any district may be entitled to choose, according to this plan, add the quotients of militia and of taxes together, and divide the aggregate number by eight. The quotient will afford the proper division, by which to divide the aggregate number of militia and of taxes, in any district: this last quotient will be the number sought.

34.

TABLE SHOWING THE MILITIA, AND TAXES, IN EACH DISTRICT			
Districts	**Counties**	**Militia**	**Taxes**
1.	Monongalia, Brooke, Ohio, Harrison, Wood, and Randolph	4427	$ 593
2.	Berkeley, Jefferson and Hampshire	4777	$ 2892
3.	Frederick and Shenandoah	5533	$ 5323
4.	Rockingham, Hardy, Augusta, Pendleton and Bath	6147	$ 3338
5.	Greenbrier, Rockbridge, Botetourt, Monroe, Kanawha	5024	$ 3018
6.	Wythe, Tazwell, Montgomery, Washington, Lee, Grayson and Russel	6099	$ 3211
7.	Loudon, Fairfax, and Prince William	5505	$ 6770
8.	Westmoreland, Richmond, Lancaster, Northumberland, King George and Stafford	3664	$ 6708
9.	Fauquier and Culpeper	4163	$ 4953
10.	Orange, Madison, Louisa, and Spottsylvania	4121	$ 7342
11.	King & Queen, King William, Essex and Caroline	3296	$ 8628
12.	York, Middlesex, Mathews, James City, Gloucester, Warwick, Elizabeth City, Accomack and Northampton	4824	$ 9640
13.	Franklin, Bedford, Patrick and Henry	4463	$ 3624

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14.	Halifax, Pittsylvania and Campbel	4900	$ 6117
15.	Prince Edward, Charlotte, Buckingham, Cumberland	4262	$ 7460
16.	Powhatan, Goochland, Amelia, Chesterfield	3183	$ 8657
17.	Brunswick, Luuenburg, and Mecklenburg	3829	$ 7202
18.	Dinwiddie, Prince George, Greensville and Nottoway	3366	$ 7568
19.	Sussex, Southampton, Surry and Isle of Wight	4029	$ 7561
20.	Norfolk, Princess Anne, and Nausemond	5556	$ 5349
21.	Albermale, Amherst and Fluvanna	4004	$ 5876
22.	Henrico, Charles City, New Kent and Hanover	3637	$ 8564

35. V. L. May 1776. c. 6. Edi. 1794 c. 61.

36. C. V. Art. 6.

37. Notes on Virginia. – 212.

38. As the senate cannot originate any bill whatsoever, they have not the power of correcting, or even of proposing the correction of, any error, into which they may once have fallen, nor of any hasty, unadvised, or unconstitutional measure, to which they may through inadvertence, or any other cause whatever, have once given their assent. A circumstance which ought most strongly to impress that body with a due sense of the prodigious importance, and infinite consequence, attached to their deliberations, and decisions.

39. Notes on Virginia, 213.

40. C. V. art. 7.

41. Ibidem art. 10.

42. Ibidem art. 8.

43. C. V. art. 10.

44. Ibidem art. 13. 14.

45. Ibidem. art. 13.

46. Appointments made in this manner, are not likely to be altogether as select, as the importance of them, may require, all responsibility is lost, in the great number of electors; private interest and intrigues have a large field of action, without much exposure to the chance of detection, and without danger of punishment. How far the giving to the executive, in certain cases, the right of nominating two or three persons, out of which number the general assembly might by joint ballot of both houses choose one: or whether the giving to the house of delegates the power of nominating, by ballot of a majority of that house, three persons, out of which the senate might choose two, from which number the executive should have the power of appointing one, might be a more eligible mode of making appointments in general, will be well worthy of consideration, if ever there should be a convention to reform the constitution. Perhaps some more eligible mode than either of these might be discovered for the appointment of the governor, members of the privy council, and the judges of the court of appeals, high court of chancery and general court.

47. C. V. art. 9. 11. 19.

48. Ibidem art. 16. 17.

49. Notes on Virginia, p. 214, to 235. Paris Edi.

50. C. V. art. 3.

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51. By an act of the last assembly the justices of the county courts have now jurisdiction in some cases of felony; as I have heard.

52. One very great inconvenience which arises from the justices of the county courts being eligible as members of assembly, begins to manifest itself very strongly with respect to those courts. The constitution declares that all persons holding lucrative offices shall be ineligible to either house of assembly. – Those members who are justices of the county courts, being in all probability, equally tenacious of their seats in the legislature, and upon the bench of their courts, may be supposed to be unwilling to accept of any compensation for their services as justices, since that would exclude them from a seat in the legislature: and not less unwilling to agree to any proposition for improving the organization of the county courts, which might hazard their removal from their station as judges of them. Hence any improvement in the plan of those courts is rendered, if not impracticable, at least extremely improbable, without a change in the constitution. When services are gratuitously rendered, it cannot be expected that they will be performed with the same diligence, punctuality, or even ability, as where they meet with due compensation and encouragement. The great number of justices in the counties, generally, lessens the weight upon them individually; but it may well be doubted, whether the public is as well served, as if a few persons only were employed, selected for their superior abilities and integrity, and properly rewarded for their services. Great complaints have been made of the unequal administration of justice in the several counties, owing, as has been said, to the different conduct of the justices in many of them, either in holding the county courts regularly and going through their dockets, or in omitting to do so for months and even years together.

53. L. V. Edi. 1794, c. 85.

54. C. V. art. 9. 10. 13. 14. 15. 16. 18.

55. C. V. art. 11.

56. Ibid. art. 3. Bill of Rights, art. 5.

57. Mr. Jefferson, in the draught of a constitution for this commonwealth, subjoined to his Notes on the State of Virginia, proposes that the governor, two counselors of state, and a judge from each of the superior courts, shall be a council to revise all bills, which shall have passed both houses of assembly, in which council the governor, when present, shall preside. Every bill before it becomes a law, shall be presented to this council, who shall have a right to advise its rejection; upon which similar proceedings shall be had, as when the president of the United States refuses his assent to an act of congress.

58. See Mr. Jefferson's draught of a constitution, art. 3. Title Governor.

59. Let those who doubt this remember the Dictators of Rome: or if they require a modem instance, let them turn their eyes to the establishment of the Consular Government in France.

60. The members of the council who have been removed in consequence of this unavoidable regulation in the constitution, have, in several instances, been re-elected as soon as the period of their incapacity is removed; a certain proof of what is advanced above. Mr. Jefferson, in his draught of a constitution, proposes that the members of the privy council shall be chosen, as at present, shall hold their offices seven years, and be ineligible a second time; and while they continue in office, shall hold no other office or emolument under this state, or any other state, or power whatsoever. Such an arrangement would, apparently, secure to them that personal independence, which at present seems to be altogether wanting.

61. C. V. art. 11.

62. L. V. Edi. 1794. c. 62.

63. C. V. art 9.

64. Mr. Jefferson, Mr. Pendleton, Mr. Wythe, Mr. George Mason, and Mr. Thomas Ludwell Lee, were appointed; but the three first only performed the duty assigned to them.

65. L. V. Oct. 1776. c. 3. Edi. 1785.

66. L. V. Edi, 1794. c. 62. Sess. acts of 1800, c. 59.

67. Oct. 1777, c. 6. and Oct. 1781, c. 24. Sessions acts.

68. Notes on Virginia, 228.

69. Notes on Virginia. – ad finem.

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70. C. V. Art. 14. 15.

71. See V. L. 1788, c. 71. Sess. Acts.

72. Ibidem, Edi. 1785, p. 37.

73. See V. L. Edi. 1785, p. 81.

74. C. V. Art. 14.

75. C. V. Art. 16, 17.

76. The celebrated Montesquieu speaking of them says, "of the three powers above mentioned the JUDICIARY is next to nothing. Spirit of laws. Vol. 1. p. 186.

77. Montesquieu's Spirit of Laws, vol. 1. p. 181.

78. See Constitution of Massachusetts, chap. 2. sec. 1. art. 13.

79. Bill of Rights, art. 9. 10. 11. Constitution, art. 15. 16. 17.

80. The judges of the court of appeals, high court of chancery, and general court might assemble, and by joint ballot, recommend three persons to till any vacancy in the superior courts of chancery and general court, out of whom the governor, with the advice of council, might either appoint one, or nominate two to the general assembly, am! that body by joint ballot of both houses, choose one. And in case of a vacancy in the court of appeals, the governor, with the advice of council, might nominate two judges of the high court of chancery, or general court, of whom one might be chosen by joint ballot of both houses of assembly. Elections made in this manner would probably be entitled to, and meet with universal approbation.

81. It would far exceed the limits of a note to suggest the many necessary improvements required in the county court system. I will nevertheless mention the outline of one, which would, if adopted, pave the way to the introduction of many more.

Let one fit, able, and discreet person, learned in the law (where persons of that character can be found) be selected in every county, who, together with the persons of the like description, selected from the three next adjacent and most convenient counties thereto, might be constituted judges of the court of common pleas, and oyer and terminer, for their several counties, and any two of them constitute a court, to be held quarterly in their respective counties, with jurisdiction in all civil cases at common law, above the value of thirty dollars, and in all cases of simple larceny, and other lesser offences against the commonwealth. They might also be constituted judges in chancery within their district, or circuit, with power to hold two sessions, annually, at some one county court-house within their circuit. Let these judges receive an adequate compensation for their services, either by a fixed salary, or by wages according to their attendance: Let them be ineligible to either house of assembly, and let the power of recommending justices of the peace, sheriffs, and coroners, be transferred to them. Let them moreover hold their offices during good behavior, or during the existence of their courts.

82. C. V. art. 21.

83. L. V. Edi. 1794. c. 40, and 53. The constitutionality of the cession made to congress for the permanent seat of government (Ibid. c. 50.) seems questionable.

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NOTE D, PART 1

Nature of U.S. Constitution; Manner of its Adoption

HAVING in the preceding pages taken a slight view of the several forms of government, and afterwards examined with somewhat closer attention the constitution of the commonwealth of Virginia, as a sovereign, and independent state, it now becomes necessary for the American student to inquire into the connection established between the several states in the union by the constitution of the United States. To assist him in this inquiry, I shall now proceed to consider: First, the nature of that instrument, with the manner in which it has been adopted; and, Secondly, its structure, and organization; with the powers, jurisdiction, and rights of the government thereby established, either independent of; or connected with, those of the state governments; together with the mutual relation which subsists between the federal, and state governments, in virtue of that instrument.

I. I am to consider the nature of that instrument by which the federal government of the United States, has been established, with the manner of its adoption.

The constitution of the United States of America, then, is an original, written, federal, and social compact, freely, voluntarily, and solemnly entered into by the several states of North-America, and ratified by the people thereof, respectively; whereby the several states, and the people thereof; respectively, have bound themselves to each other, and to the federal government of the United States; and by which the federal government is bound to the several states, and to every citizen of the United States.

It is a compact; by which it is distinguished from a charter, or grant; which is either the act of a superior to an inferior; or is founded upon some consideration moving from one of the parties, to the other, and operates as an exchange, or sale: but here the contracting parties, whether considered as states, in their politic capacity and character; or as individuals, are all equal; nor is there any thing granted from one to another: but each stipulates to part with, and to receive the same thing, precisely, without any distinction or difference in favor of any of the parties. The considerations upon which this compact was founded, and the motives which led to it, as declared in the instrument itself; were, to form a more perfect union than theretofore existed between the confederated states; to establish justice, and ensure domestic tranquility, between them; to provide for their common defense, against foreign force, or such powerful domestic insurrections as might require aid to suppress them; to promote their general welfare; and to secure the blessings of liberty to the people of the United States, and their posterity.[1]

2. It is a federal compact; several sovereign and independent states may unite themselves together by a perpetual confederacy, without each ceasing to be a perfect state. They will together form a federal republic: the deliberations in common will offer no violence to each member, though they may in certain respects put some constraint on the exercise of it, in virtue of voluntary engagements.[2] The extent, modifications, and objects of the federal authority are mere matters of discretion; so long as the separate organization of the members remains, and from the nature of the compact must continue to exist, both for local and domestic, and for federal purposes; the union is in fact, as well as in theory, an association of states, or, a confederacy.[3] The state governments not only retain every power, jurisdiction, and right not delegated to the United States, by the constitution, nor prohibited by it to the states,[4] but they are constituent and necessary parts of the federal government; and without their agency in their politic character, there could he neither a senate, nor president of the United States; the choice of the latter depending mediately, and of the former, immediately, upon the legislatures of the several states in the union.[5]

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This idea of a confederate, or federal, republic, was probably borrowed from Montesquieu, who treats of it as an expedient for extending the sphere of popular government, and reconciling internal freedom with external security,[6] as has been mentioned elsewhere.[7] The experience of the practicability and benefit of such a system, was recent in the memory of every American, from the success of the revolutionary war, concluded but a few years before; during the continuance of which the states entered into a perpetual alliance and confederacy with each other. Large concessions of the rights of sovereignty were thereby made to congress; but the system was defective in not providing adequate means, for a certain, and regular revenue; congress being altogether dependent upon the legislatures of the several states for supplies, although the latter, by the terms of compact, were bound to furnish, whatever the former should deem it necessary to require. At the close of the war, it was found that congress had contracted debts, without a revenue to discharge them; that they had entered into treaties, which they had not power to fulfil; that the several states possessed sources of an extensive commerce, for which they could not find any vent. These evils were ascribed to the defects of the existing confederation; and it was said that the principles of the proposed constitution were to be considered less as absolutely new, than as the expansion of the principles contained in the articles of confederation: that in the latter those principles were so feeble and confined, as to justify all the charges of inefficiency which had been urged against it; that in the new government, as in the old, the general powers are limited, and that the states, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdictions.[8] This construction has since been fully confirmed by the twelfth article of amendments, which declares, "that 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." This article was added "to prevent misconstruction or abuse" of the powers granted by the constitution,[9] rather than supposed necessary to explain and secure the rights of the states, or of the people. The powers delegated to the federal government being all positive, and enumerated, according to the ordinary rules of construction, whatever is not enumerated is retained; for, *expressum facit tacere tacitum* is a maxim in all cases of construction: it is likewise a maxim of political law, that sovereign states cannot be deprived of any of their rights by implication; nor in any manner whatever but by their own voluntary consent, or by submission to a conqueror.

Some of the principal points mutually insisted on, and conceded, by the several states, as such, to each other, were, that representatives and direct taxes should be apportioned among the states, according to a decennial census; that each state should have an equal number of senators; and that the number of electors of the president of the United States, should in each state be equal to the whole number of senators and representatives to which such state may be entitled in the congress; that no capitation or other direct tax shall he laid, unless in proportion to the census; that full faith and credit shall be given in each state to the public acts, records, and proceedings of every other state; that the citizens of each state shall he entitled to all the privileges and immunities of citizens in the several states; that persons charged with treason, felony, or other crime, in one state, and fleeing from justice to another state, shall he delivered up, on demand of the executive authority of the state from which he fled; that no new state shall he 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; that the United States shall guarantee to every state in the 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 he convened) against domestic violence; that amendments to the constitution, when proposed by congress, shall not be valid unless ratified by the legislatures of three fourths of the several states;

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and that congress shall, on the application of two thirds of the legislatures of the several states, call a convention for proposing amendments, which when ratified by the conventions in three fourths of the states shall be valid to all intents and purposes, as a part of the constitution; that the ratification of the conventions of nine states, should he sufficient for the establishment of the constitution, between the states so ratifying; and lastly, by the amendment before mentioned, it is declared, that 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. Thus far every feature of the constitution appears to he strictly federal.

3. It is also, to a certain extent, a social compact; the end of civil society is the procuring for the citizens whatever their necessities require, the conveniences and accommodations of life, and, in general, whatever constitutes happiness: with the peaceful possession of property, a method of obtaining justice with security; and in short, a mutual defense against all violence from without. In the act of association, in virtue of which a multitude of men form together a state or nation, each individual is supposed to have entered into engagements with all, to procure the common welfare: and all are supposed to have entered into engagements with each other, to facilitate the means of supplying the necessities of each individual, and to protect and defend him.[10] And this is, what is ordinarily meant by the original contract of society. But a contract of this nature actually existed in a visible form, between the citizens of each state, respectively, in their several constitutions; it might therefore he deemed somewhat extraordinary, that in the establishment of a federal republic, it should have been thought necessary to extend it's operation to the persons of individuals, as well as to the states, composing the confederacy. It was apprehended by many, that this innovation would he construed to change the nature of the union, from a confederacy, to a consolidation of the states; that as the tenor of the instrument imported it to he the act of the people, the construction might be made accordingly: an interpretation that would tend to the annihilation of the states, and their authority. That this was the more to be apprehended, since all questions between the states, and the United States, would undergo the final decision of the latter.

That the student may more clearly apprehend the nature of these objections, it may be proper to illustrate the distinction between federal compacts and obligations, and such as are social by one or two examples. A federal compact, alliance, or treaty, is an act of the state, or body politic, and not of an individual; on the contrary, the social contract is understood to mean the act of individuals, about to create, and establish, a state, or body politic, among themselves. – Again; if one nation binds itself by treaty to pay a certain tribute to another; or if all the members of the same confederacy oblige themselves to furnish their quotas of a common expense, when required; in either of the cases, the state, or body politic, only, and not the individual is answerable for this tribute, or quota; for although every citizen in the state is bound by the contract of the body politic, who may compel him to contribute his part, yet that part can neither be ascertained nor levied, by any other authority than that of the state, of which he is a citizen. This is, therefore, a federal obligation; which cannot reach the individual, without the agency of the state who made it. But where by any compact, express, or implied, a number of persons are bound to contribute their proportions of the common expense; or to submit to all laws made by the common consent; and where, in default of compliance with these engagements the society is authorized to levy the contribution, or, to punish the person of the delinquent; this seems to be understood to be more in the nature of a social, than a federal obligation. – Upon these grounds, and others of a similar nature, a considerable alarm was excited in the minds of many, who considered the constitution as in some danger of establishing a national, or consolidated government, upon the ruins of the old federal republic.

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To these objections the friends and supporters of the constitution replied, "that although the constitution would be founded on the assent and ratification of the people of America, yet that assent and ratification was to be given by the people, not as individuals composing one entire nation; but as composing the distinct and independent states, to which they respectively belong. It is to be the assent and ratification of the several states, derived from the supreme authority in each state, the authority of the people themselves. The, act, therefore establishing the constitution, will not," said they, "be a national but a federal act.

> "That it will be a federal and not a national act, as these terms are understood by the objectors, the act of the people, as forming so many independent states, not as forming one aggregate nation, is obvious one from this single consideration, that it is the result neither from the decision of a majority of the people of the union, nor from a majority of the states. It must result from the unanimous assent of the several states that are parties to it, differing no otherwise from their ordinary assent, than in its being expressed, not by the legislative authority, but by that of the people themselves. Were the people regarded in this transaction as forming one nation, the will of the majority of the whole people of the United States would bind the minority; in the same manner as the majority in each state must bind the minority; and the will of the majority must be determined either by a comparison of the individual votes; or by considering the will of the majority of the states, as evidence of the will of the majority of the people of the United States. Neither of these rules have been adopted. Each state in ratifying the constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. In this relation then the new constitution will be a federal, and not a national, constitution.
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> "With regard to the sources from which the ordinary powers of government are to be derived. The house of representatives will derive its powers from the people of America, and the people will be represented in the same proportion, and on the same principle, as they are in the legislature of a particular state. So far the government is national, not federal. The senate, on the other hand, will derive its powers from the states, as political and co-equal societies; and these will be represented on the principle of equality in the senate, as under the confederation. So far the government is federal, not national. The executive power will he derived from a very compound source. The immediate election of the president is to be made by the states, in their political character. The votes allotted to them are in a compound ratio, which considers them partly as distinct and co-equal societies; partly as unequal members of the same societies. The eventual election again is to be made, by that branch of the legislature which consists of the national representatives: but in this particular act they are to be thrown into the form of individual delegations, from so many distinct and co-equal bodies politic. From this aspect of the government it appears to be of a MIXED character, presenting at least as many federal, as national features.[11]
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> "The difference between a federal and national government, as it relates to the operation of the government, is, by the adversaries of the plan of the convention, supposed to consist in this, that in the former the powers operate on the political bodies composing the confederacy in their political capacities; in the latter, on the individual citizens composing the nation in their individual capacities. On trying the constitution by this criterion, it falls under the national, not the federal character, though perhaps not so completely as has been understood. In several cases, and particularly in the trial of controversies to which states

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may be parties, they must be viewed and proceeded against in their collective and political capacities only.[12]" "In some instances the powers of the federal government, established by the confederation, act immediately on individuals: in cases of capture, of piracy, of the post-office, of coins, weights, and measures, of trade with the Indians, of claims under grants of land by different states, and, above all, in the cases of trials by courts martial in the army and navy, by which death may be inflicted without the intervention of a jury, or even of a civil magistrate; in all these cases the powers of the confederation operate immediately on the persons and interests of individual citizens. The confederation itself authorizes a direct tax to a certain extent on the post-office; and the power of coinage has been so construed by congress, as to levy a tribute immediately from that source also.[13] The operation of the new government on the people in their individual capacities, in its ordinary and most essential proceedings, will, on the whole, in the sense of its opponents, designate it, in this relation, a national government.

"But if the government be national with regard to the operation of its powers, it changes its aspect again when we contemplate it in relation to the extent of its powers. The idea of a national government involves in it, not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government. Among a people consolidated into one nation, this supremacy is completely vested in the national legislature. Among communities united for particular purposes, it is vested partly in the general, and partly in the municipal legislatures. In the former case, all local authorities are subordinate to the supreme; and may be controlled, directed, or abolished by it at pleasure. In the latter, the local or municipal authorities form distinct and independent portions of the supremacy, no more subject within their respective spheres to the general authority, than the general authority is subject to them within its own sphere. In this relation then the government cannot be deemed a national one, since its jurisdiction extends to certain enumerated objects, only, and leaves to the several states a residuary and inviolable sovereignty over all other objects. It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made according to the rules of the constitution; and all the usual and most effectual precautions are taken to secure this impartiality.

"If we try the constitution by its last relation, to the authority by which amendments are to be made, we find it neither wholly national, nor wholly federal. Were it wholly national, the supreme and ultimate authority would reside in a majority of the people of the union; and this authority would be competent at all times, like that of a majority of every national society, to alter or abolish its established government. Were it wholly federal on the other hand, the concurrence of each state in the union would be essential to every alteration that would be binding on all. The mode provided by the plan of the convention is not founded on either of these principles. In requiring more than a majority, and particularly in computing the proportion by states, not by citizens, it departs from the national, and advances towards the federal character; in rendering the concurrence of less than the whole number of states sufficient, it loses again the federal, and partakes of the national character.

"The proposed constitution, therefore, even when tested by the rules laid down by its

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> antagonists, is in strictness neither a national nor a federal constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal, and partly national; in the operation of those powers, it is national, not federal; in the extent of them, it is federal, not national; and finally, in the authoritative mode of introducing amendments, it is neither wholly federal, nor wholly national.[14]"

4. It is an original compact; whatever political relation existed between the American colonies, antecedent to the revolution, as constituent parts of the British empire, or as dependencies upon it, that relation was completely dissolved and annihilated from that period. – From the moment of the revolution they became severally independent and sovereign states, possessing all the rights, jurisdictions, and authority, that other sovereign states, however constituted, or by whatever title denominated, possess; and bound by no ties but of their own creation, except such as all other civilized nations are equally bound by, and which together constitute the customary law of nations. A common council of the colonies, under the name of a general congress, had been established by the legislature, or rather conventional authority in the several colonies. The revolutionary war had been begun, and conducted under its auspices; but the first act of union which took place among the states after they became independent, was the confederation between them, which was not ratified until March 1781, near five years from the commencement of their independence. The powers thereby granted to congress, though very extensive in point of moral obligation upon the several states, were perfectly deficient in the means provided for the practical use of them, as has been already observed. The agency and co-operation of the states, which was requisite to give effect to the measures of congress, not unfrequently occasioned their total defeat. It became an unanimous opinion that some amendment to the existing confederation was absolutely necessary, and after a variety of unsuccessful attempts for that purpose, a general convention was appointed by the legislatures of twelve states, who met, consulted together, prepared, and reported a plan, which contained such an enlargement of the principles of the confederation, as gave the new system the aspect of an entire transformation of the old.[15] The mild tone of requisition was exchanged for the active operations of power, and the features of a federal council for those of a national sovereignty. These concessions it was seen were, in many instances, beyond the power of the state legislatures, (limited by their respective constitutions) to make, without the express assent of the people. A convention was therefore summoned, in every state by the authority of their respective legislatures, to consider of the propriety of adopting the proposed plan; and their assent made it binding in each state; and the assent of nine states rendered it obligatory upon all the states adopting it. Here then are all the features of an original compact, not only between the body politic of each state, but also between the people of those states in their highest sovereign capacity.

Whether this original compact be considered as merely federal, or social, and national, it is that instrument by which power is created on the one hand, and obedience exacted on the other. As federal it is to be construed strictly, in all cases where the antecedent rights of a state may be drawn in question;[16] as a social compact it ought likewise to receive the same strict construction, wherever the right of personal liberty, of personal security, or of private property may become the subject of dispute; because every person whose liberty or property was thereby rendered subject to the new government, was antecedently a member of a civil society to whose regulations he had submitted himself, and under whose authority and protection he still remains, in all cases not expressly submitted to the new government.[17] The few particular cases in which he submits himself to the new authority, therefore, ought not to be extended beyond the terms of the compact, as it might endanger his obedience to that state to whose laws he still continues to owe obedience; or may subject him

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to a double loss, or inconvenience for the same cause.

And here it ought to be remembered that no case of municipal law can arise under the constitution of the United States, except such as are expressly comprehended in that instrument. For the municipal law of one state or nation has no force or obligation in any other nation; and when several states, or nations unite themselves together by a federal compact, each retains its own municipal laws, without admitting or adopting those of any other member of the union, unless there be an article expressly to that effect. The municipal laws of the several American states differ essentially from each other; and as neither is entitled to a preference over the other, on the score of intrinsic superiority, or obligation; and as there is no article in the compact which bestows any such preference upon any, it follows, that the municipal laws of no one state can be resorted to as a general rule for the rest. And as the states, and their respective legislatures are absolutely independent of reach other, so neither can any common rule be extracted from their several municipal codes. For, although concurrent laws, or rules may perhaps be met with in their codes, yet it is in the power of their legislatures, respectively to destroy that concurrence at any time, by enacting an entire new law on the subject; so that it may happen that that which is a concurrent law in all the states to-day may cease to be law in one, or more of them to-morrow. Consequently neither the particular municipal law of any one, or more, of the states, nor the concurrent municipal laws of the whole of them, can he considered, as the common rule, or measurer of justice in the courts of the federal republic; neither has the federal government any power to establish such a common rule, generally; no such power being granted by the constitution. And the principle is certainly much stronger, that neither the common, nor statute law of any other nation, ought to he a standard for the proceedings of this, unless previously made its own by legislative adoption:[18] which, not, being permitted by the original compact, by which the government is created, any attempt to introduce it, in that or any other, mode, would he a manifest breach of the terms of that compact.

Another light in which this subject may he viewed is this. Since each state in becoming a member of a federal republic retains an uncontrolled jurisdiction over all cases of municipal law, every grant of jurisdiction to the confederacy, in any such case, is to he considered as special, inasmuch as it derogates from the antecedent rights and jurisdiction of the state making the concession, and therefore ought to he construed strictly, upon the grounds already mentioned. Now, the cases falling under the head of municipal law, to which the authority of the federal government extends, are few, definite, and enumerated, and are all carved out of the sovereign authority, and former exclusive, and uncontrollable jurisdiction of the states respectively: they ought therefore to receive the strictest construction. Otherwise the gradual and sometimes imperceptible usurpations of power, will end in the total disregard of all its intended limitations.

If it he asked, what would be the consequence in case the federal government should exercise powers not warranted by the constitution, the answer seems to be, that where the act of usurpation may immediately affect an individual, the remedy is to be sought by recourse to that judiciary, to which the cognizance of the case properly belongs. Where it may affect a state, the state legislature, whose rights will be invaded by every such act, will be ready to mark the innovation and sound the alarm to the people:[19] and thereby either effect a change in the federal representation, or procure in the mode prescribed by the constitution, further "declaratory and restrictive clauses," by way of amendment thereto. An instance of which may be cited in the conduct of the Massachusetts legislature: who, as soon as that state was sued in the federal court, by an individual, immediately proposed, and procured an amendment to the constitution, declaring that the judicial power of the United States shall not be construed to extend to any suit brought by an individual against a state.

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5. It is a written contract; considered as a federal compact, or alliance between the states, there is nothing new or singular in this circumstance, as all national compacts since the invention of letters have probably been reduced to that form: but considered in the light of an original, social, compact, it may be worthy of remark, that a very great lawyer, who wrote but a few years before the American revolution, seems to doubt whether the original contract of society had in any one instance been formally expressed at the first institution of a state.[20] The American revolution seems to have given birth to this new political phenomenon: in every state a written constitution was framed, and adopted by the people, both in their individual and sovereign capacity, and character. By this means, the just distinction between the sovereignty, and the government, was rendered familiar to every intelligent mind; the former was found to reside in the people, and to be unalienable from them; the latter in their servants and agents: by this means, also, government was reduced to its elements; its object was defined, it's principles ascertained; its powers limited, and fixed; its structure organized; and the functions of every part of the machine so clearly designated, as to prevent any interference, so long as the limits of each were observed. The same reasons operated in behalf of similar restrictions in the federal constitution, whether considered as the act of the body politic of the several states, or, of the people of the states, respectively, or, of the people of the United States, collectively. Accordingly we find the structure of the government, its several powers and jurisdictions, and the concessions of the several states, generally, pretty accurately defined, and limited. But to guard against encroachments on the powers of the several states, in their politic character, and of the people, both in their individual and sovereign capacity, an amendatory article was added, immediately after the government was organized, declaring; that 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.[21] And, still further, to guard the people against constructive usurpations and encroachments on their rights, another article declares; that the enumeration of certain rights in the constitution, shall not be construed to deny, or disparage, others retained by the people.[22] The sum of all which appears to be, that the powers delegated to the federal government, are, in all cases, to receive the most strict construction that the instrument will bear, where the rights of a state or of the people, either collectively, or individually, may be drawn in question.

The advantages of a written constitution, considered as the original contract of society must immediately strike every reflecting mind; power, when undefined, soon becomes unlimited; and the disquisition of social rights where there is no text to resort to, for their explanation, is a task, equally above ordinary capacities, and incompatible with the ordinary pursuits, of the body of the people. But, as it is necessary to the preservation of a free government, established upon the principles of a representative democracy, that every man should know his own rights, it is also indispensably necessary that he should be able, on all occasions, to refer to them. In those countries where the people have been deprived of the sovereignty, and have no share, even in the government, it may perhaps be happy for them, so long as they remain in a state of subjection, to be ignorant of their just rights. But where the sovereignty is, confessedly, vested in the people, government becomes a subordinate power, and is the mere creature of the people's will: it ought therefore to be so constructed, that its operations may be the subject of constant observation, and scrutiny. There should be no hidden machinery, nor secret spring about it.

The boasted constitution of England, has nothing of this visible form about it; being purely constructive, and established upon precedents or compulsory concessions betwixt parties at variance. The several powers of government, as has been elsewhere observed, are limited, though in an uncertain way, with respect to each other; but the three together are without any check in the constitution, although neither can be properly called the representative of the people. And from

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hence, the union of these powers in the parliament has given occasion to some writers of that nation to stile it omnipotent: by which figure it is probable they mean no more, than to inform us that the sovereignty of the nation resides in that body; having by gradual and immemorial usurpations been completely wrested from the people.

6. It is a compact freely, voluntarily, and solemnly entered into by the several sates, and ratified by the people thereof, respectively: freely, there being neither external, nor internal force, or violence to influence, or promote the measure; the U. States being at peace with all the world, and in perfect tranquility in each state: voluntarily, because the measure had its commencement in the spontaneous acts of the state-legislatures, prompted by a due sense of the necessity of some change in the existing confederation: and, solemnly, as having been discussed, not only by the general convention who proposed, and framed it; but afterwards in the legislatures of the several states, and finally, in the conventions of all the states, by whom it was adopted and ratified.

The progress of this second revolution in our political system was extremely rapid. Its origin may be deduced from three distinct sources: The discontents of the army, and other public creditors; – the decay of commerce, which had been diverted from its former channels; and the backwardness, or total neglect of the state-legislatures in complying with the requisitions, or recommendations of congress.

The discontents of the army had at several periods, during the war, risen to an alarming height, and threatened, if not a total revolt, at least a general disbandment. They were checked, or palliated by various temporary expedients and resolves of congress; but, not long before the cessation of hostilities, some late applications to congress, respecting the arrears of their pay and depreciation, not having produced the desired effect; an anonymous address to the army, couched in the most nervous language of complaint, made its appearance in camp.[23] It contained a most spirited recapitulation of their services, grievances, and disappointments, and concluded with advising, "an appeal from the justice to the fears of government." The effects, naturally to have been apprehended from so animated a performance, addressed to men who felt their own injuries in every word, were averted by the prudence of the commander in chief;[24] and congress, as far as in them lay, endeavored to do ample justice to the army; which was soon after entirely disbanded: but, as congress had not the command of any revenue, requisitions to the states were the only mode, by which funds for the discharge of so honorable a debt, could be procured. The states, already exhausted by a long and burdensome war, were either in no condition to comply with the recommendations of congress, or were so tardy and parsimonious in furnishing the supplies required, that the clamors against the government became every day louder and louder. Every creditor of government, of which there were thousands, besides the army now dispersed among the citizens, became an advocate for the change of such an inefficient government, from which they saw it was in vain to hope for satisfaction of their various demands.

But it is not probable that the discontents or clamors of the creditors of government, alone, would have been sufficient to effectuate a fundamental change in the government, had not other causes conspired to render it's inefficiency the subject of observation and complaint, among another very numerous class of citizens – these were the commercial part of the people, inhabiting almost exclusively all the sea-ports, and other towns on the continent, and dispersed at small intervals through the whole country. The New-England states, in a great measure, dependent upon commerce, had before the war enjoyed a free trade with the West-India Islands, subject to the crown of Great-Britain; they had likewise maintained a very beneficial intercourse with the French Islands, from whence they drew supplies of molasses for their distilleries. Then whale and cod-fisheries

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might be said to have been almost monopolized by them, on the American coast; at least the advantages they enjoyed for carrying on these branches of trade, bade fair to exclude every other nation from a competition with them on their native coasts. New York and Pennsylvania had likewise the benefit of an advantageous fur-trade, through the channels lately occupied by the British posts, on the frontiers of the United States, which by the treaty of peace were to have been evacuated with all convenient speed. The possession of these being still retained, and the utmost vigilance exerted by the British government to prevent any communication with the Indian country; that very lucrative branch of the trade of the United States had been wholly diverted into the channel of Canada. – The ports of the English West-India Islands, which, it was expected would have been open to our vessels, as before the revolution, were, immediately after the conclusion of the peace, strictly prohibited to the American traders: – those of the French islands were under such restrictions as greatly impaired the former advantageous intercourse with them: – The protection formerly enjoyed under the British flag from the depredations of the corsairs of the Barbarian states, being now withdrawn, the commerce with the Mediterranean and the ports bordering thereupon, whither a great part of the produce of the fisheries, as well as the surplus of grain, was exported, was entirely cut off, from the danger of annoyance from those piratical states. – Great-Britain had, formerly, not only afforded a market for the whale oil, but had given a liberal bounty on it, both of which she now ceased to do, and no other country could be found to supply either of these advantages. Thus the sources of commerce in those states, were either dried up, or obstructed on every side, and the discontents prevailing among the newly liberated states, were little short of those of the Israelites in the wilderness. – Commotions in the northern states, seemed to threaten a repetition of the horrors of a civil war; these were ascribed to the inadequacy of the general government to secure or promote the interest and prosperity of the federal union: but whether their origin was not also to be ascribed to the administration of the state governments, is at least highly questionable.

The little regard which was paid to the requisitions of congress for money from the states, to discharge the interest of the national debt, and in particular that part due to foreigners, or foreign states, and to defray the ordinary expenses of the federal government, gave rise to a proposition,[25] that congress should be authorized, for the period of twenty-five years, to impose a duty of five per cent on all goods imported into the United States. Most of the states had consented to the measure,[26] but the number required by the confederation could not be prevailed on to adopt it: New York and Rhode-Island were particularly opposed to it. Thus a project which might perhaps have answered every beneficial purpose, proposed afterwards by the new constitution, was disconcerted, from the jealousy of granting a limited power for a limited time, by the same people, who, within three years after, surrendered a much larger portion of the rights of sovereignty without reserve.

In addition to this measure, congress in their act of April 18th, 1783, had proposed, that the eighth article of the confederation, which made the value of lands the ratio of contribution from the several states, should be revoked, and instead thereof the ratio should be fixed among the states, in proportion to the whole number of white inhabitants and three-fifths of all other persons, according to a triennial census. This proposition was agreed to in Virginia,[27] but like the former, was not acceded to by a sufficient number of the states to form an article of the confederation. – Yet this ratio is precisely the same, which has been since fixed by the new constitution as the rate by which direct taxes shall be imposed on the several states.

The total derangement of commerce, as well as of the finances of the United States, had proceeded to such lengths before the conclusion of the year 1785, that early in the succeeding year

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commissioners were appointed by the state of Virginia, to meet such commissioners as might be appointed by other states, for the purpose of "considering how far an uniform system in the commercial regulations may be necessary to their common interests, and their permanent harmony; and to report to the several states such an act, relative to that object, as when unanimously ratified by them, would enable congress effectually to provide for the same." The commissioners assembled at Annapolis accordingly, in September 1786, but were met only by commissioners from four of the other twelve states. – They considered the number of states represented to be too few to proceed to business – but before they separated, wrote a letter to their constituents, recommending the appointment of deputies to meet in Philadelphia the succeeding May, for the purpose of extending the revision of the federal system to all its defects. – In pursuance whereof the legislature of Virginia passed an act, appointing seven commissioners to meet such deputies as may be appointed by other states, to assemble, as recommended, and join in "devising and discussing, all such alterations, and further provisions as may be necessary to render the federal constitution adequate to the exigencies of the union; and in reporting such an act for that purpose to the United States in congress, as when agreed to by them, and duly confirmed by the several states, would effectually provide for the same."[28] Similar measures were adopted by all the states in the union, except Rhode Island: deputies assembled from all the other states; but instead of amendments to the confederation, they produced a plan for an entire change of the form of the federal government, and not without some innovation of its principles. The moment of its appearance all the enemies of the former government lifted up their voices in its favor. Party zeal never ran higher without an actual breach of the peace. Had the opposers of the proposed constitution been as violent as its advocates, it is not impossible that matters would have proceeded to some pernicious lengths: but the former were convinced that some change was necessary, which moderated their opposition; whilst the latter were animated in the pursuit of their favorite plan, from an apprehension that no other change was practicable. In several of the states, the question was decided in favor of the constitution by a very small majority of the conventions assembled to consider of its adoption. In North Carolina it was once rejected, and in Rhode Island twice: nor was it adopted by either, until the new government was organized by the ratifying states. Considerable amendments were proposed by several states; by the states of Massachusetts, South Carolina, Virginia, and New York, particularly. It was finally adopted by all the States, after having been the subject of consideration and discussion for a period little short of two years.[29]

I have said that the constitution was ratified by the conventions of the several states, assembled for the purpose of considering the propriety of adopting it. As the tenor of the instrument imports that it is the act of the people, and as every individual may, to a certain degree, be considered as a party to it, it will be necessary to add a few words on the subject of representation, and of the power which a majority have to bind the minority.

The right of suffrage is one of the most important rights of a free citizen; and in small states where the citizens can easily be collected together, this right ought never to be dispensed with on any great political question. But in large communities, such a measure, however desirable; is utterly impracticable, for reasons too obvious to be dwelt upon: hence the necessity that the people should appoint a smaller and more convenient number to represent the aggregate mass of the citizens. This is done not only for the purposes of ordinary legislation, but in large states, and on questions which require discussion and deliberation, is the most eligible mode of proceeding, even where the vote of every individual of the nation should be desired. Therefore, when the convention at Philadelphia had made their report, the ordinary legislatures, with great propriety, recommended the appointment of state-conventions, for the sole and especial purpose of considering the propriety of adopting the

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constitution, thus proposed by the convention of the states. The deputies in most of the counties were chosen according to the prevailing sentiments of the people in favor of the constitution, the opinions of the candidates being generally previously known. It is much to be wished that this had been universally the case, since the will of the people would in that case have been unequivocally expressed.

The right of the majority to bind the minority, results from a due regard to the peace of society; and the little chance of unanimity in large societies or assemblies, which, if obtainable, would certainly be very desirable; but inasmuch as that is not to be expected, whilst the passions, interests, and powers of reason remain upon their present footing among mankind, in all matters relating to the society in general, some mode must be adopted to supply the want of unanimity. The most reasonable and convenient seems to be, that the will of the majority should supply this defect; for if the will of the majority is not permitted to prevail in questions where the whole society is interested, that of the minority necessarily must. The society therefore, in such a case, would be under the influence of a minority of its members, which, generally speaking, can on no principle be justified.

It is true there are cases, even under our own constitution, where the vote of a bare majority is not permitted to take effect; but this is only in points which have, or may be presumed to have, received the sanction of a former majority, as where an alteration in the constitution is proposed. In order, therefore, to give the greater stability to such points, they are not permitted to be altered by a bare majority: in cases also which are to be decided by a few, but which may, nevertheless, affect a variety of interests, it was conceived to be safest to require the assent of more than a bare majority; as, in concluding treaties with foreign nations, where the interests of a few states may be vitally affected, while that of a majority may be wholly unconcerned. Or, lastly, where the constitution has reposed a corresponding trust in different bodies who may happen to disagree in opinion; as, where the president of the United States shall return a bill to congress with his reasons for refusing his assent to it; in all these cases more than a bare majority are required to concur in favor of any measure, before it can be carried into complete effect.

7th. It is a compact by which the several states and the people thereof, respectively, have bound themselves to each other, and to the federal government.

Having shown that the constitution had its commencement with the body politic of the several states; and, that its final adoption and ratification was, by the several legislatures referred to, and completed by conventions, especially called and appointed for that purpose, in each state; the acceptance of the constitution, was not only an act of the body politic of each state, but of the people thereof respectively, in their sovereign character and capacity: the body politic was competent to bind itself so far as the constitution of the state permitted, but not having power to bind the people, in cases beyond their constitutional authority, the assent of the people was indispensably necessary to the validity of the compact, by which the rights of the people might be diminished, or submitted to a new jurisdiction, or in any manner affected. From hence, not only the body politic of the several states, but every citizen thereof, may be considered as parties to the compact, and to have bound themselves reciprocally to each other, for the due observance of it and, also, to have bound themselves to the federal government, whose authority has been thereby created, and established.

8. Lastly. It is a compact by which the federal government is bound to the several states, and to every citizen of the United States.

Although the federal government can, in no possible view, be considered as a party to a compact

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made anterior to its existence, and by which it was, in fact, created; yet as the creature of that compact, it must be bound by it, to its creators, the several states in the union, and the citizens thereof. Having no existence but under the constitution, nor any rights, but such as that instrument confers; and those very rights being in fact duties; it can possess no legitimate power, but such, as is absolutely necessary for the performance of a duty, prescribed and enjoined by the constitution. Its duties, then, become the exact measure of its powers; and wherever it exerts a power for any other purpose, than the performance of a duty prescribed by the constitution, it transgresses its proper limits, and violates the public trust. Its duties, being moreover imposed for the general benefit and security of the several states, in their politic character; and of the people, both in their sovereign, and individual capacity, if these objects be not obtained, the government will not answer the end of its creation: it is therefore bound to the several states, respectively, and to every citizen thereof, for the due execution of those duties. And the observance of this obligation is enforced, by the solemn sanction of an oath, from all who administer the government.[30]

The constitution of the United States, then being that instrument by which the federal government has been created; its powers defined, and limited; and the duties, and functions of its several departments prescribed; the government, thus established, may be pronounced to be a confederate republic, composed of several independent, and sovereign democratic states, united for their common defense, and security against foreign nations, and for the purposes of harmony, and mutual intercourse between each other; each state retaining an entire liberty of exercising, as it thinks proper, all those parts of its sovereignty, which are not mentioned in the constitution, or act of union, as parts that ought to be exercised in common. It is the supreme law of the land,[31] and as such binding upon the federal government; the several states; and finally upon all the citizens of the United States. – It can not be controlled, or altered without the express consent of the body politic of three fourths of the states in the union, or, of the people, of an equal number of the states. To prevent the necessity of an immediate appeal to the latter, a method is pointed out, by which amendments may be proposed and ratified by the concurrent act of two thirds of both houses of congress, and three fourths of the state legislatures: but if congress should neglect to propose amendments in this way, when they may be deemed necessary, the concurrent sense of two thirds of the state legislatures may enforce congress to call a convention, the amendments proposed by which, when ratified by the conventions of three fourths of the states, become valid, as a part of the constitution. In either mode, the assent of the body politic of the states, is necessary, either to complete, or to originate the measure.[32]

Here let us pause a moment, and reflect on the peculiar happiness of the people of the United States, thus to possess the power of correcting whatever errors may have crept into the constitution, or may hereafter be discovered therein, without the danger of those tremendous scenes which have convulsed every nation of the earth; in their attempts to ameliorate their condition; a power which they have already more than once successfully exercised. "Americans," says a writer whom I have before quoted, "ought to look upon themselves, at present, as almost the sole guardians and trustees of republican freedom: for other nations are not, as we are, at leisure to show it in its true and most enticing form. Whilst we contemplate with a laudable delight, the rapid growth of our prosperity, let us ascribe it to its true cause; the wholesome operation of our new political philosophy. Whatever blessings we enjoy, over and above what are to be found under the British government, whatever evils we avoid, to which the people of that government are exposed; for all these advantages are we indebted to the separation that has taken place, and the new order of things that has obtained among us. Let us be thankful to the parent of the universe, that he has given us, the first enjoyment of that freedom, which: is intended in due time for the whole race of man. Let us diligently study the nature

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of our situation, that we may better know how to preserve and improve its advantages. But above all, let us study the genuine principles of DEMOCRACY, and steadily practice them, that we may refute the calumnies of those who would bring them into disgrace.

> "Let us publish to the world, and let our conduct verify our assertions, that by democracy we mean not a state of licentiousness, nor a subversion of order, nor a defiance of legal authority. Let us convince mankind, that we understand by it, a well ordered government, endued with energy to fulfil all its intentions, to act with effect upon all delinquents, and to bring to punishment all offenders against the laws: but, at the same time, not a government of usurpation; not a government of prescription; but a government of compact, upon the ground of equal right, and equal obligation; in which the rights of each individual spring out of the engagement he has entered into, to perform the duties required of him by the community, whereby the same rights in others, are to be maintained inviolate."

That mankind have a right to bind themselves by their own voluntary acts, can scarcely be questioned: but how far have they a right to enter into engagements to bind their posterity likewise? Are the acts of the dead binding upon their living posterity, to all generations; or has posterity the same natural rights which their ancestors have enjoyed before them? And if they have, what right have any generation of men to establish any particular form of government for succeeding generations?

The answer is not difficult: "Government," said the congress of the American States, in behalf of their constituents, "derives its just authority from the consent of the governed." This fundamental principle then may serve as a guide to direct our judgment with respect to the question. To which we may add, in the words of the author of Common Sense, a law is not binding upon posterity, merely, because it was made by their ancestors; but, because posterity have not repealed it. It is the acquiescence of posterity under the law, which continues its obligation upon them, and not any right which their ancestors had to bind them.

Until, therefore, the people of the United States, whether the present, or any future generation, shall think it necessary to alter, or revoke the present constitution of the United States, it must be received, respected, and obeyed among us, as the great and unequivocal declaration of the will of the people, and the supreme law of the land.

NOTES

1. Preamble to the C. U. S.
2. Vattel, B. 1. c. 1 §. 10.
3. Federalist, vol. 1. p. 51. 52.
4. Amendments to C. U. S. art. 12.
5. C. U. S. art. 1. 2.
6. Spirit of Laws, vol. 1. B. 9. c. 1.
7. See Note B. Title Federal Government.
8. 2 Federalist, p 32. 33.
9. Preamble to the amendments.
10. Vattel, B. 1. c. 2. § 15. 16.

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11. Federalist, vol. II. p. 23, 24, 25.

12. Ibidem p. 25.

13. Federalist, vol. II. p. 31, 32.

14. Federalist, vol. II. p. 26, 27.

15. Federalist, vol. II. p. 33.

16. Vattel, B. 2. c. 17. §. 305, 308. amendments to the C. U. S art. 12.

17. Vattel, ibid. amendments, C. U. S. art. 11, 12.

18. Federalist, p. 50.

19. Federalist vol. 2. 74.

20. 1. Blacks. Com. 47.

21. Amendments to C. U. S. art 12

22. Ibidem. art. 11

23. See the Remembrancer vol. 18. p. 72. Carey's Museum vol. 1. 302.

24. Ibidem, p. 120. Had General Washington no other claim to the gratitude of his country, his conduct on that occasion, alone, would have entailed an inextinguishable debt of gratitude upon it, to all posterity.

25. See Resolves of Congress, April 18th, 1783.

26. Oct. 1783, c. 31. Revised Code, p. 219. May 1784. c. 21.

27. Acts of 1784, c. 31.

28. Acts of 1786, c. 8.

29. The form of ratification, and the amendments proposed by the convention of Virginia, were as follows:

> "We, the delegates of the people of Virginia, duly elected, in pursuance of a recommendation of the general assembly, and now met in convention, having fully and fairly investigated and discussed the proceedings of the federal convention, and being prepared, as well as the most mature deliberation will enable us, to decide thereon, do, in the name and behalf of the people of Virginia, declare and make known, that the powers granted under the constitution, being derived from the people of the United States, may be resumed by them, whenever the same shall be perverted to their injury or oppression; and that every power not granted thereby, remains with them and at their will: that therefore no right, of any denomination, can be cancelled, abridged, restrained, or modified by the congress, by the senate, or house of representatives, acting in any capacity, by the president, or any department or office of the United States, except in those instances where power is given by the constitution for those purposes: that among other essential rights, the liberty of conscience and of the press, cannot be cancelled, abridged, restrained, or modified by any authority of the United States.
>
> With these impressions, with a solemn appeal to the searcher of hearts for the purity of our intentions, and under the conviction, that whatsoever imperfections may exist in the constitution, ought rather to be examined in the mode prescribed therein, than to bring the union into danger by delay, with a hope of obtaining amendments previous to the ratification: we, the said delegates, in the name and in behalf of the people of Virginia, do, by these presents, assent to, and ratify the constitution recommended on the 17th day of September, 1787, by the federal convention for the government of the United States; hereby announcing to all those whom it may concern, that the said constitution is binding upon the said people, according to an authentic copy hereto annexed, in the words following:[a]
>
> The declaration of rights, and the amendments to the new constitution agreed by the convention of Virginia, to be recommended to the consideration of the congress which shall first assemble under the said constitution.
>
> RICHMOND, VIRGINIA,
> In Convention, June 27, 1788.

I. That there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity; among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety.

II. That all power is naturally vested in, and consequently derived from, the people; that magistrates, therefore, are their trustees and agents, and at all times amenable to them.

III. That government ought to be instituted for the common benefit, protection, and security of the people; and that the doctrine of non-resistance against arbitrary power and oppression, is absurd, slavish, and destructive to the good and happiness of mankind.

IV. That no man or set of men are entitled to exclusive or separate public emoluments or privileges from the community, but in consideration of public services; which not being descendible, neither ought the offices of magistrate, legislator, judge, or any other public offices, to be hereditary.

V. That the legislative, executive, and judiciary powers of government, should be separate and distinct: and that the members of the two first may be restrained from oppression by feeling and participating the public burthens, they should, at fixed periods, be reduced to a private station – return into the mass of the people, and the vacancies be supplied by certain and regular elections; in which all, or any part of the members to be eligible or ineligible, as the rules of the constitution of government, and the laws shall direct.

VI. That elections of representatives in the legislature ought to be free and frequent: and all men having sufficient evidence of permanent common interest with, and attachment to the community, ought to have the right of suffrage; and no aid, charge, tax, or fee, can be set, rated, or levied upon the people, without their own consent or that of their representatives so elected, nor can they be bound by any law to which they have not, in like manner, assented for the public good.

VII. That all power of suspending laws, or the execution of laws, by any authority without the consent of the representatives of the people in the legislature, is injurious to their rights, and ought not to be exercised.

VIII. That in all capital and criminal prosecutions, a man has a right to demand the cause and nature of his accusation; to be confronted with the accusers and witnesses; to call for evidence, and be allowed counsel in his favor; and to a fair and speedy trial, by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, (except in the government of the land and naval forces); nor can he be compelled to give evidence against himself.

IX. That no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties, privileges, or franchises, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the law of the land.

X. That every freeman restrained of his liberty, is entitled to a remedy, to enquire into the lawfulness thereof, and to remove the same, if unlawful; and that such remedy ought not to be denied or delayed.

XI. That in controversies respecting property, and in suits between man and man, the ancient trial by jury is one of the greatest securities to the rights of the people, and ought to remain sacred and inviolable.

XII. That every freeman ought to find a certain remedy of recourse to the laws for all injuries and wrongs he may receive in his person, property, or character. He ought to obtain right and justice freely without sale, completely and without denial, promptly and without delay, and that all establishments or regulations, contravening these rights, are oppressive and unjust.

XIII. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

XIV. That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers, and property; all warrants, therefore, to search suspected places, or seize any freeman, his papers or property, without information upon oath (or affirmation of a person religiously scrupulous of taking an oath) of legal and sufficient cause, are grievous and oppressive, and all general warrants to search suspected places, or to apprehend any suspected person, without specially naming or describing the place or person, are dangerous, and ought not to be granted.

XV. That the people have a right peaceably to assemble together to consult for the common good, or to instruct their representatives: and that every freeman has a right to petition, or apply to the legislature for a redress of

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grievances.

XVI. That the people have a right of freedom of speech, and of writing and publishing their sentiments; that the freedom of the press is one of the greatest bulwarks of liberty, and ought not to be violated.

XVII. That the people have a right to keep and bear arms; that a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that in all cases the military should be under strict subordination to, and governed by the civil power.

XVIII. That no soldier, in time of peace, ought to be quartered in any house, without the consent of the owner, and in time of war in such manner only as the laws direct.

XIX. That any person religiously scrupulous of bearing arms, ought to be exempted upon payment of an equivalent to employ another to bear arms in his stead.

XX. That religion, or the duty which we owe to Our creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and therefore all men have an equal, natural, and unalienable right to the free exercise of religion according to the dictates of conscience, and that ab particular religious sect or society ought to be favored or established by law in preference to others.

AMENDMENTS TO THE NEW CONSTITUTION.

1. That each state in the union shall respectively retain every power, jurisdiction, and right, which is not by this constitution delegated to the congress of the United States, or to the departments of the federal government.

2. That there shall be one representative for every thirty thousand inhabitants, according to the enumeration or census mentioned in the constitution, until the whole number of representatives amounts to two hundred; after which, that number shall be continued or increased as congress shall direct, upon the principles fixed in the constitution, by apportioning the representatives of each state to some greater number of people, from time to time, as population increases.

3. When congress shall lay direct taxes or excises, they shall immediately inform the executive power of each state, of the quota of such state, according to the census herein directed, which is proposed to be thereby raised; and if the legislature of any state shall pass a law which shall be effectual for raising such quota, at the time required by congress, the taxes and excises laid by congress shall not be collected in such state.

4. That the members of the senate and house of representatives shall be ineligible to, and incapable of holding any civil office under the authority of the United States, during the time for which they shall respectively be elected.

5. That the journals of the proceedings of the senate and house of representatives, shall be published at least once in every year, except such parts thereof relating to treaties, alliances, or military operations, as in their judgment require secrecy.

6. That a regular statement and account of the receipts and expenditures of all public money, shall be published, at least, once in every year.

7. That no commercial treaty shall be ratified without the concurrence of two thirds of the whole number of the members of the senate; and no treaty ceding, contracting, or restraining, or suspending the territorial rights or claims of the United States, or any of them – or their, or any of their rights or claims to fishing in the American seas, or navigating the American rivers, shall be made, but in cases of the most urgent and extreme necessity; nor shall any such treaty be ratified, without the concurrence of three-fourths of the whole number of members of both houses respectively.

8. That no navigation law, or law regulating commerce, shall be passed without the consent of two thirds of the members present in both houses.

9. That no standing army, or regular troops, shall be raised or kept up in time of peace, without the consent of two-thirds of the members present in both houses.

10. That no soldier shall be enlisted for any longer term than four years, except in time of war, and then for no

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longer a term than the continuance of the war.

11. That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever congress shall omit or neglect to provide for the same. That the militia shall not be subject to martial law, except when in actual service, in time of war, invasion, or rebellion; and when not in the actual service of the United States, shall be subject only to such fines, penalties, and punishments, as shall be directed or inflicted by the laws of its own state.

12. That the exclusive power of legislation given to congress over the federal town and its adjacent district, and other places, purchased, or to be purchased by congress, of any of the states, shall extend only to such regulations as respect the police and good government thereof.

13. That no person shall be capable of being president of the United States for more than eight years, in any term of sixteen years.

14. That the judicial power of the United States shall be vested in one supreme court, and in such courts of admiralty, as congress may, from time to time, ordain and establish in any of the different states: the judicial power shall extend to all cases in law and equity, arising under treaties made, or which shall be made, under the authority of the United States; to all cases affecting ambassadors, other foreign 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, and between parties claiming lands under the grants of different states. In all cases affecting ambassadors, other foreign ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction; in all other cases before mentioned, the supreme court shall have appellate jurisdiction, as to matters of law only: except in cases of equity, and of admiralty and maritime jurisdiction; in which, 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: but the judicial power of the United States shall extend to no case where the cause of action shall have originated before the ratification of this constitution; except in disputes between states about their territory; disputes between persons claiming lands under the grants of different states: and suits for debts due to the United States.

15. That in criminal prosecutions no man shall be restrained in the exercise of the usual and accustomed right of challenging or excepting to the jury.

16. That congress shall not alter, modify, or interfere in the times, places, or manner of holding elections for senators and representatives, or either of them, except when the legislature of any state shall neglect, refuse, or be disabled by invasion or rebellion to prescribe the same.

17. That those clauses which declare, that congress shall not exercise certain powers, be not interpreted in any manner whatsoever to extend the power of congress; but that they be construed either as making exceptions to the specified powers, where this shall be the case; or otherwise, as inserted merely for greater caution.

18. That the laws ascertaining the compensation of senators and representatives for their services, be postponed in their operation, until after the election of representatives immediately succeeding the passing thereof; that excepted, which shall first be passed on the subject.

19. That some tribunal, other than the senate be provided for trying impeachments of senators.

20. That the salary of a judge shall not be increased or diminished during his continuance in office, otherwise than by general regulations of salary, which may take place on a revision of the subject, at stated periods of not less than seven years, to commence from the time such salaries shall be first ascertained by congress.

And, the convention do, in the name and behalf of the people of this commonwealth, enjoin it upon their representatives in congress, to exert all their influence, and use all reasonable and legal methods to obtain a ratification of the foregoing alterations and provisions, in the manner provided by the fifth article of the said constitution; and in all congressional laws to be passed in the mean time, to conform to the spirit of these amendments, as far as the said constitution will admit.

Extract from the Journal,
JOHN BECKLEY,
Clerk of the Convention.

a. To this ratification was annexed a copy of the new Constitution.

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30. C. U. S. Art. 2. §. 1. and Art. 6.
31. C. U. S. Art. 6.
32. Ibidem, Art. 5.

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NOTE D, PART 2

Structure and Organization of the Federal Government

II. I shall now proceed to the second branch of our inquiry; namely; the structure and organization of the federal government of the United States, with its powers, jurisdiction, and rights, as established by the constitution of the United States, either independent of, or connected with, those of the state governments, respectively; together with the mutual relation which subsists between the federal and state governments in virtue of that instrument.

And, here, we may be permitted shortly to repeat some former observations: That, when the whole body of the people are possessed of the supreme power in the state, it is a democracy. That in such a government, the people are in some respects the sovereign, and in others, the subject. That, in the establishment of the constitution or fundamental law by which the state is to be governed, and in the appointment of magistrates, they are the sovereign: when the constitution of the state is fixed, the government organized, and the magistrates are appointed, every citizen is bound to obedience to the sovereign will thus expressed, and consequently becomes a subject.

That, in a democracy, the people ought to do, themselves, whatever they conveniently can; that, what they can not do of themselves, must be committed to the management of ministers chosen by themselves; that they are their trustees and agents; and that a government thus formed and organized, may be styled a REPRESENTATIVE DEMOCRACY. That, the choice of ministers may be made, either, personally, by the whole body of the people; or by their deputies, chosen for that especial purpose, and in whom they can repose a proper confidence.

That, a number of independent states may unite themselves by one common bond or confederacy, for the purposes of common defense and safety, and for the more perfect preservation of amity between themselves, without any of them ceasing to be a perfect, independent, and sovereign state, retaining every power, jurisdiction and right, which it has not expressly agreed shall be exercised in common by the confederacy of the states; and not by any individual state of the confederacy.

In the commonwealth of Virginia, the constitution, which is the fundamental law of the republic, has been shown to be the act of the people.[33] The establishment of this constitution was an immediate act of sovereignty by them. They declared, that all power is vested in, and consequently derived from the people. That magistrates are their trustees and servants, and at all times amenable to them. That government is instituted for the common benefit, protection, and security of the people. That no man or set of men are entitled to exclusive or separate emoluments or privileges but in consideration of public services. That the people have a right to uniform government; and, that no free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue; and by frequent recurrence to fundamental principles.[34] This is the principle of democracy.

By the establishment of this constitution, without any dependence upon any foreign power, Virginia became an independent and sovereign state:[35] her rights were naturally the same as any other state's. She might, therefore, perform every act, which any other sovereign state, however constituted, could perform: she was also equal to any other state, or nation, being sovereign and independent.[36]

In becoming a member of the federal alliance established between the American states, by the articles of confederation, she expressly retained her sovereignty and independence.[37] The constraints put upon the exercise of that sovereignty, by those articles, did not destroy its existence.[38]

We have already shown that this system was defective in not providing the means, for a certain and

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regular revenue and, that the inefficiency of the system, in that, and perhaps in some other respects, gave rise to the new constitution.[39] Of the immediate causes, and the particular motives and reasons which may be supposed to have led to the adoption of this important measure, together with a short history of its origin, progress, and final consummation; as also, of the foundation, and general nature of the new instrument of union between the states, a short explanation has likewise been attempted;[40] nevertheless, we shall not unfrequently have occasion to recur to, and perhaps to repeat, the same points, already touched upon; that the student may more perfectly understand, and bear in mind the reasons for the several provisions contained in the constitution, and the subsequent amendments to it, which have been proposed and ratified, and now form a part of it.

In the new instrument of union, there is no express reservation, as in the former, of the sovereignty of the several states; a subject of considerable alarm, and discussion, among those who were opposed to every thing that resembled, or might hazard, a consolidation of them. The advocates of the constitution answered, that "an entire consolidation of the states into one complete national sovereignty, would imply a complete subordination of all the parts; and whatever power might remain in them would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union, the state governments will clearly retain all the rights of sovereignty, which they had before, and which are not by that act exclusively delegated to the United States. That this exclusive delegation, or rather this alienation of state sovereignty, would only exist in three cases; where the constitution in express terms grants an exclusive authority to the union; where it grants in one instance an authority to the union, and in another prohibits the states from exercising the like authority; and where it grants an authority to the union, to which a similar authority in the states, would be absolutely, and totally contradictory, and repugnant.[41] The same writer elsewhere adds, "that it is not a mere possibility of inconvenience in the exercise of some powers, but an immediate and constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of sovereignty." And further, that "the necessity of a concurrent jurisdiction in certain cases, results from the division of the sovereign power; and the rule that all authorities of which the states are not explicitly divested in favor of the union, remain with them in full vigor, is not only a theoretical consequence of that division, but is clearly admitted by the whole tenor of the instrument."[42] And this constitution, as we have already had occasion to remark, is now confirmed by the subsequent amendments to the constitution, Art. 12. The right of sovereignty, therefore, in all cases not expressly ceded to the United States by the constitution, or prohibited by it to the several states, remains inviolably, with the states; respectively. What powers are comprehended under this reservation, will form a part of our present inquiry.

The institutions of all well constructed governments, as we have before had occasion to remark, have regard to two distinct objects; their connections, intercourse, and commerce with other states, and nations; and, the administration of justice between individuals, the preservation of their own domestic peace, and that of their citizens, and the advancement and promotion of the general happiness and prosperity of all who put themselves under their protection. Where the form of government is national it is the duty of the body politic of the state to attend to all these objects. But where the government is not national, but federal, a division of power necessarily results from such a form of government; and the connections, intercourse and commerce of the confederate republic, with foreign states and nations; and with each other, as sovereign and independent states, naturally fall under the jurisdiction of the federal government, whilst the administration of all their other concerns, whatsoever, as naturally, remains with the states forming the confederacy.

This distinction may be considered as marking out the grand boundary between the limits of federal

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and of state jurisdiction; but a more intimate union between the states, in certain respects, being thought desirable, this grand boundary has not been strictly adhered to in the federal constitution, but in some few instances the authority of the federal government has been extended beyond it; a remarkable instance of which occurs in the power granted to congress to make uniform laws on the subject of bankruptcies, throughout the United States; a regulation in the strictest sense, municipal, and not federal. These instances are, however, few, and being in derogation of the municipal jurisdiction of the several states, ought for reasons already given to be strictly construed.

With regard to the principles of the organization, and structure of the federal government, whenever it departs from those of a confederate republic, it appears to conform to those of a representative democracy. The representatives in congress are chosen immediately by the people: the president may be chosen in a manner very nearly approaching a popular election, as in this state; though in some others, the election is farther removed from the people; or rather, may be considered as taken away from them by their own legislatures, as in some of the northern states. All officers of the government, including the president, are impeachable for misconduct in office, and on conviction may be removed, and otherwise punished. These are prominent features of a representative democracy. In the appointment of senators it's type is federal: in the mode of appointing the judges, it has been regarded as "squinting at monarchy."[43]

The grand boundary which was noticed above, as marking the obvious limits between the federal and state jurisdictions, may be considered as allotting to the former, jurisdiction in all eases arising under the political laws of the confederacy, or such as relate to its general concerns with foreign nations, or to the several states, as members of the confederacy; and to the latter the cognizance of all matters of a civil nature, or such as properly belong to the head of municipal law; except in some few cases, where, by a special provision contained in the constitution, either concurrent, or exclusive, jurisdiction is granted to the federal government. Of this distribution we shall endeavor to take a nearer survey.

The objects of the political laws of a state as mentioned by eminent writer, are, first, to provide for the necessities of the nation.

To encourage labor and industry, to provide necessary workmen, to promote agriculture, to advance commerce, to establish an easy communication between the different parts of the state, to regulate the rates of money, are ranked among the first objects of a good government. To encourage education, the liberal arts, and sciences, justice and polity, and to fortify itself against attacks from without; to preserve peace, to support the dignity and equality of the nation, and to form advantageous connections, and a beneficial intercourse with other states and nations, may be considered as forming the aggregate of the political laws of a nation.[44] I say nothing of the advancement of piety and religion; the present age seems to doubt of the necessity of any connection between church and state.

The powers delegated to congress by art. 1. sect. 8, of the new constitution; to the president and senate by art. 2. sect. 2. and 3. and to the judiciary by art. 3. sect. 2. may severally be arranged under one, or the other of these heads.

Of these powers some appear to be exclusively vested in congress, or some other department of the federal government; in others, the states certainly have concurrent, though perhaps subordinate, powers; in a third class it is not easy to determine, the limits of either the state, or federal authority. The administration of justice between the citizens of the same state, appears to be left without reserve, (except in a few instances which will be particularly noticed, in the sequel) to the

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jurisdiction and control of the state governments.

Thus have we endeavored to trace the line of separation between the jurisdictions of the federal and the state governments, –it is however a broad line, extending like the ecliptic, sometimes on one side, and sometimes on the other, of our political equator: but let us examine it more minutely.

All the powers delegated by the people of the United States to the government, whether the federal, or that of the state, must fall under one of the four following heads.

I. Those exclusively granted to the federal government.

II. Those in which the state has unquestionably concurrent, though perhaps subordinate powers with the federal government.

III. Those where the concurrent authority of the state government is questionable; or controllable by congress.

IV. Those reserved to the states, exclusively.

These powers are either legislative, executive, or judiciary: we shall examine them under their respective heads.

I. The powers exclusively granted to the federal government. Of these,

A The legislative: or those vested in congress; that body being empowered,

1. To borrow money on the credit of the United States.
2. To regulate commerce

a. With foreign nations;
b. Among the several states; and
c. With the Indian tribes. The commerce between the individuals of the same state, being reserved to the state governments.

3. To coin money, regulate the value thereof, and the value of foreign coin.
4. To fix the standard of weights and measures. These last powers seem to be a necessary appendage to that of regulating commerce.
5. To provide for the punishment of counterfeiting the securities and current coin of the United States.
6. To constitute tribunals, under the federal government, inferior to the supreme court
7. To define and punish,

a. Piracies;
b. Felonies on the high seas;
c. Offenses against the law of nations.

8. And to declare the punishment of treason against the United States.
9. To declare war; grant letters of marque and reprisal; and make rules concerning captures on land and water.
10. To provide and maintain a navy, [in time of peace.]
11. To make rules for the regulation and government of the land and naval forces.
12. To raise and support armies, [in time of peace.]

It is at least doubtful whether any such power as that last mentioned, was intended to be

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entrusted to the government, except in case of eminent danger of hostility: at least beyond the necessary guards for forts, magazines, arsenals, etc. and even in these cases the constitution seems to have provided that the service should be performed by the militia of the United States.

13. To provide for calling forth the militia, when necessary to be employed in the service of the United States.
14. And for governing them when so employed.
15. To provide for organizing and disciplining the militia.
16. To exercise exclusive jurisdiction within the ten miles square, where the seat of government shall be permanently established; and in forts, magazines, arsenals, dock-yards, and other places ceded for the use of the federal government.
17. To prescribe the manner in which the public acts, records and judicial proceedings of the states shall be proved, in order to their obtaining faith and credit in other states, and the effect thereof.
18. To establish an uniform rule of naturalization.
19. And to make all laws necessary and proper for carrying the powers vested in the federal government into execution.

B. The powers vested in the executive department of the government of the United States, are all exclusive of the authority of the state government. These are,

1. To make treaties.
2. To appoint ambassadors, ministers, and consuls.
3. Judges of the supreme courts, and all other officers of the United States, except such as are vested by congress in the president alone, in the courts of law of the United States, or, in the heads of departments.

C. The judicial power of the United States seems to be exclusively vested in the tribunals of the federal government.

1. In all cases affecting ambassadors, other public ministers and consuls.
2. In all cases, of admiralty and maritime jurisdiction.
3. In controversies between two or more states.
4. In controversies between a state, and any foreign state.
5. In all cases of impeachment against an officer of the federal government.

To which I shall add,

6. In controversies to which the United States are a party, and
7. In all trials for offenses against the constitution, or law, of the federal government.

In which two last cases, I am inclined to suppose, that congress are not restrained from vesting the cognizance of any case, comprehended under those heads, in the state courts, should they find it advisable so to do, especially in fiscal proceedings,[45] and lesser offenses against the peace.

The preceding enumeration seems to comprehend all, the cases applicable to our first head: we shall now proceed to consider.

II Those in which the state has unquestionably concurrent, though perhaps subordinate powers, with the federal government. Of these,

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A. The legislature has unquestionable power.

1. To impose taxes, and duties;
2. Excises, for the support of its own domestic establishment.
3. Imposts, or duties on exports, if absolutely necessary for the purpose of executing its inspection laws.
4. To establish post-offices, and
5. Post roads, within its own precincts or territory, so that they do not contravene the establishments of the federal government.
6. To promote the progress of science, and useful arts by securing to the authors and inventors the exclusive right, within the state, to their respective writings and discoveries.
7. To provide for arming the militia of the state; and to call them forth when necessary for their internal defense.
8. To train and keep troops, [in time of war] and
9. Ships of war [in time of war].
10. And to engage in war, when actually invaded; or in such imminent danger as will not admit of delay.
11. And to propose amendments to the federal constitution.

To these we may add, that the judicial power of the state must be presumed to possess concurrent, though perhaps subordinate powers with the courts of the United States in the following cases:

B. In controversies between the state, and

1. The citizens of another state,
2. Foreign citizens, or subjects.[46]

C. Between citizens of different states; if the defendant reside within the state claiming jurisdiction.
D. Between citizens of the same state claiming lands within the state, under grants from different states.

In all which cases, there are neither express words, nor any necessary implication that the states should be abridged of the powers in these respects, which as states they must have possessed – we must therefore refer these powers to the twelfth article of the amendments to the constitution of the United States.

It is no less true, that the federal government possessing powers of deciding in these cases, the decision of the federal judiciary, is according to the principles and nature of our government, paramount to that of the state judiciary. Causes instituted in the state courts are therefore liable to re-examination in the federal courts; and, perhaps in all these cases to removal in the manner pointed out by the act of congress.[47]

III. Let us now take a short view of those powers, where the concurrent authority of the state government, either is questionable; or subject to the control of congress.

A. Congress being authorized to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States, it may well be questioned how far the states can possess any concurrent authority, on these subjects.

If, however, a doubt should arise respecting the former, it might be presumed, that the rights

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intended to be conferred by this uniform rule of naturalization, should be, in general, confined to such as might be derived from the federal government, without infringing those rights which peculiarly appertain to the states. Thus a person naturalized pursuant to the laws of the United States, would undoubtedly acquire every right that any other citizen possesses, as a citizen of the United States, except such as the constitution expressly denies, or defers the enjoyment of; and such as the constitution or laws of the individual states require on the part of those who are candidates for office under the authority of the states. Five years residence, for example, is required by the laws of Virginia, before any naturalized foreigner is capable of being elected to any office under the state. It is presumable that his being naturalized under the laws of the United States would not supercede the necessity of this qualification.

In respect to bankruptcies it may be questioned whether the power of congress extends to cases arising between citizen and citizen of the same state, since their power does not extend to the internal or domestic commerce of the state, as we have already shown. Yet, on the other hand it may with great strength of reasoning be insisted, that here is a special case in which the power of the federal government extends to internal as well as foreign commerce; and that a contrary construction would probably defeat the constitution, which could not prescribe an uniform rule, without comprehending such cases as well as others.

B. The following powers appear to be vested in the federal government, but may be also exercised by the states, with the consent of the congress, viz.

1. To lay imposts or duties on goods imported into any state, from a foreign state.
2. To lay any duty of tonnage.
3. To keep troops, or
4. Ships of war, in time of peace.
5. To enter into any compact or agreement with any other state, or,
6. With any foreign power.
7. To engage in war when not actually invaded, or in such imminent danger as will not admit of delay.

This finishes the actual enumeration of the powers granted to the federal government, except what relates to the ceded territory, and the erection of new states, and some of the provisions which do not seem necessary to be recapitulated here, though we shall have occasion to notice them hereafter. There remains only to mention,

IV. The powers reserved to the states exclusively.[48]

The twelfth article of the amendments to the constitution of the United States, declares, that 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.

The powers absolutely prohibited to the states by the constitution, are, shortly, contained in article 1. section 10, *viz.*

1. No state shall enter into any treaty, alliance or confederation.
2. Nor grant letters of marque and reprisal.
3. Nor coin money.
4. Nor emit bills of credit.
5. Nor make any thing but gold and silver coin a tender in payment of debts.
6. Nor pass any bill of attainder.

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7. Nor any ex post facto law.
8. Nor any law impairing the obligation of contracts.
9. Nor grant any title of nobility. – Concerning all which, we shall make some few observations hereafter.

All other powers of government whatsoever, except these, and such as fall properly under the first or third heads above mentioned, consistent with the fundamental laws, nature, and principle of a democratic state, are therefore reserved to the state governments.[49]

From this view of the powers delegated to the federal government, it will clearly appear, that those exclusively granted to it have no relation to the domestic economy of the state. The right of property, with all it's train of incidents, except in the case of authors, and inventors, seems to have been left exclusively to the state regulations; and the rights of persons appear to be no further subject to the control of the federal government, than may he necessary to support the dignity and faith of the nation in it's federal or foreign engagements, and obligations; or it's existence and unity as the depositary and administrator of the political councils and measures of the united republics. – Crimes and misdemeanors, if they affect not the existence of the federal government; or those objects to which it's jurisdiction expressly extends, however heinous in a moral light, are not cognizable by the federal courts; unless committed within certain fixed and determinate territorial limits, to which the exclusive legislative power granted to congress, expressly extends.[50] Their punishment, in all other cases, exclusively, belongs to the state jurisprudence.

The federal government then, appears to be the organ through which the united republics communicate with foreign nations, and with each other. Their submission to it's operation is voluntary: it's councils, it's engagements, it's authority are theirs, modified, and united. It's sovereignty is an emanation from theirs, not a flame by which they have been consumed, nor a vortex in which they are swallowed up. Each is still a perfect state, still sovereign, still independent,[51] and still capable, should the occasion require, to resume the exercise of it's functions, as such, in the most unlimited extent.

But until the time shall arrive when the occasion requires a resumption of the rights of sovereignty by the several states (and far be that period removed when it shall happen) the exercise of the rights of sovereignty by the states individually, is wholly suspended, or discontinued, in the cases before mentioned: nor can that suspension ever be removed, so long as the present constitution remains unchanged, but by the dissolution of the bonds of union. An event which no good citizen can wish, and which no good, or wise administration will ever hazard.

Let us now take a view of the federal and state constitutions, and examine the structure and organization of the government, arising from their mutual connection, and the distribution of power among the several branches or departments of each, respectively.

The powers of government, both by the federal and state constitutions, are distributed under three heads, the Legislative, Executive, and Judiciary; and these three departments the state constitution[52] expressly declares shall be separate and distinct, so that neither exercise the powers properly belonging to the other. We shall nevertheless find that the constitution itself has in many respects blended them; assigning to the legislative body, duties, which, in strictness, belong to the executive; as in the appointment of the officers of government, etc. Yet this is undoubtedly conformable to the nature of a democracy in this, that the appointment is vested in the immediate representatives of the people. The constitution of the United States seems upon the same principle to have vested congress, in whom the legislative power is reposed, with powers absolutely foreign from the exercise of

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legislation, strictly speaking; but which will appear upon a scrutiny to have been more safely and beneficially entrusted to that department, than they could have been to any other whatsoever. Yet these deviations from the fundamental maxims of the government are to be construed strictly, and not made use of as precedents to justify others, where the constitution by its silence must be presumed to have referred it to that head under which it properly falls.

In the course of this investigation, we shall have occasion to inquire into the constituent parts of these several departments; with the mode of constituting them; the periods for which they are chosen; their respective qualifications, duties, and privileges; with the manner of removing them from, and punishing them for, any misconduct in office.

We shall begin with the federal government.

I. Of the congress.

1. The first article or the federal constitution, declares, that all legislative powers therein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives. These, therefore, are the constituent parts of the federal legislature.

2. & 3. The next section prescribes the manner in which the last of these bodies shall be chosen,[53] that is to say, every second year, by the people of the several states; the qualifications of the electors being the same as that of electors of the most numerous branch of the state legislature.[54]

The same article provides that representatives and direct taxes shall be apportioned among the several states according to their respective numbers, to 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; according to an actual enumeration to be made every ten years:[55] but the number of representatives is limited to one for every thirty thousand persons.[56]

This mode of ascertaining the number of representatives, and the inseparable connection thereby established between the benefits and burdens of the state, seems to be more consonant with the true principles of representation than any other which has hitherto been suggested.[57] For every man, in his individual capacity, has an equal right to vote in matters which concern the whole community: no just reason therefore can be assigned why ten men in one part of the community should have greater weight in it's councils, than one hundred in a different place, as is the case in England, where a borough composed of half a dozen freeholders, sends perhaps as many representatives to parliament, as a county which contains as many thousands; this unreasonable disparity appears to be happily guarded against by our constitution. It may be doubted indeed how the apportionment of the numbers, as it respects slaves, is founded upon the principles of perfect equality; and if it be not, it may be a further question whether the advantage preponderates on the side of the states that have the most, or the fewest slaves amongst them; for, if on the one hand it be urged, that slaves are not in the rank of persons,[58] being no more than goods or chattels, according to the opinion of the Roman jurists, and consequently not entitled to representation, it may be answered that the ratio of representation and taxation being the same, this additional weight in council is purchased at an expense which secures the opposite party from the abuse of it in the imposition of burdens on the government. On the other hand, it must be remembered, that the two fifths of this class of people who are not represented, are by that means exempted from taxation. An exemption which probably took its rise from the unprofitable condition of that proportion of the number of slaves.

The times, places and manner of holding elections for representatives and senators, shall be prescribed in each state by the legislature; subject nevertheless to such alterations as congress may

make, except as to the places of choosing senators.[59]

It cannot be denied, that this article vests a power in congress, the exercise of which, if not really dangerous to the liberties of the states,[60] may at least interrupt their tranquility, unless dictated by the utmost wisdom and discretion. In some of the states the vote is conducted by ballot, in others viva voce. In some the members are chosen by a general ticket or ballot of the whole state; in others the representatives are chosen by districts. Without entering into the discussion of the preference due to either of these modes, we may venture to pronounce that the states respectively will be tenacious of that to which their own constitution or laws may have given the preference: any attempt to render the manner of election uniform must therefore inevitably produce discontents among the states. Hitherto the congress has wisely left this article to the direction of the state governments. The manner of proceeding in this state, as established by the act of 1788, (V. L.) c. 2. amended by the act of 1792. c. 1,[61] is shortly, as follows.

The act divides the states into as many districts, as there are representatives to be chosen, and directs that the persons qualified by law to vote for members to the house of delegates, in each county composing a district, shall assemble at their respective court houses, on the third Monday in March, (now altered by the act of 1798. c. 14. to the fourth Wednesday in April) in every second year, and then and there vote for a proper person as a representative in congress. The election to be conducted by the high sheriff, or in case of sickness or inability to attend, one of his deputies, in the same manner as the elections for delegates, except that as no determination is to be had by view, but only by the polls, the votes being publicly taken viva voce. Immediately after the closing of the poll, the clerk having first signed the same and made oath to the truth thereof, is to deliver it to the sheriff; the sheriffs of the respective counties in the district shall within seven days thereafter, assemble at the court house of the county first named in the district, compare their respective polls, and return the person having the greater number of votes, or in case of an equality of votes, giving their own votes. Duplicates of such return under the hands and seals of the sheriffs are to be sent one to the governor, the other to the representative elected, within ten days thereafter under the penalty of 100, and the poll book under a similar penalty are to be returned again to the clerk of the counties respectively. The governor is moreover required to transmit to congress without delay the returns made to him. The act further provides that no person shall, during the same election, vote more than once for the same candidate; under the penalty of one hundred dollars. This provision was made to prevent persons voting in several counties within the same district.

The representatives by this bill are chosen immediately by the people, in a public manner, by the electors within an aggregate number of counties composing a district. The person chosen seems to be strictly the delegate of those by whom he is chosen, and bound by their instructions whenever they think proper to exercise the right. This principle has been denied by the British writers[62] on their own government, and a deference to the maxims of that government probably prevented the decision of the question, when agitated in congress in the form of am article to a proposed bill of rights: but if the maxim be true, that all power is derived from the people; that magistrates are their trustees and servants, and at all times amenable to them for their conduct, it seems impossible to withhold our assent from the proposition, that in a popular government the representative is bound to speak the sense of his constituents upon every subject, where he is informed of it. The difficulty of collecting the sense of the people upon any question, forms no argument against their right to express that sense when they shall think proper so to do. Otherwise, by whatever denomination the government may be called, it is a confined aristocracy, in which the people have nothing more to do than to choose their rulers, over whose proceedings, however despotic, and repugnant to the nature and

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principles of the fundamental laws of the state, they have no control.[63] It will be answered, that the power of removing and punishing is not denied by this doctrine. I answer, that the power of preventing offenses against the commonwealth, is to be preferred to that of punishing offenders: and if the government is virtually in the people, it ought to be so organized, that whenever they choose to exercise the right of governing, they may do it without destroying it's existence. Corruption and mal-administration, unchecked, may drive them to a resumption of all the powers which they have entrusted to the government, and bring on tumults and disturbances which will end only with it's final dissolution: an event to be apprehended in all governments, but particularly in democracies, since dissatisfaction towards the administration may produce a desire of change in the constitution itself; and every change by which the government is in the smallest degree removed from its republican nature and principle, must be for the worse. This danger is effectually avoided by the principle here contended for. The aggregate of mankind understand their own interest and their own happiness better than any individual: they never can he supposed to have resigned the right of judging for themselves to any set of men whatsoever; it is a right which can never be voluntarily resigned, though it may be wrested from their hands by tyranny, or violated by the infidelity and perfidy of their servants.

When vacancies happen in the representation from any state, the executive authority thereof, shall issue writs of election to fill the vacancies.[64]

The manner of electing senators is much shorter, being vested in the legislatures of the several states; each state being entitled to two senators, whose periods of service are six years, and each senator is entitled to one vote.[65]

The election of representatives we have seen; is by a mode strictly popular. Had the distinction of states been entirely done away, there could have been no good reason assigned, perhaps, why the elections of senators should not have been assimilated thereto, at least in respect to numbers, since in a government where all parts are equal, no preference under any pretext whatsoever ought to be allowed to any one part, over the rest. Why then should Rhode Island and Delaware have as many representatives in the senate as Virginia and Massachusetts, which contain ten times their respective numbers? It has been answered, the senate are chosen to represent the states in their sovereign capacity, as moral bodies, who as such, are all equal; the smallest republic, as a sovereign state, being equal to the most powerful monarchy upon earth.[66] As states, then, Rhode Island and Delaware are entitled to an equal weight in council on all occasions, where that weight does not impose a burden upon the other states in the union. Now as the relation between taxation and representation, in one branch of the legislature, was fixed by an invariable standard, and as that branch of the legislature possesses the exclusive right of originating bills on the subject of revenue, the undue weight of the smaller states is guarded against, effectually, in the imposition of burdens. In all other cases their interests, as states, are equal, and deserve equal attention from the confederate government. This could no way he so effectually provided for, as in giving them equal weight in the second branch of the legislature; and in the executive whose province it is to make treaties, etc. – Without this equality, somewhere, the union could not, under any possible view, have been considered as an equal alliance between equal states. The disparity which must have prevailed, had the apportionment of representation been the same in the senate as in the other house, would have been such as to have submitted the smaller states to the most debasing dependence, I cannot, therefore, but regard this particular in the constitution, as one of the happiest traits in it, and calculated to cement the union equally with any other provision that it contains.

This body is not, like the former, dissolved at the end of the period for which it's members were

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ejected; it is a permanent, perpetual body; the members, indeed, are liable to a partial change every two years, the senate being divided into three classes, one of which is vacated every second year, so that a total change in the members may be made in six years, but cannot possibly be effected, without the intervention of death, in less time. – According to the arrangements of the classes actually made, both the senators from the same state shall never vacate their seats at the same time; a provision which certainly has it's advantages, as no state is thereby in danger of being not represented at any time.

This mode of constituting the senate, seems liable to some important objections.[67] The perpetuity of the body is favorable to every stride it may be disposed to make towards extending power and influence in the government: a tendency to be discovered in all bodies, however constituted, and to which no effectual check can be opposed, but frequent dissolutions and elections. It is no satisfactory answer to this objection, that the members are removable, though the body itself be perpetual. The change, even were the members ineligible a second time, would be too gradual, to effect any counterpoise to this prevailing principle.

It has been insisted that the perpetuity of this body, is the only security to be found in the constitution against that instability of councils and of measures which has marked the proceedings of those States, where no such check is provided by the constitution.[68] To which it may be answered, that every newly established government must be a government of experiment. – The design of a machine may appear correct, the model perfect, and adapted to all the purposes which the original inventor proposed: yet a thousand defects may be discovered when the actual application of it's powers is made, and, many useful improvements, in time, become obvious, to the eyes of a far less skillful mechanic. Their success and perfection must, however, still depend upon actual experiment, and that experiment may suggest still further improvement. Are we to reject these because they did not occur to the first projector, though evidently growing out of his original design? Or, if on the other hand we have unwarily adopted that as an improvement, which experiment shall evince to he a defect, shall we be so wedded to error as to persist in the practice of it, for no better reason than that we have once fallen into it.

In case of vacancies in the office of senator, the executive of the state are authorized to make a temporary appointment until the next meeting of the legislature, who are then to fill the vacancy.[69]

4. The qualifications of the members of these bodies respectively, are, that both senators and representatives should have been citizens of the United States, the former nine, and the latter seven years[70] and be citizens also of that state for which they shall be chosen, at the time of their election; to which the law of the state adds, that a representative should be a freeholder and resident of the district for which he is chosen:[71] a wise provision and perfectly consonant with the principles of representation, which should be made from the body of the people with whom the representative must be presumed to have a common interest, but which perhaps may be rendered nugatory, by the constitution which imposes no such condition, and which makes each house the judge of the qualifications, as well as of the elections and returns of its own members. The constitution further requires that a representative should be twenty-five, and a senator thirty years of age;[72] to which may be added that no person holding any office under the United States shall be a member of either house during his continuance in office.[73]

So much for the qualifications of the members of congress, to which we may subjoin their incapacities, as individuals, during the period for which they are elected; these are shortly an incapacity of being appointed to any civil office under the United States, which shall have been

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created or the emoluments thereof increased during their time.[74] An admirable provision against venality, but which, it is to be feared, is not sufficiently guarded to prevent evasion. And to preclude undue influence on the part of the federal government over that of the commonwealth, it is provided by a law of the state,[75] that the members of congress shall be ineligible to, and incapable of holding any seat in either house of assembly, or any legislative, executive, or judicial office, or other lucrative office whatsoever, under the government of this commonwealth: and this last provision is by the same act extended to all persons holding any legislative, executive, judicial or other lucrative office whatsoever under the United States, with a proviso in favor of militia officers, and county court magistrates.

5. Senators and representatives during their attendance in congress, as also in traveling to and returning from the place of their session, are privileged from arrest in all cases, except treason, felony, and breach of the peace;[76] and no speech or debate in either house can be questioned in any other place. They are also entitled to a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States.[77]

These are all the personal privileges which the constitution gives to the members of the federal legislature. And here I shall transcribe the words of one of it's former members on a similar occasion. – "The members of the legislature ought certainly to have no privilege but what is demonstrably essential to the freedom, and welfare of their constituents. The state is not made to dignify it's officers, but the officers to serve the state. The dignity of a commonwealth does not consist in the elevation of one, or a few, but in the equal freedom of the whole. The privileges of the legislature ought to be defined by the constitution, and should be fixed as low as is consistent with the public welfare." – This is the point which the constitution appears to have had in view, and very happily to have attained; and it is to be sincerely wished, the question may never arise whether they ought to have been more, or less, limited.

Thus much for the privileges of the members; each house has moreover it's own distinct privileges and powers; those of the house of representatives are,

1. To choose their own speaker, and other officers.[78]
2. To originate all bills for raising a revenue; but the senate may propose, or concur with amendments, as on other bills.[79]
3. This house also possesses the sole power of impeachment.[80] These are all it's exclusive privileges.

The vice-president of the United States is, by virtue of his office, president of the senate; but has no vote unless they be equally divided.[81]

This power may at first view appear to be of no great consequence: it is however of the utmost importance; and the occasions on which it is said to have been exercised, will demonstrate the necessity of leaving it, as seldom as possible, to it's full scope.[82]

In fact this part of the constitution gives a decided influence in the legislature to that part of the United States from which the vice-president shall be elected. He has eventually a veto, without being obliged to assign his reasons for it; it is otherwise with the president. But to return to the senate.

1. In case of the absence of the vice-president, or of his exercising the office of president of the United States, they may choose a president pro tempore – they have also a right of choosing all their other officers.[83]

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2. The senate have the sole power of trying impeachments.[84] A most inordinate power, and, in some instances, utterly incompatible with their other functions, as we shall hereafter have occasion more fully to demonstrate.

3. The senate likewise constitute a part of the executive department[85] – the examination of which part of their constitution we shall take up under its proper head.

Exclusive of these privileges which the two houses possess, as contradistinguished from each other, each house possesses the right of determining the rules of it's own proceedings; of punishing it's members for disorderly behavior; and of expulsion, provided two-thirds concur therein.[86]

Each house is moreover the judge of the elections, returns, and qualifications of it's own members,[87] as we have before observed; a majority of each is requisite to form a quorum to do business; a provision of no small importance, since otherwise it is possible that the concerns of the nation might be decided by a very small portion of it's representatives; if; as has been done in other assemblies, the quorum were left to the decision of the body itself. In England, where there are near six hundred members in the house of commons, the number of 45 constitutes a quorum to do business. Is it possible that the nation can be represented by that number, whilst the elections stand upon their present footing? But although it requires a majority of the house of representatives, or the senate, to do the business of the nation, a smaller number may adjourn from day to day,[88] and compel the attendance of absent members.

Each house is moreover required to keep a journal of its proceedings,[89] and from time to time to publish the same; excepting such parts as may in their judgments require secrecy; a provision evidently calculated to defeat the salutary purposes of the former part of the rule; since every measure which intrigue may dictate, or cabal enforce, may thus be hid from the public eye, by being consigned to the secret journals an expedient too obvious to be neglected whenever it may be found advisable.

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.[90] Any member of the house of lords in England may enter his protest on the journals of the house, but the commons possess no such privilege. In a representative government, it is of the utmost consequence that the people should be informed of the conduct of their delegates individually, as well as collectively. This purpose is fully answered by the rule here spoken of. But to prevent a call of the yeas and nays too frequently, as is said to have been practiced in the former congress, the constitution has set some reasonable limits to the exercise of this power, by requiring that at least one-fifth of the members present should concur in the expediency of it.

To prevent those inconveniences which might arise from the national legislatures omitting to assemble as often as the affairs of the nation require, the constitution provides, that congress shall assemble,[91] at least once a year, and fixes the period of assembling to the first Monday of December, unless they shall by law appoint another day. It likewise vests the president of the United States with the power of convening them, or either house, on extraordinary occasions.[92]

Lastly, to prevent the evils which might result from the want of a proper concert and good understanding between the houses, it is provided,[93] that neither house, during the session of congress shall, without 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. And further to guard against any inconvenience which might result from their disagreement, it is provided,[94] that in such case the president may adjourn

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them to any time he shall think proper. This is the only instance in which the constitution permits an interference, with the duration of the session, on the part of the executive; and we have already seen, that though the power of convening the congress is entrusted, on extraordinary occasions, to the president of the United States, yet he has none to prevent, or even retard their assembling, at any time, by their own adjournment, or at certain stated periods fixed by law, or by the constitution.

The duration of congress is necessarily limited to two years, the period for which the house of representatives is chosen. The period of its commencement seems to have been fixed to the fourth day of March, the day on which the first congress assembled, and that of it's expiration to the third of that month biennially. – It is incapable of any other mode of termination, their being no power in any part of the government to dissolve it. By these wise and salutary provisions; it is effectually guarded against every possible encroachment on it's independence. Very different from the constitution of the British parliament, since the crown may, at any time, put an end to a session by a prorogation, or to the existence of a parliament by a dissolution.

The president of the United States may be considered *sub modo*, as one of the constituent parts of congress,[95] since the constitution requires that every bill, 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 him: 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 objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that house agree to pass it, 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 shall become a law. In all such cases the yeas and nays shall be entered on the journals of both houses. If any bill, etc. be not returned by the president within ten days, Sundays excepted, unless in case of adjournment, whereby the return is prevented, it shall nevertheless be a law etc.

This closes our hasty sketch of the constituent parts of the congress of the United States, with a short view of the duration and the outlines of the distinct powers, and privileges of both houses, as also of the individuals who compose them. Before we proceed to the investigation of the powers of the whole body thus formed, let us compare some of it's most distinguished features, with those of the two houses of the British parliament, long held in idolatrous veneration, as a palladium of political freedom which some partial deity had bestowed upon that favorite nation, and presenting a model of perfection which the combined wisdom of nations, and of ages, could but faintly imitate, and never equal. We shall occasionally resume this comparison at different periods of our inquiry, in order to assist the student in the application of what he will meet with in authors on the subject of that far famed constitution, to the more recent institutions of our own.

NOTES

33. See Note C. p. 79

34. Bill of Rights, Art. 15.

35. Vattel, B. 1. c. 1. §. 4.

36. Vattel. Introduction, §. 18. 19.

37. Confederation, §. 2.

38. Vattel, B. 1. c. 1. §. 10.

39. Ante. Note D page 140.

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40. Ibidem, page 140.

41. Federalist, 1 Vol. p. 196. 197.

42. Ibidem, p. 199. 200.

43. Speech of the late Patrick Henry, Esq. in the Virginia Convention.

44. Vattel, passim.

45. The acts of the 3rd Congress ch. 49, and 65, give to the state courts, jurisdiction in certain cases of this nature.

46. But now by the 13th article of the amendments to the C. U. S. the states have exclusive jurisdiction in these causes.

47. 1. Congress, 1. session, chap. 20. sect. 12.

48. Federalist, vol. I. p.196.

49. The powers delegated by the proposed constitution of the federal government, are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation and foreign commerce; with which last, the power of taxation will for the most part be connected. The powers reserved to the several states, will extend to all the objects, which in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the state. –

Federalist, vol. II. p. 82.

50. See the tract upon the common law of England, 4th part.

51. See Vattel, page 18.

52. C. V. Art. 3.

53. On this subject the student is referred to the Federalist, Nos. 52. and 53.

54. The act of 1785 c. 55. (V. L.) fixes the qualification of electors to be a freehold estate, in twenty-five acres of land, with a house the superficial content of the foundation whereof is twelve feet square or equal to that quantity, and a plantation thereon; or in fifty acres of unimproved land; or in a lot, or part of a lot of land in a city or town established by act of assembly, with a house thereon of the like superficial content or quantity; but the possession of lands, in virtue of which the right of suffrage is claimed, unless acquired by descent, devise, or marriage settlement, must have continued six months.

In Williamsburg and Norfolk every house-keeper being a citizen is entitled to vote.

Free negroes, mulattoes, persons under the age of twenty-one years, and such as have refused to give assurance of fidelity to the commonwealth, are excluded from the right of suffrage.

55. The following table exhibiting the ratio of representation in every state, as fixed by the temporary provision contained in the constitution of the United States, and by the several acts for the apportionment of representatives among the several states according to the several enumerations made in the years 1791, and 1801, will afford a pleasing evidence of the rapid increase of the population of the United States in the short period of thirteen or fourteen years.

States	Representation under the Constitution	Representation according to the First Census	Representation according to the Second Census
New Hampshire	3	4	5
Massachusetts	8	14	17
Rhode Island	1	2	3
Connecticut	5	7	7
New York	6	10	17
New Jersey	4	5	6

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Pennsylvania	8	13	18
Delaware	1	1	1
Maryland	6	8	9
Virginia, including Kentucky	10		
Virginia, exclusive of Kentucky		19	22
North Carolina, including Tennessee	5	10	
North Carolina, exclusive of Tennessee			12
South Carolina	5	6	8
Georgia	3	2	4
THE NEW STATES, *viz.*			
Vermont		2	4
Kentucky		2	6
Tennessee		1	3
State North West of the Ohio			1
TOTAL	65	106	142

The apportionments both according to the first and second census, were made at the rate of one for every thirty-three thousand persons in each state: so that the increase of population has been as 142 to 106, or nearly as 4 to 3 in ten years. See L. U. S. 2. Cong. c. 23. and 7. Cong. 1. Sess. c. 1.

56. On this subject the student is referred to the Federalist No. 55, 56, 57, 58.

57. The student is referred to the Federalist, No. 51.

58. Spavan's Pufendorf, p. 10.

59. C. U. S. Art. 1. Sect. 4, see also Federalist, No. 59, 60, 61, upon this subject.

60. Amendments on this subject have been proposed by the States of New Hampshire, Massachusetts, Rhode-Island, New York, Virginia, North Carolina, and South Carolina.

61. These two acts are omitted in the compilation of 1794.

62. Black. Com. 159.

63. "When we elect persons to represent us in parliament" (says a judicious writer) "we must not be supposed to depart from the smallest right which we have deposited with them. We make a lodgment, not a gift; we entrust, but part with nothing. And, were it possible that they should attempt to destroy that constitution which we had appointed them to maintain, they can no more he held in the rank of representatives than a factor turned pirate, can continue to be called the factor of those merchants whose goods he had plundered, and whose confidence he had betrayed. The men, whom we thus depute to parliament, are not the bare likeness or reflection of us their constituents; they actually contain our powers and privileges, and are, as it were, the very persons of the people they represent. We are the parliament in them? we speak and act by them. We have, therefore, a right to know what they are saying and doing. And should they contradict our sense, or swerve from our interests, we have a right to remonstrate in form, and direct them. By which means we become the regulators of our own conduct, and the institutors of our own laws, and nothing material can be done but by our authority and consent." Burgh's Political Disquisitions, Vol. 1. p. 202. – However inadmissible this doctrine may be in Great Britain, it seems perfectly adapted to the principles of our government.

64. C. U. S. art. 1. sect. 2.

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65. Ibid. sect. 3. See the Federalist, No. 62.

66. Vattel, 9, 16.

67. See Federalist, No. 62.

68. Ibidem.

69. C. U. S. Art. 1. §. 3.

70. Ibid. §. 2 & 3.

71. V. L. Acts of 1788, c. 2. 1792, c. 1.

72. C. U. S. Art. 1. Sec. 2 and 3.

73. Ibidem, Sec. 6.

74. C. U. S. Art. 1. Sec. 6.

75. V. L. Acts of 1788, c .38, 1794, c. 36. Amended 1798, c. 15.

76. C. U. S. Art. 1. Sec. 6.

77. The act of the first congress, 1 Session, c. 17 fixed the compensation to the members of congress at six dollars per diem, and the same for every twenty miles distance, which they travel in coming to and returning from congress, until the fourth of March, 1795. After which period the members of the senate were to receive seven dollars, and the representatives six dollars only per diem. But the act of the 4th congress, c. 4. places the members of both houses exactly on the same footing, allowing them six dollars per diem, without distinction.

78. C. U. S. Art. 1. s. 2.

79. Ibid. s. 7.

80. C. U. S. Art. 1. s. 2.

81. Ibid. s. 3.

82. In the first session of the second congress, the house of representatives passed a bill apportioning the number of representatives in the ratio of one for thirty thousand. The senate were equally divided upon this bill. Some of the members, though momentarily expected, being absent, the question was put, and carried by the decision of the vice president against the bill. If ever a case could he named under the constitution which seemed to belong solely to the representatives to determine, it was this.

83. C. U. S. Art. 1. s. 3.

84. Ibid.

85. Ibid. Art. 2. s. 2.

86. What farther powers or privileges the several houses of congress may constitutionally possess, has now become a question of no small importance. The great Bacon observes,[b] "that as exception strengthens the force of a law, in cases not excepted, so enumeration weakens it, in cases not enumerated." The powers vested in congress, the privileges of the members, and of each house, are severally enumerated in the constitution; not made exceptions from general powers, not enumerated. Consequently it would appear that they were not capable of extension, beyond the letter of the constitution itself. The twelfth article of the amendments to the constitution seems also not to favor a constructive extension of the powers of the federal government, or any department thereof; yet a case has occurred, which shows that the house of representatives have put a different construction on their powers. – On the 28th day of December, 1795, on information given by several members in their places (not upon oath,) of an attempt to corrupt them made by one Robert Randall, it was "resolved, that Mr. Speaker do issue his warrant directed to the sergeant at arms attending this house, commanding him to take into custody, where-ever to be found, the body of the said Robert Randall, and the same in his custody to keep, subject to the further order and direction of the house.

> "A warrant, pursuant to the said resolution, was accordingly prepared, signed by Mr. Speaker under his seal, attested by the clerk, and delivered to the sergeant, with order forthwith to execute the same, and make due return

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thereof to the house." The next day Randall was brought before the house in custody. He was detained in custody from that time to the 6th day of January, when a motion was made and seconded, that the house do come to the following resolution:

"Whereas any attempt to influence the conduct of this house, or its members, on subjects appertaining to their legislative functions, by motives other than the public advantage, is a high contempt of this house, and a breach of its privileges: and whereas it does appear to this house, by the information on oath of sundry members, and by the proceedings thereon had before the house, that Robert Randall did attempt to influence the conduct of the said members, in a matter relating to their legislative functions, to wit, the sale of a large portion of the public property, by motives of private emolument to the said members, other than, and distinct from the public advantage: therefore,

"Resolved, That the said Robert Randall has thereby committed a high contempt of this house, and a breach of its privileges.

"The previous question thereon was called for by five members, to wit – shall the main question, to agree to the said resolution, be now put?

"And on the question – shall the said main question be now put?

"It passed in the negative.

"A motion was then made and seconded, that the house do come to the following resolution:

"Resolved, that it appears to this house, that Robert Randall has been guilty of a contempt to, and a breach of the privileges, of this house, by attempting to corrupt the integrity of its members, in the manner laid to his charge.

"And on the question thereupon,

"It was resolved in the affirmative, Yeas, 78. Nays, 17.

"Another motion was then made and seconded, that the house do come to the following resolution:

"Resolved, that the said Robert Randall be brought to the bar, reprimanded by the speaker, and committed to the custody of the sergeant at arms, until the further order of this house.

"And on the question thereupon,

"It was resolved in the affirmative.

"Pursuant thereto, the said Robert Randall was brought to the bar in custody, reprimanded by Mr. Speaker, and remanded in custody of the sergeant at arms, until further order of the house.

"The 13th of January, the house proceeded to consider the petition of Robert Randall, praying to be released from the imprisonment to which he is subject, by the order of this house, which lay on the table: whereupon,

"Resolved, That Robert Randall be discharged from the custody of the sergeant at arms, upon the payment of fees."

Proceedings of the house of representatives of the U. States, in the case of Robert Randall and Charles Whitney. – Published by order of the house of representatives.

Upon these proceedings a few remarks may not be deemed impertinent in this place.

1. By the amendments to the constitution, no person shall be deprived of life, liberty, or property, without due process of law.

Due process of law as described by sir Edward Coke,[c] is by indictment or presentment of good and lawful men, where such deeds be done in due manner, or by writ original of the common law. Due process of law must then be had before a judicial court, or a judicial magistrate. The judicial power of the United States is vested in one supreme court, and such inferior tribunals, as congress may establish, and extends to all cases in law and equity, arising under the constitution, etc.[d] In the distribution of the powers of government, the legislative powers were vested in congress – the executive powers (except in the instances particularly enumerated,) in the president and senate. The judicial powers (except in the cases particularly enumerated in the first article) in the courts: the word the, used in defining the powers of the executive, and of the judiciary,

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is, with these exceptions, co-extensive in it's signification with the word all: for all the powers granted by the constitution are either legislative, and executive, or judicial; to keep them for ever separate and distinct, except in the cases positively enumerated, has been uniformly the policy, and constitutes one of the fundamental principles of the American governments.

2. It will be urged, perhaps, that the house of representatives of the United States is, like a British house of commons, a judicial court: to which the answer is, it is neither established as such by the constitution (except in respect to its own members,) nor has it been, nor can it be so established by authority of congress; for all the courts of the United States must be composed of judges commissioned by the president of the United States, and holding their offices during good behavior, and not by the unstable tenure of biennial elections.

3. The amendments to the constitution[e] expressly provide, "that no warrant shall issue but upon probable cause supported by, oath or affirmation." The speaker's warrant for apprehending Randall was not supported by either: for the word affirmation must be understood as such a solemn asseveration by persons religiously scrupulous of swearing, as amounts in judicial proceedings to an oath, in point of obligation and penal consequences, and not to a bare assertion, however positive, made in any other manner. That the information of the members was made in the solemn manner before mentioned, or that their oath was dispensed with on account of religious scruples, cannot be presumed, since they were all sworn to their several declarations on the fourth of January, and not before.

4. The amendments to the constitution[f] expressly provide, that no person shall be held to answer to a capital, or otherwise infamous crime, unless on presentment, or indictment of a grand jury. Randall's offence was certainly an infamous crime, for which he deserved exemplary punishment. On the twenty-ninth of December, being brought to the bar in custody, it was demanded of him, whether he did admit or deny the truth of the charge against him; to which he answered, that he was not prepared to admit or deny the same. On the fourth of January, being again brought to the bar in custody, it was demanded of him by Mr. Speaker what he had to say in his defense; to which he answered, that he was not guilty. Here then Randall was held to answer for an infamous crime, without indictment or presentment of a grand jury.

5. The constitution provides, that the trial of all crimes, except in cases of impeachment, shall be by a jury.[g]

After the prisoner had pleaded not guilty, and made an application to the house that the informations might be sworn to, the house (after some preliminary proceedings) "resumed the hearing of his trial, and made some progress therein;" the next day they resumed it; and resolved to "proceed to a final decision on the said case" the next day.

6. The amendments to the constitution[h] provide, that in all criminal prosecutions, the accused shall enjoy the right to a special and public trial by an impartial jury of the state and district where the crime shall have been committed.

On the sixth of January the house proceeded to a final decision on the case of Robert Randall.

Five members of the house were his accusers, triers, and judges: four of these voted him guilty; the fifth voted with the minority; whether, as not conceiving him guilty, or as not conceiving the house to be a proper tribunal to condemn him, (both questions being blended in the resolution), does not appear. – Was this a trial by an impartial jury? Again,

By the amendments to the constitution, the jury should be from the state and district in which the crime was committed. The triers were composed of members, *huc undique collatis*.

b. On the advancement of learning, page 440.

c. 2 Inst. p. 50.

d. C. U. S. Art. 3.

e. Art. 6.

f. Art. 7.

g. Art. 3.

h. Art. 8.

87. C. U. S. Art. 1. Sect. 5.

88. C. U. S. Art. 1. Sect. 5.

89. Ibid.

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90. C. U. S. Art. 1. Sect. 5.
91. Art. 1. S. 4.
92. Art. 2. S. 3.
93. Art. 1. S. 5.
94. C. U. S. Art. 2. Sect. 3.
95. C. U. S. Art. 1. Sect. 7.

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NOTE D, PART 3

Comparison to British Constitution; House of Commons and House of Lords

In the course of this investigation I shall select those parts of the constitution of the British parliament, which in the opinion of one of its ablest advocates, constitutes it's superior excellence, and not unfrequently quote his opinions in his own words. To these I shall occasionally oppose the sentiments of later writers of his own country, on the same subject; the maxims of our own government, or the adaptation of those of the British government to the constitution of the United States: by these means I apprehend a fair comparison of their respective merits, as tending to promote the liberty and general happiness of the community, may be made.

I. The constituent parts of the British parliament, are, the house of commons, the house of lords, and the king, sitting there in his royal political capacity, in the union of which three estates the body politic of the kingdom consists. Analogous to which, though very differently constituted, we have seen the house of representatives and senate of the United States, and *sub modo* the president of the United States forming the general congress, or the supreme political legislature of the federal government. Thus far the great outlines of both governments appear to run parallel: they will however upon a nearer scrutiny be found frequently to diverge. We shall begin with the house of commons, which forms the democratic part of the British constitution.

"In a free state" says the author of the commentaries "every man who is supposed a free agent, ought to be in some measure his own governor, and therefore a branch at least of the legislative power should reside in the whole body of the people. In so large a state as Britain, therefore, it is very wisely contrived that the people should do that by their representatives, which it is impracticable to perform in person; representatives, chosen by a number of minute and separate districts, wherein all the voters are, or easily may be, distinguished."[96] He adds, elsewhere, "in a democracy there can be no exercise of sovereignty, but by suffrage, which is the declaration of the people's will. In all democracies, therefore, it is of the utmost importance to regulate by whom and in what manner the suffrages are to be collected. In England where the people do not debate in a collective body, but by representation, the exercise of this sovereignty consists in the choice of representatives."[97]

Such are the principles laid down by this distinguished writer, from whence one would be led to conclude that the elections for members of the house of commons were regulated in a manner as conformable thereto as possible. That where there was an equality of right, an equality of representation would also be found; and that the right of suffrage would be regulated by some uniform standard, so that the same class of men should not possess privileges in one place, which they are denied in another.

1. By equality of representation, it will be understood, that I mean the right which any given number of citizens possessing equal qualifications in respect to the right of suffrage, have, to an equal share in the councils of the nation by their representatives, as an equal number of their fellow citizens in any other part of the state enjoy.

In England and in Wales there are fifty-two counties, represented by knights,[98] elected by the proprietors of lands; the cities and boroughs are represented by citizens and burgesses, chosen by the mercantile part, or supposed trading part of the nation. – The whole number of English representatives, is 513 and of Scots, 45. The members of boroughs now bear above a quadruple proportion to those for counties: from whence one would, at first, be apt to conclude, that the population or at least the number of electors in the counties were equal; and, that the boroughs were

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at least four times as populous as the counties, collectively. The former of these suppositions would be perfectly unfounded in truth; the latter perhaps may approach nearer to it. In truth, were the latter supposition well founded, the equality of representation would not be much advanced by it. In London which is supposed to contain near a seventh part of the number of the inhabitants of all England, they are entitled to four members only in parliament. The inconsiderable borough of Melcomb Regis in Dorsetshire sends as many. Manchester and Birmingham, two large populous, flourishing, manufacturing towns have no representative, whilst the depopulated borough of Old Sarum, without a house or an inhabitant, is the vehicle through which two members obtain their seats in parliament; a representation equal to that of the most populous county.

Many other corresponding instances might be adduced to prove the inequality of representation; but they are unnecessary. – In America the representation is in exact proportion to the inhabitants. Every part of the states is therefore equally represented, and consequently has an equal share in the government. Here the principle that the whole body of the people should have a share in the legislature, and every individual entitled to vote, possess an equal voice, is practically enforced. – In England it is a mere illusion.

It is but justice to acknowledge that attempts have repeatedly been made, to effect a reform in this part of the British constitution: the voice of the nation has more than once loudly demanded it – but their rulers, like the god Baal, have been otherwise employed; or deaf, or peradventure asleep, and could not be awaked.

2. As to the right of suffrage in the individual, nearly the same principle seems to prevail in respect to the qualification in lands, in both countries; and the different manner of ascertaining it, is not sufficient to require any remark. I shall only observe that copy-holders, whose interest, in almost every other respect in their lands, seem to be equal to that of a free-holder, (at least, such as have inheritances in them) are not admitted to the tight of suffrage. The proportion of copy-holders for life; or of inheritance, to the freehold tenants of the counties, I have never heard estimated: it is, however, very considerable.

"The right of voting in boroughs is various," says Blackstone, "depending entirely on the several charters, customs, and constitutions of the respective places, which has occasioned infinite disputes." It may vary no less perhaps in the different states of America, but there is this advantage, that however various, there can be little room for doubts, or disputes on the subject. In Virginia the qualification to vote in boroughs, is as fixed and invariable as in the counties. One principle however must not be lost sight of; which perhaps should have come under the last head. No borough can ever be entitled to a representative, whenever the number of inhabitants shall, for the space of seven years together, be less than half the number of the inhabitants of any county in Virginia. In England the boroughs retain the right of representation, as we have seen, even after they have lost their inhabitants. Another circumstance respecting them is no less notorious; though the right of suffrage is in the burgher, the power of sending the member to parliament is in the lord of the soil; a number of the boroughs being private property, and the burghers, who are tenants, bound to vote as their lord shall direct: the shadow of the right of suffrage is all these burghers possess – to the exercise of that right they are as much strangers, as to the pyramids of Egypt, or the ruins of Palmyra. It is scarcely possible that the electors of America should ever be degraded to a similar state of political mechanism.

3. The qualification of the members is the next object of our comparison. In England a knight of the shire must possess an estate in lands of the value of 600£ sterling, per annum, and a member for a

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borough of one half that value, except the eldest sons of peers; and of persons qualified to be knights of shires, and members of the two universities.

This at first view appears to be a proper and necessary precaution, as far as it extends, to secure the independence of the members of that branch of the legislature. But this argument is neither conclusive in fact, nor even in theory. Neither of these sums is an adequate support for a man moving in the rank of a member of the British parliament. Luxury has taken too deep root in the nation to authorize the supposition generally; and if it fails in general, it is of little avail that a few instances may be found of persons in that sphere, whose expenses do not exceed the requisite qualification in point of fortune. But if the principle be admitted that an independent fortune be necessary to secure the independence of the member in his legislative conduct, it would seem that the measure ought to be the same to all the members, since, according to the doctrine laid down by our author, a member though chosen by a particular district, when elected, serves the whole realm, the end of his election not being particular, but general. An equality of qualification should then have taken place; and if 600£ is necessary to secure the independence of the member, those who possess but half as much ought to be excluded; on the other hand, if 300£ be a competent sum for that purpose, how injurious must that law be to the rights of the citizen, which requires the qualification which is acknowledged to be sufficient for every good purpose, to be doubled. But a qualification in respect to estate is neither equally nor uniformly required; if the member elected should happen to be the eldest son of a peer, or of a person qualified to be, knight of the shire; in either of these cases it is altogether dispensed with. The effect of this, as it respects the former of these classes of men, we shall speak of hereafter. As to the latter, it is sufficient to say, that presumption is allowed to supply the place of evidence; and both the exceptions prove the deviation from the general principle to have originated in the influence of the aristocratical interest of the nation.

In America no qualification in point of estate is required in the representative in congress by the constitution; and perhaps we may with some propriety insist that any such qualification would be not only unnecessary, but contrary to the true interests of their constituents. In England the interests of the crown, of the nobles, and of the people, are confessedly distinct and often diametrically opposite. In America all are citizens possessing equal rights, in their civil capacities and relations; there are no distinct orders among us, except while in the actual exercise of their several political functions. When the member quits his seat, or the magistrate descends from the bench, he is instantly one of the people. The pageantry of office reaches not beyond the threshold of the place where it is exercised; and civil distinctions privileges or emoluments independent of the office are interdicted by the principles of our government. To secure the independence of the members conduct, perhaps no previous qualification, in point of estate may be requisite; though such a qualification might for another reason have been not improper: that by sharing in the burdens of government, he might be restrained from an undue imposition of them upon his constituents. The law of the state indeed requires that the representative should he a freeholder, as well as a resident in the district; but both these provisions, as they require qualifications which the constitution does not, may possibly be found to be nugatory, should any man possess a sufficient influence in a district in which he neither resides nor is a freeholder, to obtain a majority of the suffrages in his favor. But how strong soever the reasons in favor of a qualification in point of estate might have been, on the grounds last spoken of; they were overbalanced probably by two considerations.

First, that in a representative government, the people have an undoubted right to judge for themselves of the qualification of their delegate, and if their opinion of the integrity of their

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representative will supply the want of estate, there can be no reason for the government to interfere, by saying, that the latter must and shall overbalance the former.

Secondly; by requiring a qualification in estate it may often happen, that men the best qualified in other respects might be incapacitated from serving their country. To which we may add, that the compensation which the members receive for their services, is probably such an equivalent, as must secure them from undue influence, or concessions from motives of interest.

A second qualification required by the British constitution is, that the person elected shall be of the age of twenty-one years at the time of his election:[99] ours with more caution and perhaps with better reason, requires that he shall have attained to the age of twenty-five years.

These are all the positive qualifications, in which there appears to be any very material difference worth remarking. Of negative ones, those which relate to the incapacity of certain descriptions of placemen and pensioners in England, are limited to a very small part of the host of the former who depend upon the crown for support; and in respect to the latter only such pensioners as hold during the pleasure of the crown, are excluded.[100] A list of placemen and pensioners in either the present or last parliament of England was published some years ago. – I do not recollect their exact number, but I can be positive that it exceeded two hundred.[101] A number, sufficient to secure the most unlimited influence in the crown: to these let us add the eldest sons of peers, and ask whether in a question between the commons and the nobility, it would be probable that they would give an independent vote, against the order in which they soon hoped to obtain a permanent rank and station.

Lastly, let me ask, if the conduct of those borough members who hold their seats by the appointment of members of the other house, or perhaps of their own, may reasonably be expected to be uninfluenced by the nod of their patrons? Can a house thus constituted be said to represent the people, the democratic part of the government? Can they be said to form a check upon the proceedings of the nobility, or the measures of the crown?[102] The question only requires to be understood, to be answered decidedly in the negative.

We have seen that no person holding any office under the United States, shall be a member of either house during his continuance in office; and that no member of congress 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 thereof increased during such time.[103] These provisions appear to be more effectual to secure the independence of the members, than any qualification in respect to estate: but, they seem not to have been carried quite far enough.

In the course of this parallel, we have seen that every deviation in the constitution of the United States from that of Great Britain has been attended with a decided advantage and superiority on the part of the former. We shall perhaps discover, before we dismiss the comparison between them, that all its defects arise from some degree of approximation to the nature of the British government.

The exclusive privileges of the house of commons, and of our house of representatives, with some small variation are the same. The first relative to money bills, in which no amendment is permitted to be made by the house of lords, is modified by our constitution so as to give the senate a concurrent right in every respect, except in the power of originating them; and this upon very proper principles; the senators not being distinguished from their fellow citizens by any exclusive privileges, and being in fact the representatives of the people, though chosen in a different manner from the, members of the other house; no good reason could be assigned why they should not have a voice on the several parts of a revenue bill, as well as on the whole taken together. The power of

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impeachment by the house of representatives corresponds, precisely with that of the British house of commons.

II. We are now to draw a parallel between the house of lords and the senate of the United States, as a second constituent part of the national legislature; and could the parallel between them end there, it might have been said, that all the branches of our political legislature, were, like a well chosen jury, *omni exceptione majores*.

The house of lords are to be considered in two distinct points of view. – First, as representing a distinct order of men, with exclusive privileges annexed to their individual capacity, and" secondly, as representing the nation.

1. As to the necessity of a distinct order of men in a state; with exclusive privileges annexed to the individual capacity, the author of the commentaries observes, "That the distinction of rank and honors is necessary in every well governed state, in order to reward such as are eminent for their public services, in a manner the most desirable to individuals, and yet without burden to the community; exciting thereby an ambitious, yet laudable ardor, and generous emulation, in others. A spring of action, which however dangerous or invidious in a mere republic, will certainly be attended with good effects under a monarchy. And since titles of nobility are thus expedient in the state, it is also expedient that their owners should form an independent and separate branch of the legislature. If they were confounded with the mass of the people, and like them only had a vote in electing representatives their privileges would soon be borne down and overwhelmed by the popular torrent, which would effectually level all distinctions."[104]

The conclusion which evidently arises from the former part of this quotation, "that no mere republic can ever be a well governed state," inasmuch as honors and titles, the necessity of which, is here so pointedly urged, are dangerous and invidious in such a government, may be proved to be false; both, from reasoning and example. But it will be time enough to controvert our author's conclusion, when the truth of the principle upon which it is founded is established. The British constitution, with him, is somewhat like the bed of Procrustes; principles must he limited, extended, narrowed, or enlarged, to fit it. If they are not susceptible of so convenient a modification, they are to be wholly rejected. – But to return:

The vital principle of MIXED governments is the distinction of orders, possessing, both collectively and individually, different rights, privileges or prerogatives. In an absolute monarchy, a confirmed aristocracy, or a pure democracy, this distinction cannot be found. There being no distinction of orders, there can be no contention about rights, in either of these forms of government, so long as the government remains in the full vigor of its constitution. When either of these three forms of government departs from its intrinsic nature, unless it assumes one of the other instead thereof, it becomes a MIXED government. – And this mixture may consist in the combination of monarchy with aristocracy, as in Poland; or with democracy, as in France, under it's late constitution, as modeled by the national assembly, and ratified by the king; or, in the bleeding of the aristocratic and democratic forms, as was the case with the Roman Republic after the establishment of the tribunes; or of all three, as in the British constitution. The existence of either of these combinations are said to form the constitution of the state in all the governments of the world, except those of America, and France under it's late constitution; in these the constitution creates the powers that exist: In all others, the existing powers determine the nature of the constitution. To preserve those existing powers in their full tone and vigor, respectively, it may be necessary that each should possess an independent share in the supreme legislature, for the reasons assigned by the author of the

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commentaries; but this no more proves the necessity of the order, in a well governed state, than the necessity of wings to the human body would be proved, by a critical dissertation, on the structure, size, and position, of those of the fabulous deities of antiquity.

Our author considers those rewards which constitute a separate order of men; as attended with no burden to the community; nothing can be more false than such a supposition. If the distinction be personal, only, it must be created at the expense of the personal degradation of the rest of the community, during the life of the distinguished person. If hereditary, this degradation is entailed upon the people: personal distinctions cannot be supported without power, or without wealth; these are the true supporters of the arms of nobility; take them away, the shield falls to the ground, and the pageantry of heraldry is trodden under foot.[105] What character is less respected in England, than a poor Scotch lord, who is not one of the sixteen peers of that kingdom? That lord in his own clan, possesses comparative wealth and power sufficient among his humble dependents, to be looked up to as a Cræsus in wealth, and a Caesar in authority.

"A titled nobility," says a late distinguished English writer,[106] "is the most undisputed progeny of feudal barbarism. "Titles had in all nations denoted offices it was reserved for Gothic Europe, to attach them to ranks. Yet this conduct admits explanation, for with them offices were hereditary, and hence the titles denoting them became hereditary too. These distinctions only serve to unfit the nobility for obedience, and the people for freedom; to keep alive the discontent of the one, and to perpetuate the servility of the other; to deprive the one of the moderation that sinks them into citizens, and to rob the other of the spirit that exalts them into freemen. The possession of honors by the multitude, who have inherited, but not acquired them, engrosses and depreciates these incentives and rewards of virtue."[107] If these are the genuine fruits of that laudable ardor, and generous emulation, which give life and vigor to the community, and sets all the wheels of government in motion, heaven protect those whom it encounters in it's progress.

But is there no stimulus to that laudable ardor and generous emulation which the commentator speaks of, to be found in a pure democracy, which may compensate for the absence of ranks and honors? Yes. VIRTUE; that principle which actuated the Bruti, a Camillus, and a Cato in the Roman republic, a Timoleon, an Aristides, and an Epaminondas among the Greeks, with thousands of their fellow citizens whose names are scarcely yet lost in the wreck of time. That principle whose operation we have seen in our own days and in our own country, and of which, examples will be quoted by posterity so long as the remembrance of American liberty shall continue among men. – "Virtue," says Montesquieu,[108] "in a republic is a most simple thing; it is a love of the republic. Love of the republic in a democracy is a love of the democracy: love of the democracy is that of equality. The love of equality in a democracy limits ambition to the sole desire, to the sole happiness, of doing greater services to our own country than the rest of our fellow citizens. – But all cannot render equal services: hence distinctions arise here from the principle of equality, even when it seems to be removed, by signal services, or superior abilities."

This distinction, the only one which is reconcilable to the genius and principle of a pure republic, is, if we may reason from effect to cause,[109] the most powerful incentive to good government that can animate the human heart, with this advantage over those hereditary honors for which the commentator is so zealous an advocate, that the ambition excited by the former must of necessity be directed to the public good, whilst the latter springing from self love, alone, may exist in the breast of a Caesar or a Cataline. A Franklin, or a Washington, need not the pageantry of honors, the glare of titles, nor the pre-eminence of station to distinguish them. Their heads like the mountain pine are seen above the surrounding trees of the forest, but their roots engross not a larger portion

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of the soil.

Equality of rights, in like manner, precludes not that distinction which superiority in virtue introduces among the citizens of a republic. Washington in retirement was equal, and only equal, in rights, to the poorest citizen of the state. Yet in the midst of that retirement the elevation of his character was superior to that of any prince in the universe, and the luster of it far transcended the brightest diadem.

But even where it is conceded that distinctions of rank and honors were necessary to good government, it would by no means follow that they should be hereditary; the same laudable ardor which leads to the acquisition of honor, is not necessary to the preservation of its badges; and these are all which it's hereditary possessors, in general, regard. Had nature in her operations shown that the same vigor of mind and activity of virtue which manifests itself in a father, descends unimpaired to his son, and from him to latest posterity, in the same order of succession, that his estate may be limited to, some appearance of reason in favor of hereditary rank and honors might have been offered. But nature in every place, and in every age, has contradicted, and still contradicts this theory.[110] The sons of Junius Brutus were traitors to the republic; the emperor Commodus was the son of Antoninus the philosopher; and Domitian was at once the son of Vespasian, and the brother of Titus.

If what has been said be a sufficient answer to the necessity of the distinction of ranks and honors to the well government of a state, the commentator himself[111] has afforded an unanswerable argument against their expedience in a republic, by acknowledging them to be both dangerous and invidious in such a government. And herewith agrees the author of the Spirit of Laws,[112] who informs us, that the principle of a democracy is corrupted, when the spirit of equality is extinct. The same admirable writer[113] gives us a further reason why so heterogeneous a mixture ought not to have a place in any government where the freedom and happiness of the people is thought an object worthy the attention of the government "A nobility," says he, "think it an honor to obey a king, but consider it as the lowest infamy to share the power with the people."

We are indebted to the same author,[114] for the following distinguished features of aristocracy: "If the reigning families observe the laws, aristocracy is a monarchy with several monarchs: but when they do not observe them, it is a despotic state governed by a great many despotic princes. In this case the republic consists only in respect to the nobles, and among them only. It is in the governing body; and the despotic state is in the body governed. The extremity of corruption is when the power of the nobles becomes hereditary they can hardly then have any moderation." Such is the picture of that order of men who are elevated above the people by the distinctions of rank and honors. When the subjects of a monarchy, they are the pillars of the throne, as the commentator stiles them; or, according to Montesquieu, the tools of the monarch. – When rulers, as in an aristocracy, they are the despots of the people. – In a mixed government, they are the political Janisaries of the state, supporting and insulting the throne by turns, but still threatening and enslaving the people.[115]

In America the Senate are not a distinct order of individuals, but, the second branch of the national legislature, taken collectively. They have no privileges, but such as are common to the members of the house of representatives, and of the several state legislatures: We have seen that these privileges extend only to an exemption from personal arrests, in certain cases, and that it is utterly lost, in cases of treason, felony, or breach of the peace. They more properly the privileges of the constituents, than of the members, since it is possible that a state might have no representative, and the United States no legislature, if the members might be restrained from attending their duty, by process issued at the

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suit of a creditor, or other person who might suppose he had cause of action against them. In England the privileges of the peerage are in some instances an insult to the morals of the people, the honor of a peer, on several occasions, being equipollent [equivalent] with the oath of a commoner. The exemption from personal arrests in civil cases is extended as well to his servant, as to the lord of parliament; to the injury of creditors, and the no small encouragement of fraud and knavery. And the statutes of *scandalum magnatum* hang in *terrorem* over the heads of those who dare to scrutinize, or to question the reality of those superior endowments which the law ascribes, to the immaculate character of a peer or peeress of the realm. Happy for America that her constitution[116] and the genius of her people, equally secure her against the introduction of such a pernicious and destructive class of men.[117]

Secondly. We shall now consider the British house of lords, as representing the nation.

The superior degree of wisdom which is to be found in aristocracies, forms the principal argument in favor of this branch of the British legislature. Let us examine how far this requisite to national councils, is to be attained by the constitution of that house.

1. The house of lords is composed either of new made peers, or of such to whom that honor has been transmitted by hereditary right; we may admit, though the fact will hardly justify it, that the new made peers have a chance of being selected for their superior wisdom; nay that this is universally the case; the portion of wisdom thus acquired, even in the creative reign of George the third, could never he sufficient to counterbalance the large majority of hereditary peers, who affect to hold in great contempt the talents and learning of their new created brethren. The wisdom of this body rests then upon the chance of natural talents, with the advantages of education to improve and mature them. As to the latter, should we admit that a child, who, from the moment he is capable of making any observation, sees himself treated as a superior being, would have the same stimulus to improve, as one who is taught to consider the road to science as the only one which leads to distinction, no advantage could be claimed in favor of the hereditary legislator, unless it should be proved that the benefits of education are necessarily confined to that class of men. – The question rests then solely upon the mode by which the nobility become legislators, and here every argument against the transmission of talents and virtue in hereditary succession, recurs with accumulated force, the chance of this inheritance being confined by the laws to the eldest son.[118]

The senate of the United States, as we have seen, is composed of individuals selected for their probity, attachment to their country, and talents, by the legislatures of the respective states. They must be citizens of the states for which they are chosen – their merits must be known, must have been distinguished, and respected. Age must have matured the talents, and confirmed the virtues which dawned with childhood, or shine forth with youth. Principles must have been manifested, and conduct have evinced their rectitude, energy, and stability. – Equivocation of character can scarcely obtain admittance where the trust is important, elections rare, and limited to an individual, or, at most, to two. The whole number of senators are at present limited to thirty-two – it is not probable that they will ever exceed fifty. – A late writer[119] has observed, that an assembly of Newtons, if they exceeded a hundred, would be a mob. The British house of peers consists of twice that number at the least, and may be increased, at the will of the prince, to any number.[120] – The senators of America have the interest of a state to promote, or to defend. A British house of peers has the privileges of the order, the interests of the corporation of aristocracy, to advance. Their wisdom, their exertions, are directed to their own personal aggrandizement. – Those of an American senator can scarcely find an object, except the good of the nation, or of the individual state which he represents. A peer holds himself responsible to no one for his conduct; a senator is responsible to

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his constituents, and if he abuses their confidence, will be sure to be displaced, whilst the former hugs himself in the security and stability of his station. I say nothing of the bench of bishops. The independence of that body has been too frequently questioned to render them respectable, even in the eyes of their own nation, as a part of the legislature.

A member of the house of lords, may make another lord his proxy,[121] to vote for him in his absence; a privilege which he is supposed to derive from sitting there in his own right; and not as one of the representatives of the nation. He may likewise, by leave of parliament enter his protest against any measure, analogous to which we have seen that the yeas and nays of either house of congress shall be called, if one fifth part of the members present concur therein.[122]

The lord chancellor, or any other person appointed by the king's commission is speaker of the house of lords;[123] and if none be so appointed, the house of lords may elect; and if the speaker be a lord of parliament he may also give his opinion upon any question which the speaker of the commons cannot. – The vice president of the United States is in like manner speaker of the senate, but he is prohibited from voting unless the senate be equally divided.[124] The necessity of providing for the case of a vacancy in the office of president doubtless gave rise to the creation of this officer: and for want of something else for him to do, whilst there is a president in office, he seems to have been placed, with no very great propriety, in the chair of the senate. An idea probably originating from the tendency which we have sometimes discovered, to imitate the model of the British constitution. The casting vote, which this officer is entrusted with, (as was before observed,) is a very important trust, and ought to have been so modified as to leave the exercise of it, to as few cases as possible. – If a measure originates in the senate, indeed, it would seem to be less dangerous, to permit the exercise of this casting vote, than where it was made use of; to negative a measure, perhaps unanimously adopted by the other house, and upon which the senate have been divided merely from the absence of some of it's members. This has actually happened once, on a very important occasion, as we have seen, and may happen again, on others equally interesting to the rights of the citizen.

3. The third constituent part of the British parliament, is the king, without whose assent no bill can pass into a law. The reason for this seems to be the protection of the *Jura Coronae* from the encroachments of the legislature, but this protection, says the Commentator,[125] consists in the power of rejecting rather than resolving: in like manner we have seen, that the president of the United States to, whom the executive power is entrusted, has a kind of suspensive veto – not an absolute, but a qualified negative; and so qualified too, that no salutary measure can be so long delayed by his objection to it, if two thirds of both houses concur in the expediency.[126] In England since the revolution, the royal negative, as to the practical and ostensible exercise of it, seems to be a mere fiction of the constitution, the influence of the crown in both houses, having always proved sufficient to prevent the obtrusion of any obnoxious bill upon the throne; as has been proved on more than one occasion. The power of calling up any number of new lords, ad libitum, is a sufficient guarantee against the necessity of exercising this unpopular prerogative in the crown. But if that were to be found insufficient, a prorogation which puts an end to all matters depending in parliament would effectually answer the purpose. – And should the parliament upon being re-assembled give any indications of reviving the offensive subject, a dissolution is sure to pave the way for a more complying body in the house of commons. The history of the present administration in England affords facts to justify what has here been offered.[127] – In America the executive authority does not extend to the creating new members of the legislature: the president has no power of dissolution, or prorogation, nor even of adjournment, but in case of actual disagreement on that subject between the two houses. His assent if held longer than ten days exclusive of Sundays; is not necessary to the

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force of a law; and his negative, if it be exercised at all, must be notified within the same period to congress, together with his reasons in support of it: if they should be deemed insufficient for the rejection of the bill by two thirds of both houses, it will become a law without his approbation: which seems rather to have been intended as a precaution, provided by the constitution against the hasty passage of impolitic, or unconstitutional acts, than as an essential to the completion of a law; as we have before observed.

This concludes a short sketch of the constituent parts of the supreme legislatures of Great Britain and the U. States, with a parallel between them, and the mutual checks and balances provided by the constitution of both countries against the possible encroachments of one of these constituent parts upon the rights of the other. A late English writer[128] of popular eminence, undertakes to prove that these governments of balance and control have never existed but in the vision of theorists. I leave the affirmative to be proved by the advocates for the British constitution, confessing that my own conviction inclines rather to the doctrines of the political heretic, than to those of the most orthodox supporters of the creed which he controverts. But before I quit the subject of checks and balances, I shall say a few words on those required by the political situation, and provided by the constitution of the United States.

The territory of the United States extends along the seacoast from north to south, about one thousand miles, and westward from the coast about eight hundred, affording a variety of productions, and holding forth a variety of pursuits to the inhabitants, corresponding with that of climate, soil and situation. – To secure an equal representation of the interests of the individuals inhabiting this extensive country, united in one political bond, as to their correspondence and intercourse with the other nations of the globe, the house of representatives was constituted upon the principles of equality and reciprocity, between burdens and representation in the manner that we have already seen. But although the interests of the individuals might be common in many respects, throughout the United States, yet the territorial, as well as political division, constitution and laws of the several states, created or manifested a contrariety of interests between them, which all were perhaps equally tenacious of maintaining unimpaired. The territorial extent of Virginia being at least one hundred times as great as that of Delaware, and her representation in the proportion of nineteen to one, at present; the interest of the latter could never stand in competition with the former, if the whole legislature were composed of a single house constituted as the house of representatives is: but in the senate, Delaware, as a state; has an equal share in council with Virginia. Her separate interests are there put upon the same footing, with those of the largest states in the union, nor can she be oppressed, but in such a case as would render any other state liable to the same fate. This appears to me to be a wise and effectual balance. Should it fail, the suspensive negative of the president may counteract the machinations of an oppressive majority, in either, or both houses of congress by requiring, the concurrence of a larger proportion of both, than are likely to agree in any impolitic, unconstitutional, or partial measure. On the other hand should state interest prevail in the senate it would meet an effectual check in the house of representatives, where the number of members is not regulated by states, but by the right of suffrage. The influence of states on the latter house, can never be so great hereafter, as it was during the first and second congress, after the adoption of the constitution; that influence received a check from the negative of the president[129] which restored the constitution to it's principles, and manifested the happy effects to be derived from a well organized government, so long as any part of it remains uninfluenced by partial or corrupt motives.

Before we dismiss our parallel, a short notice of some other points may not be improper. And first, the privileges of the parliament of England,[130] and of it's members, are indefinite, and depend upon

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their own construction of them when a new case occurs. In America the privileges of the members of congress are, as we have seen, defined, and I presume limited, by the constitution;[131] and the powers of congress are equally prescribed thereby, whilst those of the British parliament have no constitutional limits whatsoever, "and if by any means a misgovernment should any way fall upon it, the subjects of the kingdom are left without all manner of remedy."[132] In America two methods are pointed out, by which any defects in the constitution may be remedied; and, should congress prove too corrupt to adopt the one, it is in the power of the state legislatures to enforce the other;[133] besides the chance which frequent elections afford, of remedying an evil before it has taken root in the several branches of government too firmly to be eradicated. Frequent elections of the representatives of the people, have been justly esteemed one of the best securities to the liberties of the people. The most frequent elections of parliaments in England have been triennial. – they have been protracted to seven years, professedly says Blackstone,[134] to prevent the great and continued expenses of frequent elections. Frequent elections would certainly offer the most effectual remedy for this evil, by diminishing that parliamentary influence which septennial elections tend to secure, and to secure which is the great object of election expenses. Whether biennial election of representatives to congress will be sufficiently frequent to secure the due dependence of the members upon their constituents, must be ascertained by experiment. I incline to think, that the reasons in favor of that period are at least equal to those against it.[135] Every objection against it's extension beyond the period assigned to the duration of our state legislature, must apply with accumulated force against the duration of the parliament of Great Britain. In England, the convening of the parliament, the continuance of the session, and the existence of the parliament depend on the pleasure of the crown. In America, the periods of election, convening, and duration of congress are fixed by the constitution or by law: the adjournments depend upon themselves, the executive have no control over any matter relative thereto, except in one instance before mentioned, and that must arise from a disagreement between the houses. In England, forty-five members constitute a house to do business, where the whole number consists of 558. In America there must be a majority of both houses to constitute a quorum.[136]

NOTES

96. 1. Blacks. Com. p. 158. 159.

97. 1. Blacks. Com. p. 170.

98. Ibid. p. 116. 159. Every county in England sends two knights of the shire to parliament: the county of Merionethshire in Wales, only, has but one. See Jacob's Law Dictionary. Tit. Knights of the Shire. As to the electors in boroughs &c. see Federalist, No. 56.

99. 1. Black. Com. p. 162.

100. Ibid 175, 176.

101. The number mentioned in Burgh's Pol. Disq. vol. 2. p. 44.

102. Mackintosh's defense of the Fr. revolution p. 262. to 269, 334. to 340.

103. C. U. S. Art. 1. Sec. 6

104. 1. B. C. 157, 158.

105. George Nevil, duke of Bedford, was degraded by act of parliament, because of his poverty, 12, Rep. 107.

106. Mackintosh on the French Revolution. p. 77.

107. Mackintosh on the French Revolution, p. 82.

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108. Esprit des Loix , lib. 1. c. 2. 3.

109. The greatest characters the world has known, have risen on the democratic floor. Aristocracy has not been able to keep a proportionate pace with democracy. The artificial noble shrinks into a dwarf before the noble of nature. Paine's Rights of Man, 45.

110. Paine's Rights of Man, 45.

111. 1 Vol. p. 157.

112. 1 Vol. p. 159.

113. 1 Vol. p. 163.

114. 1 Vol. p. 164.

115. It often happens that the contest for power is betwixt the prince and nobles, the people having been previously enslaved. In this case, the form of government is variable so far as relates to the prince and nobility; but the slavery of the people is lasting. It would be a very happy thing in an aristocracy, if, by some indirect means or other, the people could be emancipated front their state of annihilation. Montesquieu, Vol. 1. p. 16.

116. C. U. S. Art. 1. Sec. 9, 10.

117. An alien applying to be admitted to citizenship in the United States, who shall have borne any hereditary title, or been of any of the orders of nobility, in any other kingdom or state, must make an express renunciation thereof in court, at the time of his admission. L. U. S. 3. Cong. c. 85.

118. The right of primogeniture to the inheritance of virtue and talents, has always appeared to be questionable, if we may draw our conclusion from the authority of the sacred scriptures. The first born son of the first man, was a murderer. The first born son of Abraham, (by a concubine it must be confessed,) was an outcast from society; his hand was against every man, and every man's hand against him. – The first born son of Isaac was, by the dispensations of the divine providence, postponed to his younger brother; the first born of Jacob went up unto his father's bed, and defiled it; and the scepter was transmitted to the race of Judah; the first born of Jesse, appeared worthy in the sight the prophet, but he, with six of his brethren, was rejected in favor of David the youngest and the first born of that same David, was by the same providence set aside in favor of Solomon his youngest son.

119. Mackintosh.

120. The temporal peers of Great Britain are said to amount to two hundred and twenty at this time.

121. 1. Black. Com. p. 168.

122. C. U. S. Art. 1. s. 5.

123. 1. Black. Com. p. 181.

124. C. U. S. Art. 1. s. 3.

125. Vol I. p. 154.

126. C. U. S. Art. 1. Sec. 7.

127. In the reign of queen Anne, there was a creation of twelve new peers at once, in order to secure a majority in the house of lords against a bill which had been sent up by the commons, and had passed one or two readings in the other house. The passage of the India bill, which was introduced in the house of commons during the administration of Charles Fox and Lord North, was prevented by a similar expedient, and those obnoxious ministers were dismissed from the service of the crown after midnight: of the same evening when the determination was obtained. – The dissolution of the parliament, in which there was an evident majority against the new ministry, followed soon after, and secured the tranquility of their administration, by a decided majority in the new house of commons.

128. Mackintosh.

129. The bill for apportioning representatives among the states, was negatived by the president, as contrary to constitutional principles. A new bill was afterwards introduced and passed, there not being a majority of two thirds of either house, in favor of the former. – 2. Cong. 1. Sess. 1792.

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130. Black. Com. p. 160, 164, 165.

131. C. U. S. Art. 1. Sec. 6.

132. 1. Black. Com. p. 161.

133. C. U. S. Art. 5.

134. Vol. 1. p. 189.

135. Federalist Vol. 2. p. 124, to 135.

136. The manner of conducting the business in congress is very similar to that observed in the British parliament. At the opening of the session, the president meets the congress in one or other of their chambers, and addresses them upon the general affairs of the union. This address has generally received a separate answer from each house, which is presented by the whole house, to the president in his audience chamber, that is, at his own house. Every resolution to which the concurrence of the senate is necessary, must be laid upon the table on a day preceding that, in which it is moved, unless, by express commission of the house. Petitions, memorials, &c. addressed to the house must be proceeded upon in like manner. Bills are introduced by motion for leave, or by order of the house on the report of a committee, and in either case a committee is appointed to prepare the bill. Revenue bills, as was observed elsewhere, must originate in the house of representatives; but the senate may originate any other bill, and may also propose, or concur to amendments, in revenue bills, as well as others. As the senate constitutes a part of the executive department, this power of origination must have a strong tendency to strengthen, and give activity to that branch of the government.[i] Every bill receives three readings; but no bill can be twice read on the same day without special order of the house. If upon the first reading of a bill it be opposed, the question put is, whether it shall be rejected; upon the second reading, the speaker states that it is ready for commitment or engrossment. The commitment may be either to a select committee or to the whole house. In a committee of the whole, the speaker quits the chair, and a chairman is appointed, who, when the committee rises, reports to the house the progress therein made. After commitment and report, a bill may be recommitted, or at any time after, before its passage. Previous to the third reading of a bill, it is ordered to he engrossed, or written in a fair round hand; when passed in the house of representatives, it is sent to the senate for concurrence. Bills, except for imposing taxes, may originate in either house. If an amendment be agreed to, in one house, and dissented to in the other, if either house request a conference, a committee is appointed in each house to meet in the conference chamber, to state to each other, verbally, or in writing the reasons of their respective houses, for and against the amendment. After a bill has passed both houses it is enrolled on parchment, examined by a joint committee of both houses, signed by the speaker of the house of representatives, and president of the senate, and is then presented by the committee of enrolment to the president of the United States for his approbation; with an indorsement thereon, specifying in which house it originated, and the day of presentation is entered on the Journals of such house.[j] If the president approve the bill, he signs it;[k] it is then received from him by the secretary of state, recorded, and deposited among the rolls in his office; a copy of it is published in at least three of the public papers, and one printed copy is delivered to each senator and representative, and two others, duly authenticated, are sent to the executive authority of each state. The same course is to be observed, where a bill is not returned by the president, within the time limited by the constitution, and thereby becomes a law: or, having been returned, reconsidered, and approved by two thirds of both houses, becomes law.[l] The manner of proceeding in case a bill be not approved and signed by the president, has been already fully mentioned, in this Appendix.

i. See De Lolme, B. 2. c. 4. and 5.

j. Rules and Orders of the House of Representatives.

k. C. U. S. Article 1. Sect. 7.

l. L. U. S. 1. Congress. 1. Session, c. 14.

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NOTE D, PART 4

Powers of Congress

We shall now resume our inquiry into the powers the exercise of which, is by the constitution confided to the congress of the United States. Most of these we have had occasion to enumerate in the course of our examination into the distribution of power between the federal and state governments. This examination we shall now resume more at large; another object of our further inquiry will be, how, these powers are adjusted and to whom confided, in other governments, particularly that of Great Britain: this will lead us frequently to resume our parallel, and I trust, it will scarcely be found, that upon a fair comparison, the superiority can in any instance be denied to the constitution of the United States.

6. The powers of congress are the next subject to which our inquiries are to be directed; these are in general legislative yet in some few instances, they extend also to other subjects, which fall under the executive department in most other nations.

1. Congress is authorized to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense, and general welfare of the United States:[137] but all duties, imposts, and excises shall be uniform throughout the United States and no capitation; or other direct tax shall be laid, unless in proportion to the census, or enumeration, before directed to be taken: nor shall any tax or duty be laid on articles exported from any state.[138]

The principle upon which the right of taxation is founded, is here shortly expressed; viz. "To pay the debts and provide for the common defense, and general welfare of the United States." For since the government is bound to defend the lives and fortunes of the citizen, which protection cannot be afforded, unless the government be furnished with adequate supplies for that purpose, it is but reasonable that the individual should, on his part, contribute his proper proportion thereof.[139] On the other hand, since the citizen is on no other account obliged to pay taxes, or undergo any other public burden, but as they are necessary to defray the expenses of the state, it ought to be the singular care of the government to draw no further supplies than the exigencies of the public require; and to see likewise that the citizens be as little as possible incommoded with the charges they are forced to put them to; and moreover, that the public impositions be laid in just and fair proportions, without favoring and exempting of one, to the defrauding or oppression of another.[140] Such are the principles which the constitution establishes, by requiring that direct taxes should be "according to the census;" and that indirect taxes, viz. duties, imposts; and excises should be "uniform" throughout the United States.

The distinction which the constitution thus creates between direct taxes, and others, renders an inquiry into the grounds and nature of that distinction particularly interesting.

The author of the treatise upon political economy defines a tax, to be "a certain contribution of fruits, service, or money imposed upon the individuals of a state."[141] He adds; "this definition may include, in general, all kinds of burdens which can possibly be imposed, whether under the name of tribute, tithe, tally, impost, duty, gabel, custom, subsidy, excise, or any other."

As this definition includes the several species of burdens which the congress are authorized to impose, it may be proper to see in what manner the same author distinguishes them. – This he does into three classes: 1. Those upon alienation, which he calls proportional; 2. Those upon possessions, which he calls cumulative, or arbitrary; 3. Those exacted in service, as in the militia, on the roads, etc.

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1. A proportional tax is paid by the buyer, who intends to consume, at the time of the consumption; and is consolidated with the price of the commodity.

Two requisites are necessary to fix this tax upon any one first, he must be a buyer; secondly he must be a consumer.

Examples of this tax are all excises, customs, (viz. duties on imposts or exports) stamp duties, postage, coinage, and the like.

2. A cumulative or arbitrary tax may be known; 1. By the intention; which is, to affect the possessor in such a manner; as to make it difficult for him to augment his income in proportion to the tax he pays: 2. By the object when instead of being laid on any determinate piece of labor, or consumption, it is made to affect past, and not present, gains; 3. By the circumstances, under which it is levied; which imply no transition of property from hand to hand.[142]

Examples of cumulative taxes, are land taxes, poll taxes, window taxes, duties upon coaches, servants, etc.

The taxes, duties, imposts, and excises, mentioned in the constitution of the United States, appear naturally to fall under a similar division, and the words direct, and indirect, may consequently be substituted for the terms cumulative and proportional, used by that author.

It is the nature of a cumulative (or direct tax) to affect the possessions, income, and profit, of every individual, without suffering it to be in their power to draw it back again in any way whatever. A proportional, (or indirect tax) on the contrary may be said to be paid voluntarily; being paid by a voluntary purchaser, who is also a consumer.[143]

This distinction it is conceived may be illustrated by the following example: If a tax be laid upon wheels, so that every person in the state shall be liable to pay a certain sum in proportion to the number of carriages he has for his convenience this, according to the author last mentioned, would be a cumulative, or direct tax; but if a similar tax be collected in the hands of the wheel-wright, it would be a proportional, or indirect tax: in the first case; he who pays the tax upon the carriages, which he keeps for his convenience, cannot possibly draw the tax back again, after he has once paid it, by any means whatever; in the second, the wheel-wright only advances the tax, but is repaid by the purchaser who buys it for his convenience: inasmuch as he advances the price of his wheels, in proportion to the duty or tax, he has paid upon them.[144]

Supposing this to be the true distinction to be taken between direct and indirect taxes, a correspondent distinction in the mode of imposing the tax should be adopted; if, for example, the last mentioned tax is to be levied upon the person who uses the carriage for his convenience; this being a direct tax, the whole sum required to be raised thereby, must first be apportioned among the several states; but the tax itself, need not be uniform throughout the state; if it be levied on the wheelwright, the tax becomes an indirect one, and must be uniform throughout the states; but there need not be any previous apportionment of the quotas of the several states.[145]

Whilst the constitution of the United States was under consideration, objections were offered in this state, and in some others, against the power of direct taxation, thereby granted to congress. One of the amendments proposed by the convention of this state, was, "That when congress shall lay direct taxes or excises, they shall immediately inform the executive power of each state, of the quota of such state according to the census by the constitution directed, which is proposed to be thereby raised; and if the legislature of any state shall pass a law, which shall be effectual for raising such

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quota, at the time required by congress, the taxes and excises laid by congress shall not be collected in such state." This amendment was passed over in silence by congress; but the exercise of the right of direct taxation, which it was intended to qualify, has never yet been exerted; and probably will not, so long as any other expedient can be fallen upon to raise money for the support of the government.[146] Not only Virginia, but Massachusetts, South Carolina, New York, and North Carolina, concurred in expressing a disapprobation of this part of the constitution. It may, however, be doubted, whether there is as much reason for the objection, as the concurring sense of five such considerable states induces a supposition that there may be in it's favor. The power of taxation seems indispensably necessary to constitute an efficient government, and appears inseparable from the right of deciding upon any measure, which requires the aid of taxes, to carry it into effect. By the same article of the constitution we shall find, that congress have power to declare war, and to raise and support armies. What could this declaration avail without the further power of procuring the means for their support? The effects of paper emissions, lotteries, loan-offices, impressments, and requisitions from the states, the occasional expedients, and ultimate resources of a feeble confederacy, had been sufficiently seen, and felt during the revolutionary war. How often were the sinews of government unstrung; how often were it's operations stopped in the most critical conjunctures how few of them were carried into vigorous effect, from the imbecility of the federal government, and the deranged state of the finances of the union? – Nor is the mode proposed by the amendment, altogether free from objection: the states might pass laws apparently effectual, for the purpose of raising the sum required, and yet the execution of those laws be so retarded by the delinquency of collectors, as to render the suspension of the act of congress a matter no longer reconcilable to the pressing emergencies of the government. In this case, the government must either be deprived of it's resources, or the citizens he doubly burdened. Was there an instance where the requisitions of the revolutionary congress were strictly complied with, both as to the time of payment, and the quantum required? Were not arrears upon arrears continually the subject of their demands from the respective states? If this was the case during the struggle for independence, what may not be apprehended upon other occasions? It will be alleged, perhaps, that the quotas of the several states were not adjusted upon equal principles by the confederation: that each state supposed, and even complained, that it had already contributed more than it's proper quota; and that this may well account for their tardiness in complying with the requisitions of congress. This, it is true, was the ostensible excuse with most of them: but it is no less true that the states who were under-rated, or who were actually in arrears, were not less positive, or vehement, in their complaints of the inequality of the burden, than those who had reason and justice on their side; consequently they were not less tardy in complying with any new requisition. If the experience of former evils ought to make us wise, the United States have surely derived sufficient information from this source.

It is observable, that the objection only goes to the exercise of the right of direct taxation; and the imposition of excises; all other indirect modes of taxation seem to be given up without a question: but if the necessity of investing congress with a power to impose taxes be admitted, it may be questioned, whether more numerous, and important objections may not be offered against indirect, than direct taxation, as a source of revenue in a free state. If, on the one hand, indirect taxation may be considered as least burdensome in the mode of collection, on the other hand it may be remarked, that the increase of burden upon the consumer, who ultimately pays every indirect tax, is probably more than an equivalent for this convenience; which is moreover fully counterbalanced by that unavoidable inequality of burdens, resulting from indirect taxes, which it should be the object of direct taxation to avoid. Indeed, if equality of taxation be desirable, the only mode by which it can be obtained, seems to be by direct taxes, imposed in the mode prescribed by the constitution. It was,

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perhaps, impracticable to fix the ratio of direct taxes, in any just proportion, by reference to any particular species of property, even land, that kind of property, which, of all others, is most susceptible of such an adjustment, being of very unequal value, although perfectly equal in quality, and produce, in different parts of the United States. And this circumstance, alone, appears to afford a sufficient reason against uniformity, in the imposition of direct taxes. The attempt was made under the confederation to apportion the burdens of the union among the states, according to the value of all lands within each state, granted to, or surveyed for any person, with the buildings and improvements thereon.[147] But congress, by their act of April 18, proposed to the states to rescind that part of the articles of confederation, and in lieu thereof, to adopt precisely the same mode which the present constitution establishes. A bill to that effect was passed in this state;[148] but whether the proposal was favorably received by the other states, I am not informed. It appears then to be somewhat extraordinary, that the opposition to direct taxation was so strong in Virginia, where the proportion proposed, had already received the approbation of her legislature. A proportion established by reference to labor, the original source of wealth, may be considered as the best medium, by which to ascertain the rate of actual wealth; and if it be remembered, that two-fifths of the slaves in the southern states are thrown out of the calculation, we should conclude that they could not reasonably be dissatisfied with the ratio thereby established.[149]

One of the objections to the power of direct taxation most strongly insisted on, was, that a representative of Massachusetts, or Georgia, could not be a proper judge of the most fit objects of taxation in Virginia; this objection, however, the constitution seems to have guarded against effectually, by requiring that the sum to be raised by direct taxes should be apportioned among the several states in the first instance. What motive, then, could representative from Massachusetts, or from Georgia, have for opposing any mode of raising the tax in Virginia, which might be proposed by the representatives from that state? As the sum to be contributed by the state would be previously fixed, it could neither be augmented nor diminished by the mode of collection: of this, the members from the several states might he considered as the best judges, respectively. Uniformity not being required by the constitution to be observed in the imposition of direct taxes, the tax in New-England might be a poll-tax, in Pennsylvania a land-tax, and in South Carolina a tax on slaves, if those modes, respectively, should be recommended by the representatives of those states, without either violating the constitution, or disadvantage to any other state. In the imposition of such taxes; therefore, congress might pursue the system of each State, respectively, within that state.[150] The inequality of indirect taxes, among states, as well as among individuals, is perfectly unavoidable.[151] It may in time become so great as to shift all the burdens of government from a part of the states, and to impose them, exclusively, on the rest of the union. The northern states, for example, already manufacture within themselves, a very large proportion, or perhaps the whole, of many articles, which in other states are imported from foreign parts, subject to heavy duties. They are consequently exempted, in the same proportion, from the burden of duties paid on these articles. Hence a considerable inequality already exists between the contributions from the several states; this inequality daily increases, and is indeed daily favored, upon principles of national policy: for whenever any species of manufacture becomes considerable in the United States, it is considered proper to impose what are called protecting duties, upon foreign articles of the same kind. Nor does the matter rest here; for several American manufactures are now subject to an excise:[152] this species of tax, though advanced by the manufacturer, is paid by the consumer, as has been already shown: consequently, the duty upon every excised commodity is in fact paid by that state where it is consumed, whilst the manufacturing state is not only exempt from the burden, but enriched by it. This inequality is no otherwise to be avoided but by direct taxes. The same disproportion also

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obtains among individuals of the same state where it operates as a tax on luxury, it may be considered in a beneficial light; but there are a thousand instances where a tax upon consumption will produce an inequality of burdens, though the tax should operate only upon the necessaries, and not the luxuries of life: a person in health may dispense with many comforts which a sick man stands in the utmost need of; he can better afford to pay a tax on what he consumes; but the sick man must either pay an additional tax, or perish because he cannot afford it. Indirect taxes, therefore, not unfrequently impose the burden upon those who are least able to sustain it; a direct tax on the contrary may always be apportioned according to the means of defraying it.

It seems agreed among political writers, that another objection to indirect taxes arises from the tax being so interwoven with the price, that the consumer blends them together, and is thus rendered ignorant of the burdens imposed upon him by the government. This is conceived to be peculiarly dangerous in a free government, and utterly incompatible with that responsibility, which ought to subsist between the representative and his constituents; whose burdens are thus imperceptibly increased, to the great hazard of their liberties, whenever the government shall thus insensibly acquire an independent revenue; the source and amount of which may be equally unknown to the generality of the people. If, for example, a duty of 10 per cent. ad valorem, he imposed upon any foreign article imported, or upon any domestic manufacture made for sale in the United States, the duty is in a very few years entirely forgotten, being wholly lost in the price of the article, in the consumer's estimation; an additional 5 per cent. is laid; this, like the former, is equally forgotten, and blended with the price in a few years more. This may be repeated at no very distant periods, till the duty is doubled, trebled, or quadrupled, and the effect still be the same: in another generation the same experiment may be repeated with like success, and each succeeding generation undergo the like additional burdens, until it would require the most consummate skill in political arithmetic to calculate the amount; whereas, if direct taxes were increased in the like proportion, every individual would at once perceive from what source this additional burden arose, and would be led to inquire for what reason he was subjected to it. Hence it would seem to be the interest of every freeman, in a free state, that his taxes should be imposed in such manner as to be subject to his immediate observation; since whatever inconvenience he may thereby sustain, must be amply recompensed by the security thus afforded to his liberty.

The power of imposing direct taxes, excises, and duties, except on imports or exports, is one of those, in which, according to our distribution, the United States and the individual states possess concurrent authority. It was apprehended by the opposers to the constitution, that this power in the congress would, like Aaron's rod, swallow up that of the state legislatures.[153] The government must be wholly corrupted whenever this happens; so long as the taxes imposed by the federal legislature are limited to constitutional purposes, it is impossible that the states should be without a revenue sufficient to support their civil lists. Beyond that object, so long as the federal government is properly administered, the states can have no urgent occasion for any revenue.[154]

The abuse of the powers of government should be guarded against by the constitution as far as possible. The purposes for which any grievous tax can, with any shadow of necessity, be imposed by the federal legislature, must be the raising and supporting armies. Appropriations for that purpose are limited to two years. The duration of congress is limited to the like period. Would not a new election strike at the root of the evil? If it should not, the people must resort to first principles. Even annual elections would probably be an insufficient protection against such a total depravity, as could not be curbed by these provisions in the constitution."

Excises, the second branch of revenue which created an alarm in the minds of the opposers of the

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constitution, are defined to be an inland imposition, usually paid upon the retail sale of a commodity.[155] It appears, however, that they are generally imposed on manufactures, and paid by the manufacturer,[156] who advances the price of his commodity in proportion. The author of the commentaries on the laws of England acknowledges, that the rigor and arbitrary proceedings of excise laws; seems hardly compatible with the temper of a free nation.[157] – This observation, founded on the experience of a nation whose accumulated debts, financial embarrassments may have driven them to it's adoption, it might have been expected, would have co-operated with the clamors of a considerable part of the union, against the admission of such a principle of taxation into the constitution, to deter congress from an immediate resort to an experiment of it's effects upon the minds of their constituents. It is said that this mode of taxation is familiar to the New England states, and that it is by no means obnoxious to the people there. This circumstance probably paved the way for its reception in congress; in this state it was a perfect novelty, and was made the subject of one of the amendments, proposed to the constitution. The arguments in favor of this, as an economical mode of taxation, abstractedly considered, appear to be much in its favor; it being alleged, that the charges of levying, collecting, and managing the excise duties in England, are considerably less in proportion, than in any other branches of the revenue.[158] This may be true in a country abounding in manufacturing towns; but in a country where the objects of the excise are few, and those dispersed over an immense tract of country, it is perhaps demonstrable from the number of salaried officers employed in the collection, that a smaller portion of the excise, than of any other tax goes into the treasury of the United States. The giving salaries to these officers is an irrefragable proof of this position: for if the tax to be collected were so considerable, as that a moderate percentage would afford a sufficient compensation to the collectors, for their trouble, there would be no need of resorting to salaries, which may perhaps amount to fifteen, or twenty per cent, in some places, and in others, prove almost commensurate with the tax itself.[159] On the other hand, it must be acknowledged, that the excise contributes in some measure to restore the balance arising from the inequality produced by duties on foreign imports and this, not only among individuals, but in a small degree among the states; the manufacturing states being thereby subject to some portion of the tax on consumption: but this last benefit can only last so long as each state shall manufacture for its own consumption, only; and it will be entirely lost, and even become doubly oppressive, whenever the manufactures of one part of the union, are exported from thence and consumed in the other states. Excises will then operate as the most burdensome species of impost, on those parts of the union, where consumption takes place.

Duties and imposts, in their common acceptation mean those takes which merchants are compelled to pay upon merchandise imported, or exported, from any state, and which have in many countries obtained the general name of customs; probably from the usual and constant demand made of them for the use of the princes, state, or government. But in the constitution of the United States they seem to have obtained a more extensive signification, and were probably intended to comprehend every species of tax, or contribution, not included under the ordinary terms, taxes and excises. Taken in the general and comprehensive sense, the states respectively possess the power of imposing them, concurrently with the federal government, with the single exception of customs, or duties upon imports or exports; the right of imposing which, is either exclusively vested in the congress of the United States, or can only be exercised by the respective states with the assent of congress, except what may be absolutely necessary for executing their inspection laws: and the nett 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 are subject to the revision and control of the congress; nor can any state without the consent of congress lay any duty on tonnage.[160] Frequent instances have occurred

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where the assent of congress has been given to acts of the state legislatures, made for especial purposes, such as erecting piers, appointing health officers, deepening the navigation, etc.[161]

In February 1781, the congress of the United States made a proposal to the several states to authorize congress to impose a duty of five per cent. ad valorem, on certain goods, wares and merchandises, (such as wines and ardent spirits, etc.) and on all prizes and prize goods, which might be imported, or brought, into the United States. The legislature, at their next session, passed an act, in conformity thereto.[162] Several of the states as was afterwards alleged, neglected to pass similar laws, and their unanimous consent was requisite,[163] under the existing articles of confederation, to give effect to such an important change in the system; in consequence of which, the act of this state was suspended, by a law passed at the ensuing session,[164] until the several states in the union should concur in adopting the measure: it has been said that the non-concurrence of a single state, (and that, one of the smallest in the union,) prevented the proposition from taking effect; but this is not the reason, assigned by the legislature of this state, for repealing their act of assent. An ill timed jealousy at that period, had crept into the legislature, who declared by their act of October, 1782, c. 137. "That the permitting any power, other than the general assembly of the commonwealth to levy duties or taxes upon the citizens of this state, within the same, is injurious to it's sovereignty, and may prove destructive of the rights and liberties of the people;" for which reason they repeated the act of the preceding year, by which the concurrence of the state was yielded to the proposed measure. In the month of April 1783, the proposition was new modeled by congress, and again presented to the states, for their assent and concurrence; and was a second time acceded to by the state of Virginia, in the month of October, in the same year, but, with a suspending clause, until the other states, in the union, should likewise, concur in the proposed concession.[165] The preamble to this act recites, that congress had recommended to the several states as indispensably necessary to the restoration of public credit, and to the punctual and honorable discharge of the public debt, to invest the United States in congress assembled with a power to levy, for the use of the United States, certain duties upon goods imported into the said states from any foreign part, for the period of twenty-five years. The powers thereby granted were moreover guarded by a number of provisoes and restrictions, and limited to a period, barely sufficient to answer the purpose of reviving the confidence of the creditors of the union. – Yet this measure like the former, miscarried for the want of the unanimous concurrence of the states, so cautious were they at that time, in their concessions of power to the federal government. It was at this session, likewise, (Oct. 1783[166]), that the legislature of Virginia, passed an act to authorize the congress of the United States to adopt certain regulations respecting the British trade; the object of which was to authorize that body to prohibit the importation of the growth or produce of the British West-India Islands, in British vessels; or, to adopt any other mode which might most effectually tend to counteract the designs of Great Britain, with respect to the American commerce, so long as the growth or produce of any of the United States of America should be prohibited from being carried to those islands, by any other than British subjects, in British built ships, owned by British subjects, and navigated according to the laws of that kingdom. This measure, which, if it had been adopted would have operated to the exclusive benefit of the navigating states, likewise failed, from the same causes as the two former. When peace was concluded with Great Britain a commercial rivalship very soon began to manifest itself among the several states, but between none more remarkable than Maryland and Virginia, to both which the waters of the Chesapeake, and the Potomac, were as a common high-way. Scarcely a session of the general assembly passed over in either state, without some change in the duties upon imports, and tonnage, with a view to counteract some law, or regulation, of the other. Various attempts were made to produce an uniformity in their custom-house systems, but without effect. At this period,

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likewise, the inefficiency of the federal government began to excite loud clamors, as we have had occasion to mention, elsewhere. The want of an uniform system of commercial regulations, among the states, and the total want of funds, in the hands of congress, for the discharge of the continental debt, as well foreign, as domestic, convinced every one of the propriety of investing congress with power over these subjects, and gave rise to the measures already mentioned elsewhere. Hence, no opposition was ever made, to these branches of the authority of congress, when the question respecting the adoption of the constitution of the United States was agitated.

All duties and imposts (as contradistinguished from direct taxes) and all excises, as we have seen, must be uniform throughout the United States,[167] by which means the principle of equality, as far as the nature of the subject will admit, is still adhered to in the constitution. A candid review of this part of the federal constitution, cannot fail to excite our just applause of the principles upon which it is founded. All the arguments against it appear to have been drawn from the inexpediency of establishing such a form of government, rather than from any defect in this part of the system, admitting that a general government was necessary to the happiness and prosperity of the states, individually. This great primary question being once decided in the affirmative, it might be difficult to prove that any part of the powers granted to congress in this clause, ought to have been altogether withheld: yet being granted, rather as an ultimate provision in any possible case of emergency, than as a means of ordinary revenue, it is to be wished that the exercise of powers; either oppressive in their operation, or inconsistent with the genius of the people, or irreconcilable to their prejudices, might be reserved for cogent occasions, which might justify the temporary recourse to a lesser evil, as the means of avoiding one more permanent, and of greater magnitude.[168]

2. Congress have power to borrow money on the credit of the United States;[169] a power inseparably connected with that of raising a revenue, and with the duty of protection which that power imposes upon the federal government. For, though in times of profound peace, it may not be necessary to anticipate the revenues of a state, yet the experience of other nations, as well as our own, must convince us that the burden and expense of one year, in time of war, may be more than equal to the revenues of ten years. Hence a debt is almost unavoidable, whenever a nation is plunged into a state of war. The least burdensome mode of contracting a debt is by a loan: in case of a maritime war, the revenues arising from duties upon merchandise imported, and upon tonnage, must be greatly diminished. Had not congress a power to borrow money, recourse must be had to direct taxes in the extreme, or to impressments, lotteries, and other miserable and oppressive expedients. A system of revenue being once organized, and the ability of the states to pay their debts, being known, money may easily be procured on loan, to be repaid when all the sources of revenue shall have regained their operation, and flow in their proper channel.

But while we contend for the power, let it not be supposed that it is meant to contend for the abuse of it. When used as a means of necessary defense, it gives energy, vigor and dispatch to all the measures of government; inspires a proper confidence in it, and disposes every citizen to alacrity and promptitude, in the service of his country. By enabling the government punctually to comply with all it's engagements, the soldier is not driven to mutiny for want of his subsistence, nor the officer to resign his commission to avoid the ruin of himself; and his family. By this means also, the pressure and burden of a war, undertaken for the benefit of posterity, as well as the present generation, may be in some degree alleviated, and a part of the burden transferred to those who are to share the advantage. On the other hand, where loans are voluntarily incurred, upon the principle that a public debt is a public blessing, or to serve the purposes of aggrandizing a few at the expense of the nation, in general, or of strengthening the hands of government, (or more properly those of

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a party grasping at power, influence and wealth,) nothing can be more dangerous to the liberty of the citizen, nor more injurious to remotest posterity, as well as to present generations.

Congress had power, under the former articles of confederation, to borrow money upon the credit of the United States, and to pledge their faith for the repayment. But not possessing any revenue independent of the states, their loans were obtained with difficulty, and, very rarely in time to answer the purposes for which they were intended. The consequences of these, and other corresponding defects in the system, have been too frequently noticed to require a repetition of them in this place.

3. Congress have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.[170]

We have already had occasion to mention the state of foreign commerce, upon the conclusion of the peace with Great-Britain, and the conduct of the government of that nation in excluding our vessels from their ports in the West-India Islands. The proposition made by the state of Virginia to authorize congress to prohibit the importation of the growth or produce of those islands into the United States in British vessels, and even to adopt more energetic measures, by refusing the necessary supplies to those islands, if adopted, would probably have counteracted the designs of that politic nation: but, that fatal want of unanimity among the states, which at that period marked all their councils, defeated the proposal. The boldness of the measure on the part of Great-Britain, evinced a determination to secure her commercial advantages, even at the risk of the existence of her colonies; yet it is not to be imagined that she would have persevered in such a conduct towards her own colonies, if the United States had offered to retaliate her policy, by refusing them provisions, lumber, and other articles of the first necessity, unless they were admitted to send them thither in their own vessels, as well as in those of British subjects. For, independent of the injustice and inhumanity of such a conduct in the predominant state, the prosperity of the sugar colonies must have been of more consequence to Great-Britain, than the whole of the carrying trade between those islands and the United States. True it is, that it was pretended by the British ministry, and their adherents, that Nova Scotia and Canada could supply those islands, with every necessary formerly derived from the United States. But the bare admission of those articles from the United States, in any manner whatsoever, might be relied on as an unequivocal evidence that they had no confidence in the sufficiency of the resources which might be drawn from Canada or Nova Scotia; and experience is said to be strongly in favor of the opinion that those colonies cannot supply the sugar islands, either with provisions or lumber, in any degree proportionate to their necessities. The conduct of Great-Britain in declining any commercial treaty with America, at that time, was unquestionably dictated at first by a knowledge of the inability of congress to extort terms of reciprocity from her; and of that want of unanimity among the states, which, under the existing confederation, was a perpetual bar to any restriction upon her commerce with the whole of the states; and any partial restriction would be sure to fail of effect.

Having repeatedly noticed the defect of the former confederation, in respect to the regulation of the commerce between the several states, and the inconveniences resulting from it, I shall only mention one not yet touched upon: I mean the burdens which might be imposed by some of the states, on others, whose exports and imports must necessarily pass through them. Thus a duty on salt imported into Virginia, or on tobacco exported from thence, might operate very extensively as a tax upon the citizens of the western parts of North Carolina and Tennessee, to the exclusive emolument of the state of Virginia. So unreasonable an advantage ought not to prevail among members of the same confederacy, and without a power to control it lodged somewhere, it would be impossible that it should not be exerted: the repetition of such exertions could scarcely fail to lay the foundation of

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irreconcilable jealousies, and animosities among the states. And it was evidently with a view to prevent these inconveniences, that the constitution provides that no state shall, without the consent of congress, lay any imposts, or duties on exports or imports, except what may be absolutely necessary for executing it's inspection laws.[171]

A direct consequence of this power of regulating commerce with foreign nations, and among the several states, is that of establishing ports; or such places of entry, lading, and unlading, as may be most convenient for the merchant on the one hand, and for the easy and effectual collection of the revenue from customs, on the other. In England, this is one of the branches of the royal prerogative, but is vested in the supreme federal legislature, and not in the executive, by the constitution of the United States.

Previous to the revolution the ports of Virginia were co-extensive with her tide waters. The ships anchored wherever their navigators thought proper, and discharged or took on board their cargoes, as suited their own convenience, or contributed to the saving of expense. Nothing could be more favorable to the practice of smuggling; and consequently the revenue was frequently defrauded with impunity. Nothing could be more unfavorable to the internal navigation by small vessels, although few countries possess greater advantages for it's encouragement and promotion. The employment of a considerable number of these, would not only afford a nursery for seamen, but prove an actual mercantile saving to the state, so long as commerce should be carried on in foreign bottoms, as was at that time pretty generally the case. The legislature became sensible of the things, and in the year 1784, (May session, c. 32.) passed an act, whereby ship: and other vessels trading to this commonwealth, from foreign parts, being the property of other than citizens of the commonwealth, were obliged to lade, and unlade at certain particular ports, and no where else, within the commonwealth. The number of ports was increased, by the act of 1786. c. 42. and the restrictions as to unlading was extended to all vessels whatsoever, coming into the state; but any vessel built within the United States, and wholly owned by any citizens thereof, was permitted to take in her lading at any port or place within the state. These acts underwent some further amendments by the acts of 1787. c. 3, among which were some whole some regulations respecting river craft: but these appear to have beta considered as repealed, by the act of 1 cong. 1 sess. c. 11. sec. 22 and 23, on the subject of the coasting trade. But the constitutionality of that act may perhaps be questioned,[172] so far as it relates to vessels trading wholly within the limits of any particular state. The policy of the before-mentioned acts of this state, appears to have been well founded: the effects begun to manifest themselves in the production of a greater number of river craft, than had ever been known at any former period. – But the acts of congress, for the establishment of ports, having extended the number for foreign ships to fourteen, and even permitted them to proceed as far as the tide-water flows in James' River, Rappahannock, and Potomac, these salutary regulations in the state laws, have undoubtedly been, in a great measure, frustrated. It seems rather extraordinary; that on a subject of this nature, no regard should have been paid to the former policy of the state legislature, especially, as that policy was evidently favorable to the collection of the revenue arising from the customs.

A distinction between the admission of foreign ships, and those of our own confederacy, into the ports of the state, obviously appears to be proper to be made on other grounds. The navigation of our rivers was found, in the time of the revolutionary war, to be infinitely too familiar to our enemies, in consequence of the privilege before-mentioned, which had so long been enjoyed by the trading ships of Great Britain. A renewal of the same policy will probably produce the same consequences, whenever the occasion will permit. But if these reasons be not sufficiently cogent for restraining foreign ships to a few ports, and those as near to the sea as might be consistent with

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safety; the promotion of an internal domestic navigation, as a nursery for domestic seamen, appears of itself to be an object of sufficient importance to have engaged the attention of congress to this subject.

Another consequence of the right of regulating foreign commerce, seems to be the power of compelling vessels infected with any contagious disease, or arriving from places usually infected with them, to perform their quarantine. The laws of the respective states, upon this subject, were, by some persons, supposed to have been virtually repealed by the constitution of the United States. But congress have manifested a different interpretation of the operation of that instrument, and had passed several acts for giving aid and effect to the execution of the laws of the several states respecting quarantine. The last act upon the subject, 5. cong. c. 118, enjoins it as a duty upon the collectors, and other officers of the revenue, the masters and crews of the revenue-cutters, and the commanding officers of forts or stations upon the sea-coasts, duly to observe, and aid in the execution of those laws. Upon the like principle, I presume that the act of this commonwealth concerning wrecks, (Edi. 1794. c. 6.) remains in force, until congress shall think proper to pass some law upon that subject. A contrary construction of the operation of the federal constitution in these and other similar cases, upon which congress may be authorized to legislate, but omit doing it, might be productive of infinite inconvenience and disorder.

The right of regulating foreign commerce, draws after it also, the right of regulating the conduct of seamen, employed in the merchant service; and by a continued chain, that of punishing other persons harboring or secreting them, as well on land, as elsewhere; and the act of 1. cong. 2. sess. c. 29, accordingly makes it penal in any person to harbor or secret any seaman regularly engaged in the service of any ship.

There seems to be one class of laws which respect foreign commerce, over which the States still retain an absolute authority; those, I mean, which relate to the inspection of their own produce, for the execution of which, they may even lay an impost, or duty, as far as may be absolutely necessary for that purpose: of this necessity it seems presumable, they are to be regarded as the sole judges. [C. U. S. Art. 1. Sec. 10.] The article, indeed, is not altogether free from obscurity; but as no controversy has hitherto arisen upon the subject, it is not my intention to begin one.

But, this power of regulating commerce is qualified by some very salutary restrictions; for the constitution expressly declares, Art. 1. Sec. 9. "That no tax or duty shall be laid on articles exported from any state – that no preference shall be given by any regulation of commerce, or revenue, to the ports of one state, over those of another; and that vessels bound to, or from, one state, shall not be obliged to enter, clear, or pay duties in another." These restrictions are well calculated to suppress those jealousies, which must inevitably have arisen among the states, had any tax or duty been laid upon any particular article of exportation; and, at the same time, to curb any disposition towards partiality in congress, should it at any time be likely to manifest itself.

An amendment to the constitution proposed by the convention of this state, and concurred in by that of North Carolina, was, "That no commercial treaty should be ratified without the concurrence of two-thirds of the whole number of the members of the senate. – And, that no navigation law, or law regulating commerce should be passed without the consent of two-thirds of the members present in both houses."[173] It is somewhat remarkable, that the treaty of navigation and commerce concluded with Great Britain in the year 1794, notwithstanding the very general repugnance to it in almost every part of the United States, was, nevertheless, ratified precisely in the manner proposed by the first of these amendments. It appears that a proposition somewhat like the second, viz. "that no treaty

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should be binding upon the United States, which was not ratified by law;" had been made in the general convention at Philadelphia, and rejected.[174] Nevertheless, the experience which we have had upon the subject of treaties, seems to recommend the adoption of some further precautions against the indiscreet use of this extensive power. On this subject we shall say something more hereafter.

The regulation of commerce with the Indian tribes, as distinguished from foreign nations, seems, in some degree, to be founded upon this principle, that those tribes which are not settled within the limits of any particular state, could only be regarded as tributary to the United States in their federal capacity; as to those who reside within the limits of particular states, it was thought necessary to unfetter them from two limitations in the articles of confederation which rendered the provision obscure, and perhaps contradictory. The power is there restrained to Indians not members of any of the states, and is not to violate or infringe the legislative right of any state within its own limits. What description of Indians were to be deemed members of a state; had been a question of frequent contention and perplexity in the federal councils. And how the trade with Indians, though not members of a state, yet residing within its legislative jurisdiction, could be regulated by an external authority, without so far intruding on the internal rights of legislation, seems altogether incomprehensible.[175]

NOTES

137. C. U. S. Art. 1. Sec. 8.

138. C. U. S. Art. 1. Sec. 9.

139. Spavan's Pufendorf, vol. II. p. 330.

140. Spavan's Pufendorf, vol. II. p. 283.

141. Stuart's Political Economy, vol. II. p. 485.

142. Stuart's Political Economy, vol. II. p. 485.

143. Ibid. p. 496.

144. Stuart's Pol. Economy, Vol. 1, p. 520. – For a variety of examples to illustrate the distinction here made, the student is referred to the same book. Art. taxes.

145. The preceding investigation of this subject, was made about two years before congress passed the act imposing duties upon carriages for the conveyance of persons. The tax was opposed in Virginia as unconstitutional, because the sum to be raised thereby was not first apportioned among the states. A suit was brought in the federal court in Virginia; the judges were divided in opinion, and the case, by consent, was carried to the supreme federal court; it was there decided that the tax was not direct; and consequently that no apportionment was necessary. United States vs. Hylton. The editor's reasoning upon this subject, must therefore be regarded by the student as merely hypothetical, and speculative.

146. Direct taxes have been more than once proposed in congress: but the strenuous opposition to them leaves reason to believe that a maritime war, alone, will overcome the repugnance to them. Happily for America, if this repugnance should always operate so strongly, as to make her avoid such an occasion for them.

But since the preceding was written, congress have imposed a direct tax of two million of dollars. See L. U. S. 5. Cong. c. 86, and 92. 126. 6 Cong. c. 3. See Note 33. p. 313. of the first Book of the Commentaries. – part 2.

147. Confederation, Art. 8.

148. May, 1784, c. 31.

149. See Federalist, No. 54.

150. See Federalist, No. 36.

151. Ibid. No. 35.

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152. See L. U. S. 2. Cong. c. 32. 3. Cong. c. 51. 108. But since this was written the excise laws have all been repealed. 7 Cong. 1 Sess. c. 19.

153. "Though the law for laying a tax for the use of the United States would be supreme in its nature, and could not legally be opposed or controlled, yet a law for abrogating or preventing the collection of a tax laid by the authority of a state, unless upon exports or imports; would not be the supreme law of the land, but an usurpation of power not granted by the constitution." Federalist, No. 33.

The inference upon the whole is, that under the proposed constitution the individual states would retain an independent and uncontrollable authority to raise revenue to any extent, of which they may stand in need, by every kind of taxation, except duties on imports and exports." Ibid, No. 33, vol. I. p. 205.

154. "As to the suggestion of double taxation, the answer is plain. The wants of the union are to be supplied in one way or another: if it be done by the authority of the federal government, it will not be done by that of the state governments. The quantity of taxes to be paid by the community must be the same in either case." Ibid. No. 36. vol. I. p. 225.

155. 1 Blacks. Com. 318.

156. Ibid. 320.

157. Ibid.

158. Blacks. Com. 318, which appears however to be a misstatement. See Christian's Edi. in a note to p. 318. 1. Blacks. Com.

159. What is said above was the result of conjecture but a report of the secretary of the treasury to the house of representatives, dated December 18, 1801, places the subject beyond the uncertainty of conjecture. "It will appear, says the secretary, from a statement annexed, that whilst the expenses of collection on merchandise and tonnage, which are defrayed out of the revenue do not exceed four per cent, those on the permanent internal duties amount to almost twenty per cent. This is an inconvenience which, on account of the great number of individuals on whom the duties are raised, and of their dispersed situation throughout the whole extent of the United States, must, more or less attach to the system of internal taxation, so long as the wants of government shall not require any considerable extension, and the total amount of revenue shall remain inconsiderable."

160. C. U. S. Art. 1. §. 10.

161. See L. U. S. 5. Cong. c. 38, and 39, with many others.

162. May 1781, c. 2. the title occurs in the chancellor's revisal, p. 140.

163. Articles of confederation and perpetual union, Art. 13.

164. L. V. November, 1781. c. 9. Sessions Acts.

165. Ibid. October, 1783. c. 218 Ibid.

166. L. V. October, 1783. c. 5.

167. C. U. S. Art. 1, Sec. B.

168. It seems to have been upon this principle that all the internal taxes (except that arising from the post-office,) were repealed by an act of 7. Cong. 1. Session, c. 19)

169. C. U. S. Art. 1. Sec. 8.

170. C. U. S. Art. 1, Sec. 8.

171. C. U. S. Art. 1. §. 10.

172. The constitution of the United States does not authorize congress to regulate, or in any manner to interfere with, the domestic commerce of any state. Consequently, a vessel wholly employed in that domestic commerce, seems not to he subject to the control of the laws of the United States. Those laws may certainly provide for the punishment of such persons. and confiscation of such vessels, as may he detected in giving aid or assistance to any fraudulent commerce, either with foreign parts, or between the states; they may also prescribe, or limit the terms and conditions, upon which vessels may he permitted to trade with foreign parts, or with other states: but they seem to have no constitutional right to control the intercourse between

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any two or more parts of the same state. See Amendments to C. U. S. Art. 12.

173. Amendments proposed by the convention of Virginia, Art. 7, 8.

174. Message from the President of the U. S. to the House of Representatives, March 30, 1796.

175. Federalist, No. 42.

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NOTE D, PART 5
Powers of Congress (cont.)

4. Congress have power to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies, throughout the United States.[176]

As to the former of these powers; by the first articles of confederation and perpetual union between the states, it was agreed, that the free inhabitants of each state, paupers, vagabonds, and fugitives from justice excepted, should be entitled to all privileges and immunities of free Citizens in the several states; and the people of each state shall, in every other, enjoy all the privileges of trade and commerce, etc.[177] The dissimilarity of the rules of naturalization in the several states, had long been remarked as a fault in the system, and, as combined with this article in the confederation, laid a foundation for intricate and delicate questions. It seems to be a construction scarcely avoidable, that those who come wider the denomination of free inhabitants of a state, (although not citizens of such state), were entitled in every other state to all the privileges of free citizens of the latter, that is, to greater privileges than they may be entitled to in their own state: our free negroes, for example, though not entitled to the right of suffrage in Virginia; might, by removing into another state, acquire that right there; and persons of the same description, removing from any other state, into this, might be supposed to acquire the same right here, in virtue of that article, though native-born negroes are undoubtedly incapable of it under our constitution: so that every state was laid under the necessity, not only to confer the rights of citizenship in other states, upon any whom it might admit to such rights within itself, but upon any whom it might allow to become inhabitants within its jurisdiction. But were an exposition of the term "inhabitants" to be admitted, which would confine the stipulated privileges to citizens alone, the difficulty would not be removed. The very improper power would still have been retained by each state, of naturalizing in every other state. In one state, residence for a short time conferred all the rights of citizenship; in another, qualifications of greater importance were required: an alien, therefore, legally incapacitated for certain rights in the latter, might, by previous residence only in the former, elude his incapacity; and thus the law of one state, be preposterously rendered paramount to the law of another, within the jurisdiction of such other. By the laws of several states, certain descriptions of aliens, who had rendered themselves obnoxious, and other persons whose conduct had rendered them liable to the highest penalties of the law, were laid under interdicts, inconsistent, not only with the rights of citizenship, but with the privileges of residence, beyond the short period allowed by the treaty of peace with Great Britain. We owe it to mere casualty, that very serious embarrassments on this subject have not occurred.[178] The constitution, and the several acts of naturalization passed by congress, have therefore wisely provided against them by this article, and by an explicit declaration contained in the law, that no person heretofore proscribed by any state, shall be admitted a citizen, except by an act of the legislature of the state in which such person was proscribed.[179]

The federal court, consisting of judges Wilson and Blair, of the supreme court, and judge Peters, district judge in Pennsylvania, at a circuit court held for the district of Pennsylvania, in April, 1792, decided, "that the states, individually, still enjoy a concurrent jurisdiction upon the subject of naturalization: but that their individual authority cannot be exercised so as to contravene the rule established by the authority of the union: the true reason for investing congress with the power of naturalization (said the court,) was to guard against too narrow, instead of too liberal a mode of conferring the right of citizenship. Thus the individual states cannot exclude those citizens; who have been adopted by the United States; but they can adopt citizens upon easier terms, than those which congress may deem it expedient to impose."[180]

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But this decision seems to have been afterwards doubted by judge Iredel, 2 Dallas, 373. And the act of 5 cong. c. 71. declares, that "no alien shall be admitted to become a citizen of the United States, or of any state, unless in the manner prescribed by that act." And by a subsequent act, passed 7 cong. chapter 28, it is also declared, that any alien, being a free white person, may become a citizen of the United States, or any of them, on the conditions therein mentioned, "and not otherwise." These legislative expositions of the constitution do not accord with the judicial opinion above-mentioned. A very respectable political writer makes the following pertinent remarks upon this subject.[181] "Prior to the adoption of the constitution, the people inhabiting the different states might be divided into two classes: natural born citizens, or those born within the state, and aliens, or such as were born out of it. The first, by their birth-right, became entitled to all the privileges of citizens; the second, were entitled to none, but such as were held out and given by the laws of the respective states prior to their emigration. In the states of Kentucky and Virginia, the privileges of alien friends depended upon the constitution of each state, the acts of their respective legislatures, and the common law; by these they were considered, according to the time of their residence, and their having complied with certain requisitions pointed out by these laws, either as denizens, or naturalized citizens. As denizens, they were placed in a kind of middle state between aliens and natural born citizens; by naturalization, they were put exactly in the same condition that they would have been, if they had been born within the state, except so far as was specially excepted by the laws of each state. The common law has affixed such distinct and appropriate ideas to the terms denization, and naturalization, that they can not be confounded together, or mistaken for each other in any legal transaction whatever. They are so absolutely distinct in their natures, that in England the rights they convey, can not both be given by the same power; the king can make denizens, by his grant, or letters patent, but nothing but an act of parliament can make a naturalized subject. This was the legal state of this subject in Virginia, when the federal constitution was adopted; it declares that congress shalt have power to establish an uniform rule of naturalization; throughout the United States; but it also further declares, that the powers not delegated by the constitution to the U. States, nor prohibited by it to the states, are reserved to the states, respectively, or to the people. The power of naturalization, and not that of denization, being delegated to congress, and the power of denization not being prohibited to the states by the constitution, that power ought not to be considered as given to congress, but, on the contrary, as being reserved to the states. And as the right of denization did not make a citizen of an alien, but only placed him in a middle state, between the two, giving him local privileges only, which he was so far from being entitled to carry with him into another state, that he lost them by removing from the state giving them, the inconveniences which might result from the indirect communication of the rights of naturalized citizens, by different modes of naturalization prevailing in the several states, could not be apprehended. It might therefore have been extremely impolitic in the states to have surrendered the right of denization, as well as that of naturalization to the federal government, inasmuch as it might have operated to discourage migration to those states, which have lands to dispose of, and settle; since, it might be a disagreeable alternative to the states, either to permit aliens to hold lands within their territory, or to exclude all who have not yet completed their probationary residence within the U. States, so as to become naturalized citizens, from purchasing, or holding lands, until they should have acquired all other rights appertaining to that character."

Here, another question presents itself: if the states, individually, possess the right of making denizens of aliens, can a person so made a denizen of a particular state, hold an office under the authority of such state? And I think it unquestionable that each state has an absolute, and uncontrollable power over this subject, if disposed to exercise it. For every state must be presumed

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to be the exclusive judge of the qualifications of it's own officers and servants: for this is a part of their sovereignty which they can not be supposed to have intended ever to give up. And if there be nothing in their constitutions, respectively, to the contrary, the legislature may unquestionably, by a general law, limit, or extend such qualifications, so far as they may think proper. The law of Virginia declares, "that all persons other than alien enemies, who shall migrate into this state, and give satisfactory proof by oath or affirmation that they intend to reside therein, and take the legal oath of fidelity to the commonwealth shall be entitled to all the rights, privileges and advantages of citizens, except that they shall not he capable of election or appointment to any office, legislative, executive or judiciary, until an actual residence in the state for five years thereafter; nor until they shall have evinced a permanent attachment to the state, by intermarrying with a citizen thereof, or of some one of the United States, or purchased lands of the value of three hundred dollars therein." Now although the act of congress may operate to repeal this act, so far as relates to the rights of naturalization, or, a state of perfect citizenship, under the constitution and laws of the union; yet, as it respects the rights which the state has power to grant, such as holding lands, or an office under the sole, and distinct authority of the state, I see no reason to doubt that the law is as valid at this day, as it was before the adoption of the constitution of the United States.

The periods of residence, required by the several acts of congress before an alien can be admitted a citizen, have been various. The act of 1 congress, 2 session, c. 3, required two years only: this period was increased to five years, by the act of 3 congress, c. 85, which was still further extended to fourteen years, by the act of 5 congress, c. 71, but the act of 7 cong. c. 28. has reduced it to five years, again. Any alien who shall have borne any hereditary title; or been of any order of nobility, in any other state, must renounce the same, on oath, at the time of his admission to take the oath of a citizen. A wise provision, the benefit of which it is to be hoped, may reach to the latest posterity.

There are few subjects upon which there is less practical information to be obtained in Virginia, than that of bankruptcies. The English statutes of Bankruptcy have never been regarded as in force, here; and the manner in which the commerce of the colony was conducted, before the revolution, by no means seemed to favor their adoption. In a commercial country, such as England, the necessity of good faith in contracts, and the support of commerce, oblige the legislature to secure for the creditors the persons of bankrupts. It is, however, necessary to distinguish between the fraudulent and the honest bankrupt: the one should be treated with rigor; but the bankrupt, who, after a strict examination, has proved before proper judges, that either the fraud, or losses of others, or misfortunes unavoidable by human prudence, have stripped him of his substance, ought to receive a very different treatment. Let his whole property be taken from him, for the benefit of his creditors; let his debt, if you will, not be considered as cancelled, till the payment of the whole; let him be refused the liberty of leaving his country without leave of his creditors, or of carrying into another nation that industry, which, under a penalty, he should be obliged to employ for their benefit; but what pretense can justify the depriving an innocent, though unfortunate man, of his liberty, as is said to be the practice in some parts of Europe, in order to extort from him the discovery of his fraudulent transactions, after having failed of such a discovery, upon the most rigorous examination of his conduct and affairs![182]

But, how necessary soever, bankrupt laws may be in great commercial countries, the introduction of them into such as are supported chiefly by agriculture, seems to be an experiment which should be made with great caution. Among merchants and other traders, with whom credit is often a substitute for a capital, and whose only actual property is the gain, which they make by their credit, out of the property of others, a want of punctuality in their contracts, may well be admitted as a

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ground to suspect fraud, or insolvency. But the farmer has generally a visible capital,[183] the whole of which he can never employ, at the same time, in a productive manner. His want of punctuality may arise from bad crops, unfavorable seasons, low markets, and other causes, which however they may embarrass, endanger not his solvency; his property is incapable of removal, or of that concealment, which fraudulent traders may practice with success; his transactions within the proper line of his occupation are few, and not liable to intricacy; whilst the merchant is perhaps engaged in a dozen different copartnerships, in which his name does not appear, and in speculations which it might require a life to unravel. To expose both to the same rigorous, and summary mode of procedure, would be utterly inconsistent with those maxims of policy, which limit laws to their proper objects, only. And accordingly, we find, that even in England, where the interests of commerce are consulted on all occasions, and where they are never sacrificed, (unless, perhaps, to ambition,) the bankrupt laws cannot affect a farmer, who confines himself to the proper sphere of his occupation; and the bankrupt law of the United States, 6 congress, 1 session, c. 19, is confined to merchants, or other persons, actually using the trade of merchandise, by buying and selling in gross, or by retail, or dealing in exchange as a banker, broker, factor, underwriter, or marine insurer. Whilst the bankrupt laws are confined to such characters, and are resorted to, merely as a necessary regulation of commerce, their effect, in preventing frauds, especially where the parties or their property may be, or be removed into different states, will probably be so salutary, that the expediency of this branch of the powers of congress, will cease to be drawn in question.

5. Congress have power to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.[184]

By the former articles of confederation it was agreed that the United States in congress assembled, should have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective states; and fixing the standard of weights and measures throughout the United States.[185] By the present constitution the respective states are interdicted from coining money.[186] All the powers mentioned in this clause are branches of the royal prerogative in England, but are with much greater propriety vested in the legislative department by the federal constitution. The history of England affords numberless instances,[187] where this prerogative has been exercised to the great oppression of the subject. The power of debasing the value of the coin, at pleasure, has in fact been frequently used as an expedient for raising a revenue, and is accordingly reckoned as one of the indirect modes of taxation, by the author of the treaties on political economy: for if the government gives coin of an inferior standard, for purer coin of the same weight, as is generally done in these cases; or if it receives more for the coin, than the value of the bullion, and the expense of the coinage, as is likewise frequently practiced, the difference is an acquisition of revenue, paid by him who brings his bullion to the mint. According to the principles of our constitution, therefore, such a tax can not be imposed but by the representatives of the people.[188]

Mr. Barrington, in his readings upon the English statutes, doubts whether the regulation of weights and measures be practicable, by law. He remarks, that in England it has been attempted by at least six different statutes, all of which have been ineffectual. He quotes an observation of Montesquieu's that it is the mark of a little mind in a legislature to attempt regulations of this kind. In England, perhaps, the attempt has not succeeded from some defect in the system. That proposed by Mr. Jefferson, when secretary of state, appears to be perfectly simple, and, I should apprehend, easily practicable: and the standard of measure, especially, may be obtained with a mathematical exactness sufficient for all the purposes of commerce, and even of arts and sciences.

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It appears by the journals of the senate of the United States, March the 1st, 1791. "That a proposition had been made to the national assembly of France for obtaining a standard of measure, which shall at all times be invariable, and communicable to all nations, and at all times. That a similar proposition had been submitted to the British parliament: as the avowed object of these is to introduce an uniformity in the weights and measures of commercial nations; and as a coincidence of regulation by the government of the United States on so interesting a subject would be desirable, the senate resolved, that it would not be eligible at that time to introduce any alterations in the weights and measures of the United States."

6. Congress have power to provide for the punishment of counterfeiting the securities, and current coin of the United States.[189]

This power seems to be a natural incident to two others, of which we have before taken notice: the power of borrowing money on the credit of the United states, and that of coining money, and regulating the value thereof.

But congress appear to have extended the interpretation of this, article much further than it might have been supposed it would bear: and possibly much further than the framers of the constitution intended. I allude to the act of 5 cong. c. 7 8, to punish frauds committed on the bank of the United States, which inflicts the penalty of fine and imprisonment, for forging or counterfeiting any bill or note, issued by order of the president, directors and company of the bank of the United States.

The right of congress to establish this company or corporation, with exclusive, privileges, was warmly contested when the bill for establishing the bank was introduced into congress. 1 cong. 3 sess. c. 10. The same congress had at their first session agreed to an amendment of the constitution, declaring, that 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. The advocates for the bill were challenged to produce the clause in the constitution which gave congress power to erect a bank. It nevertheless passed both houses. The president of the United States hesitated; it is said that he consulted his constitutional advisers upon the subject. That two of them were of opinion the bill was unconstitutional. It nevertheless, received his assent on the last day, that the constitution allowed him to deliberate upon it. Had he turned to the journals of the convention (as on another occasion,) it has been confidently said, he would there have seen, that the proposition to authorize congress to establish a bank, had been made in convention and rejected: of this, he can not be supposed to have been ignorant, as he presided in the convention, when it happened the journals of that body were then a secret, and in his keeping. If it was proper to resort to those journals to give a proper interpretation to the constitution in one instance, it surely was equally proper in the other; and if the rejection of one proposition in that body, was a sufficient reason for rejecting the same, when made by either house of congress, it seems difficult to assign a reason why the other should not have been treated in the same manner.[190]

If it were, in fact, an unconstitutional exercise of power in congress to pass a law establishing the bank, nothing can manifest the impropriety of over-stepping the limits of the constitution, more than the act which we have just noticed. It shows that the most unauthorized acts of government may be drawn into precedents to justify other unwarrantable usurpations.

7. Congress have power to establish post-offices, and post-roads. And this is one of those cases, in which I have supposed in that the states may possess a concurrent, but subordinate authority, to that of the federal government. Concurrent, inasmuch, as there seems to be nothing in the constitution, nor in the nature of the thing itself, which may not be exercised by both, at the same time, without

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prejudice, or interference; subordinate, because wherever any power is expressly granted to congress, it is to be taken, for granted, that it shall not be contravened by the authority of any particular state. If, therefore, any state should find it necessary to establish post-offices on any road, which is not an established post-road, under the laws of the United States, there seems to be no constitutional objection to its doing so, until congress should think proper to exert its constitutional right to establish a communication by post, between the same places. – I put this case merely to show how far the exercise of these concurrent powers may be reconciled: it is much to be desired that a question of such delicacy may never occur between any state, and the federal government.

The post-office, under proper regulations, is one of the most beneficial establishments which can be introduced by any government; by providing the means of intercourse between the citizens of remote parts of the confederation, on such a regular footing, as must contribute greatly to the convenience of commerce, and to the free, and frequent communication of facts, and sentiments between individuals. Hence the revenue arising from this source will always be more easily collected, and more cheerfully paid, than any other whatever. It appears, that notwithstanding the many unprofitable branches, into which the post-roads have been divided for the convenience of the people of the United States, there still remains a considerable sum that is annually brought into the federal treasury.

It seems reasonable that the product of this branch of the revenue should be, exclusively, applied to the extension of its benefits, until they shall completely pervade every part of that union.[191]

8. Congress have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. C. U. S. Art. 1, Sect. 8.

This is another branch of federal authority, in which I presume the states may possess some degree of concurrent right within their respective territories; but as the security which the state could afford, would necessarily fall short of that which an authority co-extensive with the union may give, it is scarcely probable that the protection of the laws of any particular state will hereafter be resorted to; more especially, as the act of 2 Cong. c. 53, declares, that "where any state before it's adoption of the present form of government shall have granted an exclusive right to any invention, the party claiming that right, shall not be capable of obtaining an exclusive right under that act, but on relinquishing his right under such particular state, and of such relinquishment his obtaining an exclusive right under that act, shall be sufficient evidence." But this act does not appear to extend to copy-rights: the exclusive right to which is secured by an act passed, 1 Cong. 2 Sess. c. 15, amended by the act of 1 Cong. c. 36, for fourteen years; and if at the expiration of that term, the author being living, the same exclusive right shall be continued to him and his heirs, for other fourteen years. But the exclusive rights of other persons to their inventions, is limited to fourteen years, only, by the act first mentioned. Aliens, who have resided two years in the United States, are moreover entitled to the benefit of a patent for any new invention, by virtue of the act of 6 Cong. c. 25.

Whether it was under this clause of the constitution, or not, that the first secretary of the treasury grounded his opinion of the right of congress to establish trading companies, for the purpose of encouraging arts and manufactures;[192] or whether it was under this clause, that the establishment of a company for the discovery of mines, minerals, and metals, was contemplated by the authors of that scheme;[193] or whether it was from a conviction of the unconstitutionality of the proposition, in both cases, that neither of them took effect, I cannot presume to determine: but, certainly, if this clause

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of the constitution was relied upon, as giving congress a power to establish such monopolies, nothing could be more fallacious than such a conclusion. For the constitution not only declares the object, but points out the express mode of giving the encouragement; viz. "by securing for a limited time to authors and inventors, the exclusive right to their respective writings, and discoveries." Nothing could be more superfluous, or incompatible, with the object contended for, than these words, if it was, indeed, the intention of the constitution to authorize congress, to adopt any other mode which they might think proper.

9. Congress is moreover authorized to constitute tribunals inferior to the supreme court. [C. U. S. Art. 1. § 8.] The third article of the constitution further declares, that the judicial power of the United States shall be vested in one supreme court, and in such inferior courts, as congress may from time to time, ordain, and establish. – The establishment of courts, is in England, a branch of the royal prerogative, which has in that country been, from time to time, very much abused; as in the establishment of the famous courts of high-commission, and of the star-chamber; two of the most infamous engines of oppression and tyranny; that ever were erected in any country. "The judges of which (as the statute for suppressing the former declares) undertook to punish, where no law did warrant, and the proceedings, and censures of which were an intolerable burden upon the subject, and the means to introduce an arbitrary power and government." In England there are also courts of special-commission of oyer and terminer, (I do not here speak of the ordinary commissions of oyer and terminer and general goal delivery, under which, courts are held by the judges of the courts of Westminster-hall, at the assizes, in every county,) occasionally constituted for the special purpose of trying persons accused of treason, or rebellion, the judges of which, are frequently some of the great officers of state, associated with some of the judges of Westminster-hall, and others, whose commission determines as soon as the trial is over. Most of the state trials, have been had before courts thus constituted: and the number of convictions and condemnations in those courts is a sufficient proof how very exceptionable such tribunals are: or rather how dangerous to the lives and liberties of the people, a power to select particular persons, as judge. for the trial of state offenses, must be, in any country, and under any possible form of government. In these cases, the offense is not only in theory, against the crown and government, but often, in fact, against the person, authority, and life of the ruling monarch. His great officers of state share with him in danger, and too probably in apprehension, and resentment. These are the judge, he selects, and from their hands expects security for himself and them. Whilst the frailties of human nature remain, can such a tribunal be deemed impartial? Wisely, then, did the constitution of the United States deny to the executive magistrate a power so truly formidable: wisely was the supreme federal legislature made the depositary of the power of establishing courts, inferior to the supreme court; and most wisely was it provided, that the judges of those courts, when once appointed by the president with the advice of the senate, should depend only on their good behavior for their continuance in office, and be placed at once beyond the reach of hope or fear, where they might hold the balance of justice steadily in their hands.

These considerations induce a conviction in my mind, that this clause of the constitution does not authorize the establishment of occasional, or temporary courts, but courts of a permanent constitution and duration. Courts that could neither be affected in their conduct nor in their existence by the ferments or changes, of parties; and which might remain a monument to all posterity of the wisdom of that policy, which separates the judiciary from the executive and legislative departments, and places it beyond the influence or control of either.

These remarks are offered in this place, only for the sake of method; it will be our duty to give the

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subject a fuller consideration elsewhere.

10. Congress have power to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations. C. U. S. Art. 1. § 8.

The definition of piracies, says the author of the Federalist, might perhaps, without inconvenience, be left to the law of nations: though a legislative definition of them is found in most municipal codes. A definition of felonies on the high seas is evidently requisite, being a term of loose signification, even in the common law of England. The true ground of granting these powers to congress seems to be, the immediate and near connection and relation which they have to the regulation of commerce with foreign nations, which must necessarily be transacted by the communication on the high seas; and the right of deciding upon questions of war and peace, where the law of nations, is the only guide. Under this head, of offenses against the law of nations, the violation of the rights of ambassadors, as also of passports, and safe conducts is included. The act of 1 cong. 2 sess. c. 9, embraces the whole.

And here we may remark by the way, the very guarded manner in which congress are vested with authority to legislate upon the subject of crimes, and misdemeanors. They are not entrusted with a general power over these subjects, but a few offenses are selected from the great mass of crimes with which society may be infested, upon which, only, congress are authorized to prescribe the punishment, or define the offense. All felonies and offenses committed upon land, in all cases not expressly enumerated, being reserved to the states respectively. From whence this corollary seems to follow. That all crimes cognizable by the federal courts (except such as are committed in places, the exclusive jurisdiction of which has been ceded to the federal government) must be previously defined, (except treason,) and the punishment thereof previously declared, by the federal legislature.[194]

11. The power of declaring war, with all its train of consequences, direct and indirect, forms the next branch of the powers confided to congress;[195] and happy it is for the people of America that it is so vested. The term war, embraces the extremes of human misery and iniquity, and is alike the offspring of the one and the parent of the other. What else is the history of war from the earliest ages to the present moment but an afflicting detail of the sufferings and calamities of mankind, resulting from the ambition, usurpation, animosities, resentments, piques, intrigues, avarice, rapacity, oppressions, murders, assassinations, and other crimes, of the few possessing power! How rare are the instances of a just war![196] How few of those which are thus denominated have had their existence in a national injury! The personal claims of the sovereign are confounded with the interests of the nation over which he presides, and his private grievances or complaints are transferred to the people; who are thus made the victims of a quarrel in which they have no part, until they become principals in it, by their sufferings. War would be banished from the face of the earth, were nations instead of princes to decide upon their necessity. Injustice can never be the collective sentiment of a people emerged from barbarism. Happy the nation the people are the arbiters of their own interest and their own conduct! Happy were it for the world, did the people of all nations possess this power.

In England the right of making war is in the king. In Sweden it was otherwise after the death of Charles XII. until the revolution in 1772, when from a limited monarchy, Sweden became subject to a despot.[197] With us the representatives of the people have the right to decide this important question, conjunctively with the supreme executive who may, on this occasion as on every other, (except a proposal to amend the constitution,) exercise a qualified negative on the joint resolutions of congress; but this negative is unavailing if two thirds of the congress should persist in an opposite

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determination; so that it may be in the power of the executive to prevent, but not to make, a declaration of war.[198]

The several states are not only prohibited from declaring war, but even from engaging in it, without consent of congress, unless actually invaded, or in such imminent danger as will not admit of delay.[199] This is certainly a very wise prohibition – in fact, every barrier which can be opposed to the hasty engaging in war, is so much gained in favor of the interests of humanity. Upon the same principle it seems to be, that the states are likewise prohibited from granting letters of marque and reprisal: a measure which not unfrequently precedes a declaration of war where individuals of one nation are oppressed or injured by those of another, and justice is denied by the state to which the author of such oppression or injury belongs.[200] Did the several states possess the power of declaring war, or of commencing hostility without the consent of the whole, the union could never be secure of peace, and since the whole confederacy is responsible for any such act, it is strictly consonant with justice and sound policy, that the whole should determine on the occasion which may justify involving the nation in a war. The keeping up troops or ships of war in time of peace, is also prohibited to the several states upon the same principle. For these kinds of preparations for hostility are such as frequently may provoke, and even justify hostility on the part of other nations. But whenever war is actually declared, this prohibition ceases, and any state may adopt such additional measures for it's own peculiar defense as it's resources will enable it to do. The prohibition to emit bills of credit,[201] must, however, infallibly narrow the means of recurring to these resources; a consequence which probably was not adverted to by the state conventions, as I do not recollect any amendments proposed on that subject.

The power of declaring war, with all it's immediate consequences, was granted to congress under the former confederation,[202] and nearly the same restrictions against engaging in war, keeping up troops and vessels of war in time of peace, were laid upon, the individual states by the same instrument.[203]

Among the amendments proposed by the convention of this state, and some others, to the constitution, there was one, "that no declaration of war should be made, nor any standing army or regular troops be raised or kept up, in time of peace, without the consent of two-thirds of the members present in both houses. And that no soldier should be enlisted for a longer term than four years, except in time of war, and then for no longer term than the continuance of the war."[204] North Carolina, as well as some other of the states, concurred in proposing similar amendments, but none has yet been made in this respect.

One of the most salutary provisions of the constitution, under this head, appears to be, that no appropriation of money to the use of an army, shall be for a longer term than two years.[205] Perhaps it would have been better to have limited such an appropriation to a single year. But inasmuch as no appropriation can be made for a longer time than the period affixed for the duration of congress, it will be in the power of the people, should the reasons of such an appropriation be disapproved by them, to remove their representatives, on a new election, from a trust which they may appear willing to betray. It is, therefore, to be hoped, that such a consideration will afford a sufficient check to the proceedings of congress, in regard to the raising and supporting armies. With regard to a navy, the nature of such an establishment, to have any good effect, must be permanent. It would, therefore, have been extremely unwise to impose any prohibitions on that subject.

12. Congress has, moreover, power 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,

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reserving to the states, respectively, the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by congress C. U. S. Art. 1, Sec. 8.

The objects of this clause of the constitution, although founded upon the principle of our state bill of rights, Art. 8, declaring, "that a well regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defense of a free state," were thought to be dangerous to the state governments. The convention of Virginia, therefore, proposed the following amendment to the constitution; "that each state respectively should have the power to provide for organizing, arming, and disciplining it's own militia, whenever congress should neglect to provide for the same." A further amendment proposed, was, "that the militia should not be subject to martial law, except when in actual service, in time of war, rebellion, or invasion." – A provision manifestly implied in the words of the constitution. As to the former of these amendments, all room for doubt, or uneasiness upon the subject, seems to be completely removed, by the fourth article of amendments to the constitution, since ratified, viz. "That a militia being necessary to the security of a free state, the right of the people to keep, and hear arms, shall not be infringed." To which we may add, that the power of arming the militia, not being prohibited to the states, respectively, by the constitution, is, consequently, reserved to them, concurrently with the federal government. In pursuance of these powers, an act passed, 2 Cong. 1 Sess. c. 33, to provide for the national defense, by establishing an uniform militia throughout the United States; and the system of organization thereby established, has been carried into effect in Virginia, and probably in all the other states of the union.

Uniformity in the system of organization, and discipline of the militia, the constitutional defense of a free government is certainly desirable, and must be attended with beneficial effect, whenever the occasion may again require the co-operation of the militia of the states respectively. The want of power over these subjects, was one of the defects of the former system of government under the confederation; and the consequent want of uniformity of organization, and of discipline, among the several corps of militia drawn together from the several states, together with the uncertainty and variety of the periods of service, for which those corps were severally embodied, produced a very large portion of those disgraces, which attended the militia of almost every state, during the revolutionary war; and, thus contributed to swell the national debt, to an enormous size, by a fruitless expense. By authorizing the federal government to provide for all these cases, we may reasonably hope, that the future operations of the militia of the confederated states, will justify the opinion, that they are the most safe, as well as most natural defense of a free state. An opinion, however, which will never be justified, if the duty of arming, organizing, training, and disciplining them, be neglected: a neglect the more unpardonable, as it will pave the way for standing armies; the most formidable of all enemies to genuine liberty in a state.

We have seen that the appointment of the officers of the militia, and the authority of training them, are expressly reserved to the states, by this article: this was considered as a most important check to any possible abuse of power in the federal government, whenever the aid of the militia should be required by it.

Notwithstanding this wise precaution in the constitution, the fifth congress appear to have disregarded it, by authorizing the president of the United States, to enlist and organize volunteers, or special corps of militia, whose officers HE was authorized to appoint, either by his own authority, or with the concurrence of the senate; they were likewise to be trained and disciplined in the manner which he should direct, and be liable to be called upon to do duty, at any time that he should judge proper, within two years after their acceptance, and be exempted, during the time of their engagement, from all militia duty, which might be required of them by the laws of the United States,

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or of any state, and from every line, penalty, or disability, provided to enforce the performance of any duty or service in the militia. – The number of these corps was at first unlimited,[206] and the president was authorized to sell or lend them artillery, small-arms, accouterments, from the public arsenals. L. U. S. 5 Cong. c. 64. Sec. 3, and c. 74. – As these select corps were not called into actual service by those acts, but were only liable to be called upon at the pleasure of the president, it seems impossible to view them in any other light, than as a part of the militia of the states, separated by an unconstitutional act of congress, from the rest, for the purpose of giving to the president powers, which the constitution expressly denied him, and an influence the most dangerous that can be conceived, to the peace, liberty, and happiness of the United States.

13. Congress have power to declare the punishment of treason, against the United States; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted. C. U. S. Art. 3. Sec. 3. The act of 1 Cong. 2 Sess. c. 9. accordingly declares, that the punishment shall be death, by hanging; and that no conviction or judgment for treason, shall work any forfeiture of estate. The constitution. itself declares, that treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort: and that 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 precise definition of treason, and the limitation of it to two cases, only, both of which are clearly and explicitly described, at once evince the prudence, caution, and wisdom, of the framers of the constitution, by shutting the door (as far as human prudence, and human foresight, could provide the means of doing so), against all possible cases of constructive treason. The many infamous acts of complying parliaments in England, during the reigns of the Tudors and other tyrannical princes, and the still more infamous and detestable decisions of servile and corrupt judges, from the days of Empson and Dudley, to those of the execrable Jefferies, must evince the necessity and propriety of such a limitation. From such corruption and servility, either in the legislature, or in the tribunals of justice, we may reasonably hope that this clause of the constitution will effectually guard and protect the United States. Nor should we forget, that the security of the citizen is still further ensured by that provision in the constitution, which declares that 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. So that no extrajudicial confession, though proved by fifty witnesses, would, of itself, be evidence sufficient to convict a man upon a charge of treason. A provision which almost bids defiance to false witnesses. – The abolition of forfeiture, and of the corruption of blood, in cases of treason, is moreover a happy expedient for lessening the incentives, to prosecutions for treason, in corrupt governments. Rapacity is equally the cause and effect of tyranny. To curb every pretense for the exercise of it, should be the invariable object of a people forming a constitution. It is a monster that assumes a thousand shapes; of which the most odious, as well as the most terrible, is that, in which it attacks life, liberty and property, at the same time, and with the same weapons: its power is then irresistible.

14. Congress have power 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. C. U. S. Art. 1. §. 8.

The exclusive right of legislation granted to congress by this clause of the constitution, is a power,

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probably, more extensive than it was in the contemplation of the framers of the constitution to grant: such, at least, was the construction which the convention of Virginia. They, therefore, proposed an article, as, an amendment to the constitution, declaring, "that the powers granted by this clause, should extend only to such regulations as respect the police, and good government thereof." The states of New York and North Carolina proposed similar amendments;[207] and one to the like effect was actually proposed in the senate of the United States, but shared the fate of many others, whose object was to limit the exercise of power in the federal government.

I agree with the author of the Federalist,[208] that a complete authority at the seat of government was necessary to secure the public authority from insult, and it's proceedings from interruption. But the amendment proposed by Virginia, certainly, would not have abridged the federal government of such an authority. A system of laws incompatible with the nature and principles of a representative democracy, though not likely to be introduced at once, may be matured by degrees, and diffuse it's influence through the states, and finally lay the foundation of the most important changes in the nature of the federal government. Let foreigners be enabled to hold lands, and transmit them by inheritance or devise; let the preference to males, and the rights of primogeniture, be revived, together with the doctrine of entails, and aristocracy will neither want a ladder to climb by, nor a base for it's support. Many persons already possess an extent of territory in the United States, not inferior to in any of the German principalities: if they can be retained for a few generations, without a division, our posterity may count upon the revival of feudal principles, with feudal tenures.

The permanent seat for the government of the United States has been established under the authority of an act passed 1 Cong. 2 Sess. c. 28, and 3 Sess. c. 17, upon the river Potomac, including the towns of Alexandria in Virginia, and Georgetown in Maryland. And the laws of Virginia (with some exceptions) were declared in force in that part of the ten miles square, which was ceded by Virginia, and those of Maryland in the other part, ceded by Maryland; and several other regulations were likewise established by two several acts, 6 Cong. 2 Sess. c. 15 and 24. An amendatory act passed also at the first session of the seventh congress, but the system does not appear to be as yet completely organized.[209] It has been said, that it was in contemplation to establish a subordinate legislature, with a governor to preside over the district. But it seems highly questionable whether such a substitution of legislative authority is compatible with the constitution; unless it be supposed that a power to exercise exclusive legislation in all cases whatsoever, comprehends an authority to delegate that power to another subordinate body. If the maxim be sound, that a delegated authority cannot be transferred to another to exercise, the project here spoken of will probably never take effect. At present that part of the union is neither represented in the congress, nor in any state legislature; a circumstance, of which there seems to be some disposition to complain. An amendment of the constitution seems to be the only means of remedying this oversight.

15. Congress may admit new states into the 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 congress. C. U. S. Art. 3, Sec. 3.

In the articles of confederation it was agreed, that Canada, acceding thereto, and joining in the measures of the United States, should be admitted into the union; but no other colony should be admitted, unless such admission be agreed to by nine states. The eventual establishment of new states, within the limits of the territory of the United States, seems to have been overlooked by the compilers of that instrument. The inconvenience of this omission had been felt, and congress were, perhaps, led into an assumption of power not strictly warranted by the confederation; in the

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establishment of a government north-west of the Ohio. With great propriety, therefore, has the constitution supplied the defect. The general precaution that no new states should be formed without the concurrence of the federal authority, and that of the states concerned, is consonant to the principles which ought to govern such transactions. The particular precaution against the erection of new states by the partition of a state without it's consent, quiets the jealousy of the larger states; as that of the smaller is quieted by a like precaution against a junction of states without their consent. Under the authority of this article, the states of Vermont, Kentucky, and Tennessee, have been admitted into the union. And the boundaries of a new state have been lately established within the territory northwest of the Ohio, which, as soon as formed, is to be admitted as a member of the union, upon the same footing with the original states.[210]

Congress, under the former confederation, passed an ordinance, July 13, 1787, for the government of the territory of the United States, north-west of the Ohio, which contained, among other things, six articles, which were to be considered as articles of compact between the original states, and the people and states of the said territory, and to remain unalterable, unless by common consent. These articles appear to have been confirmed by the sixth article of the constitution, which declares, that, all debts contracted, and engagements entered into before the adoption of the constitution, shall be as valid against the United States under the constitution, as under the confederation. The first of these articles secures the absolute freedom of religion: The second secures the benefit of the writ of habeas corpus; the trial by jury; judicial proceedings according to the course of the common law; the right of bail; the moderation of fines and of punishments; the right of personal security, and the right of private property; the sacredness of private contracts; and a proportionate representation of the people in the legislature. The third engages for the encouragement of schools, and the means of education; and for good faith with the Indians, and the security of their persons and property from injury. The fourth stipulates, that the states formed in that territory shall forever remain part of the American confederacy, etc. that they shall pay it part of the federal debt, and a proportional part of the expenses of government; that the legislatures of the new states shall never interfere with the primary disposal of the soil, by the United States in congress assembled; that no tax shall be imposed on lands the property of the United States; and that non-resident proprietors shall in no case be taxed higher than residents. That the navigable waters and carrying places shall be common highways, and forever free to all the citizens of the American confederacy, without any tax, impost, or duty therefor. The sixth article declares, that there shall be formed in the said territory, not less than three, nor more than five states; that whenever any of the said states shall have sixty thousand free inhabitants, it shall be admitted into the confederacy on an equal footing with the original states in all respects whatever, and be at liberty to form a permanent constitution and state government; provided the same be republican, and in conformity to the principles contained in those articles: and so far as can be consistent with the general interest of the confederacy; such admission shall be sooner allowed. The last article stipulates that there shall be neither slavery, nor involuntary servitude, otherwise than in punishment of crimes: with a proviso, that persons escaping into the same from any state, where they may have been lawfully held to service, may be lawfully reclaimed and delivered up.

The ordinance further provides, that the estates both of resident and non-resident proprietors, shall descend to their children, or other next of kin, of a person dying intestate, in equal degree; and that there shall be no distinction between kindred of the whole and half blood; that the widow shall be endowed of one third part of the real and personal estate of her intestate husband, for life; and that this law, relative to descents and dower, shall remain in full force until altered by the legislature. That estates may be devised by will, and conveyed by lease and release, or by bargain and sale, by

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persons of full age, until the governor and judges should adopt other laws, as therein authorized. That the governor and judges, or a majority of them, shall adopt and publish, in the district, such laws of the original states, criminal and civil, as may be necessary, and best suited to the circumstances of the district, and report them to congress from time to time; which laws shall be in force until the organization of the general assembly therein, unless disapproved of by congress; but afterwards, the legislature might alter them as they should think fit. That the general assembly shall consist of the governor, a legislative council, and a house of representatives; that the governor shall be appointed by congress, every three years; that he shall have a negative upon all legislative acts; that he shall have power to convene, prorogue, and dissolve the general assembly; that the legislative council shall consist of five members, to continue five years in office, and to be appointed by congress, out of ten persons, residents and freeholders in the district, to be nominated by the house of representatives; that the governor and members of the council be removable by congress; that a house of representatives shall be chosen as soon as there shall be five thousand free male inhabitants of full age in the district, and consist of one member for every five hundred free male inhabitants, until the number shall amount to twenty-five, after which the number shall be regulated by the legislature; that the representatives thus elected, shall serve for two years. That a court of common law jurisdiction shall be appointed, to consist of three judges, who shall hold their offices during good behavior. Such are the principal outlines of the temporary provisions made upon this subject, which, I presume, still remain in force in those parts of the territory, not included within the bounds of the new state, lately admitted as a member of the federal union. By the act of 1 Cong. c. 8, the president of the United States is authorized to nominate, and by and with the advice and consent of the senate, to appoint all officers, which, by that ordinance were to have been appointed by congress, under the confederation. And by the act of 6 Cong. c. 41, the territory was divided into two separate governments, one of which was called the Indiana Territory, and a government established therein, in all respects similar to that provided by the above mentioned ordinance, except that the legislature thereof might be organized, notwithstanding there may not be five thousand free male inhabitants of full age therein. The act further declares, that nothing therein contained, shall be construed in any manner, to affect the government already in force, on the northwest of the Ohio river, further than to prohibit the exercise thereof within the Indiana territory.

By the act of 5 Cong. c. 45, authorizing the establishment of a government in the Mississippi territory, the president of the United States is authorized to establish therein a government, in all respects similar to that in the northwest territory, excepting and excluding that article of the ordinance of July 13, 1787, which declares, that there shall be neither slavery; nor involuntary servitude therein. The importation of slaves from foreign parts, is, nevertheless, prohibited, under the penalty of three hundred dollars upon the importer, and the slave is moreover entitled to freedom. Considering that the southern climate is in general favorable to negroes, and the difficulties which the number of them may in time create in some of the states; their dispersion is an object rather to be favored, perhaps, than discountenanced. Yet it is difficult to suppress a sigh, whenever we discover any measure which seems to favor the continuance of slavery among us.

16. Congress, 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 the constitution shall be so construed as to prejudice any claims of the United States, or of any state. C. U. S. Art. 3, Sec. 3.

During the revolutionary war, congress recommended to the several states in the union, having claims to waste and unappropriated lands in the western country, a liberal cession to the United States of a portion of their respective claims, for the common benefit of the union. In consequence

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of which, the state of Virginia ceded to the United States, for the common benefit of the whole confederacy, all the right, title, and claim which the commonwealth had to the territory northwest of the river Ohio, subject to the terms and conditions contained in her several acts of cession, viz. January 2, 1781. – Acts of October session, 1783. c. 18, and of December 30, 1788.[211] One of the conditions of the latter act, being, that the said territory should be divided into not more than five, nor less than three states, whose boundaries are therein prescribed, of which we have already had occasion to make. mention. It appears by a late document,[212] that the tract of country thus ceded, probably contains about 10,894,447, acres, within the line of the Indian boundary, of which 1,059,120, acres have been either located or set apart for military claims, 575,268, have been sold, or otherwise granted, and about 9,260,089, remained unsold on the first of November, 1801. The acts of 4 Cong, c. 29, and 6 Cong, c. 55, providing for the sale of these lands, contain many wise, and wholesome regulations, the principal of which, are, that they shall be laid out into townships six miles square, by north and south lines, according to the true meridian, and by others crossing them at right angles; that one half of those townships, taking them alternately, shall be subdivided into sections of six hundred and forty acres, which shall be numbered in order; that fair plats of these townships shall be made; that four sections at the center of every township, and every other section upon which a salt spring may be discovered shall be reserved for the use of the United States; that all navigable rivers shall be deemed, and remain public highways; and all lesser streams, and their beds shall become common to the proprietors of the lands on the opposite banks; and that no part of the lands shall be sold for less than two dollars per acre. A former secretary of the treasury estimated the value of these lands at twenty cents per acre, only.[213] Those which have been already sold pursuant to the act of congress, have averaged two dollars and nine cents; or, more than ten times that valuation. The celebrated Doctor Price, in his observations on the importance of the American revolution, recommends the reserving the whole, or a considerable part of these lands, and appropriating a certain sum annually to the clearing unlocated lands, and other improvements thereon; and computes that 100,000. thus expended, with fidelity, would produce a capital of one hundred millions sterling, in about eighty years. This hint is probably worthy of attention to a certain extent: but it might well be questioned, whether, if the measure were adopted as jar as he seems to have thought advisable, it might not lay the foundation of so large a revenue, independent of the people, as to he formidable in the hands of any government. To amass immense riches to defray the expenses of ambition when occasion may prompt, without seeming to oppress the people, has uniformly been the policy of tyrants. Should such a policy creep into our government, and the sales of land, instead of being appropriated to the discharge of former debts, be converted to a treasure in a bank, those who can at any time command it, may be tempted to apply it to the most nefarious purposes. The improvident alienation of the crown lands in England, has been considered as a circumstance extremely favorable to the liberty of the nation, by rendering the government less independent of the people.[214] The same reason will apply to other governments, whether monarchical or republican: whenever any government becomes independent of the nation all ideas of responsibility are immediately lost: and when responsibility ceases, slavery begins. It is the due restraint, and not the moderation of rulers that constitutes a state of liberty; as the power to oppress, though never exercised, does a state of slavery.

The disposal of the whole of the western lands, at so low a rate as even that now established by congress, as a minimum, is a measure of the policy of which, doubts may be entertained. – The western territory ought to be regarded as a national stock of wealth. It may be compared to bullion, or coin deposited in the vaults of a bank, which although it produces no present profit, secures the credit of the institution, and is ready to answer any emergency. This supposes the lands, like bullion,

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to remain always of the same value; but the lands must increase in value at the rate of compound interest, whenever population becomes considerable in those parts of the union. This we see is daily increasing with great rapidity; and the value of the lands can not fail to keep pace with it. The most fertile spots upon the globe are of no more value than those which are covered by the ocean, so long as they continue remote from population; as the most barren spots are rendered valuable by its progress, and approach. A reserve of one half, or some other considerable proportion of the lands remaining unsold, therefore, seems to be recommended by many prudential considerations.

Other considerable cessions have been made to the United States by other states in the union. The state of Connecticut, made a cession which appears to have been accepted by congress, September 14, 1786. The act of 6 Cong. c. 38, authorizes the president of the United States to release the soil of a tract lying west of the west line of Pennsylvania, and extending one hundred and twenty statute miles, westward, and from the completion of the forty-first, to the latitude of the forty-second degree and two minutes, north, which was excepted by the state of Connecticut out of their cession, provided that state shall cede to the United States certain other lands, and relinquish her right of jurisdiction over the territory, the soil of which shall be thus released to that state. South Carolina likewise appears to have made a cession of lands to the United States.[215] The territory ceded by North Carolina now constitutes the state of Tennessee.[216] The acts of 5 Cong. c. 45, and 6 Cong. c. 50, authorize the acceptance of a cession of lands, or of the jurisdiction thereof, from the state of Georgia, on such terms as may seem reasonable to the commissioners appointed on the part of that state, and of the United States respectively. In the mean time the establishment of the Mississippi government is not in any respect to impair the right of the state of Georgia to the jurisdiction, or of the said state, or any person, to the soil of the territory thereof.[217]

17. To give efficacy to these powers, congress is authorized to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the constitution in the government of the United States, or in any department, or officer thereof. C. U. S. Art. 1. §. 8.

After the, satisfactory exposition of this article given in the Federalist,[218] that if the constitution had been silent on this head, there could be no doubt, that all the particular powers requisite, as the proper means of executing the general powers specified in the constitution, would have resulted to the federal government, by unavoidable implication; and that if there be any thing exceptionable in this particular clause, it must be sought for in the specific powers, upon which this general declaration is predicated: and after the explicit declaration contained in the twelfth article of the amendments to the constitution, that 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: we might have indulged a reasonable hope, that this clause would neither have continued to afford any ground of alarm, and apprehension, on the part of the people or the individual states, nor any pretext for an assumption of any power not specified in the constitution, on the part of the federal government. But, notwithstanding this remarkable security against misconstruction, a design has been indicated to expound these phrases in the constitution, so as to destroy the effect of the particular enumeration of powers, by which it explains and limits them, which must have fallen under the observation of those who have attended to the course of public transactions.[219]

The plain import of this clause is, that congress shall have all the incidental or instrumental powers, necessary and proper for carrying into execution all the express powers; whether they be vested in the government of the United States, more collectively, or in the several departments, or officers thereof. It neither enlarges any power specifically granted, nor is it a grant of new powers to

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congress, but merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those otherwise granted, are included in the grant. A single example may illustrate this matter. The executive has power to make treaties, and by the treaty with Algiers, a certain tribute is to be paid annually to that regency. But the executive have no power to levy a tax for the payment of this tribute; congress, therefore, are authorized by this clause, to pass a law for that purpose: without which the treaty, although it be a supreme law of the land, in it's nature, and therefore binding upon congress, could not be executed with good faith. For the Constitution expressly prohibits drawing any money from the treasury but in consequence of appropriations made by law.

Whenever, therefore, a question arises concerning the constitutionality of a particular power; the first question is, whether the power be expressed in the constitution? If it be, the question is decided. If it be not expressed, the next inquiry must be, whether it is properly an incident to an express power, and necessary to it's execution. If it be, it may be exercised by congress. If it be not, congress cannot exercise it. – And this construction of the words "necessary and proper," is not only consonant with that which prevailed during the discussions and ratifications of the constitution, but is absolutely necessary to maintain their consistency with the peculiar character of the government, as possessed of particular and defined powers, only; not of the general and indefinite powers vested in ordinary governments.[220]

Under this construction of the clause in question, it is calculated to operate as a powerful and immediate check upon the proceedings of the federal legislature, itself, so long as the sanction of an oath, and the obligations of conscience, are regarded, among men. For, as every member is bound by oath to support the constitution, if he were to bring every measure that is proposed to the test here mentioned, and reject whatsoever could not stand the scrutiny, we should probably cease to hear any questions respecting the constitutionality of the acts of the federal government. To which we may add, that this interpretation of the clause is indispensably necessary to support that principle of the constitution, which regards the judicial exposition of that instrument, as the bulwark provided against undue extension of the legislative power. If it be understood that the powers implied in the specified powers, have an immediate and appropriate relation to them, as means, necessary and proper for carrying them into execution, questions on the constitutionality of laws passed for this purpose, will be of a nature sufficiently precise and determinate, for judicial cognizance and control. If on the one hand congress are not limited in the choice of the means, by any such appropriate relation of them to the specified powers, but may use all such as they may deem capable of answering the end, without regard to the necessity, or propriety of them, all questions relating to means of this sort must be questions of mere policy, and expediency, and from which the judicial interposition and control are completely excluded. – If, for example, congress were to pass a law prohibiting any person from bearing arms, as a means of preventing insurrections, the judicial courts, under the construction of the words necessary and proper, here contended for, would be able to pronounce decidedly upon the constitutionality of these means. But if congress may use any means, which they choose to adopt, the provision in the constitution which secures to the people the right of bearing arms, is a mere nullity; and any man imprisoned for bearing arms under such an act, might be without relief; because in that case, no court could have any power to pronounce on the necessity or propriety of the means adopted by congress to carry any specified power into complete effect.

This finishes our view of the legislative powers granted to the federal government; great and extensive as they must appear, they are in general such as experience had evinced to be necessary, or as the principles of a federal government had recommended to experiment, at least. In many

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instances these powers have been guarded by wise provisions, and restraints; some which have been already noticed; the remainder will soon pass under review. Experience has already evinced the benefit of these restraints; and had they been more numerous, and more effectual, there is little reason to doubt that it would have contributed largely to the peace and harmony of the union, both heretofore, and hereafter. All governments have a natural tendency towards an increase, and assumption of power; and the administration of the federal government, has too frequently demonstrated, that the people of America are not exempt from this vice in their constitution. We have seen that parchment chains are not sufficient to correct this unhappy propensity; they are, nevertheless, capable of producing the most salutary effects; for, when broken, they warn the people to change those perfidious agents, who dare to violate them.

NOTES

176. C. U. S. Art. 1. Sec. 8.

177. Confederation, Art. 4.

178. Federalist, No. 42.

179. L. U. S. 1 Cong. 2 Sess. c. 3. 7 Cong. c. 28.

180. 2 Dallas's Reports, 296.

181. See a letter of George Nicholas, Esq. on the Alien and Sedition laws.

182. See Beccaria, on Crimes and Punishments, c. 14

183. In Virginia, farmers generally cultivate their own lands. It may be otherwise in the northern states.

184. C. U. S. Art. 1. sect. 8.

185. Confederation, Art. 9.

186. C. U. S. Art. 1. sect. 9.

187. See Hale's Hist. p. C. v. 1. p.198.

188. Consequently every bill for this purpose, or for any other by which a revenue may be raised, should originate in the house of representatives. Yet I am very much mistaken if a recurrence to the early journals of the senate of the United States, would not prove, that the several acts for establishing the post-office; for regulating the value of foreign coins, and for establishing a mint, all originated in the senate. The reason of the acquiescence of the house of representatives on these occasions, probably was, that no revenue was in tended to be drawn to the government by these laws: whereas strictly speaking, a revenue is raised by the act establishing the mint; 2 cong. c. 16. §. 14, equal to one half per centum, as an indemnification to the mint for the coinage: and in the case of the bill for establishing the post-office, there can be no room to doubt that it operates as a revenue law, and that, to a very considerable amount.

189. C. U. S. Art. 1. sec. 8.

190. On the 24th of March, 1796, the house of representatives requested the president to lay before the house his instructions to Mr. Jay, together with the correspondence and other documents relative to the treaty with Great Britain, which he refused to do, upon the ground, that that house had no constitutional participation in the business of making treaties; to which he adds the following: –

> "If other proofs than these, and the plain letter of the Constitution itself be necessary to ascertain the point under consideration, they may be found in the journals of the general Convention, which I have deposited in the office of the department of state. In those Journals, it will appear, that a proposition was made, that no treaty should be binding on the United States which was not ratified by a law, and that the proposition was explicitly rejected."
> – Message from the president to the house of representatives, March 30, 1796.

191. The annual proceeds of the duties on postage may not be estimated at less than 50,000 Dollars. – Report of the secretary of the treasury to the house of representatives. December 18, 1801.

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192. See the report of Mr. Secretary Hamilton on this subject.

193. See the resolution of congress respecting the copper-mines on the south side of Lake Superior. April 16, 1800. – A bill for establishing a mine, mineral, and metal company, was brought into congress the next session, (as I have understood) but miscarried.

194. See the opinion delivered by Judge Chase, in the federal circuit court of Pennsylvania, in the case of the United States vs. Worrel, 2 Dallas's Reports, 384.

195. C. U. S. Art. 1. Sec. 8.

196. Vattel, Lib. 3. Ch. 3.

197. Vattel, 439.

198. This is certainly the spirit of the constitution: but in the practical exercise of the functions of the president of the United States, it may be found to be in the power of that magistrate to provoke, though not to declare war.

199. C. U. S. Art. 1, Sec. 10.

200. 1 Blacks. Com. 258.

201. C. U. S. Art. 1, Sec. 9.

202. Confederation, Art. 9.

203. Ibidem, Art. 6.

204. Journals of the Virginia Convention, Art. 9, 10.

205. This restriction has proved illusory in practice; though congress are restricted from making any appropriation for the support of an army for more than two years, they have supposed themselves authorised to enlist an army for any period they may think proper, even in times of peace.

206. They were afterwards limited to 75,000 men. 5 cong. c. 137.

207. Amendments proposed by Virginia; Art. 12, by New York, Art. 11, and 12, by North Carolina, Art. 13.

208. Federalist, Vol. 2. No. 43.

209. Having lately procured a copy of the acts passed at the first session of the seventh congress, I find that three acts were passed on the subject of the present seat of the government of the United States. The first, entitled "An act to abolish the board of commissioners in the city of Washington, and for other purposes." The second, "An act additional to, and amendatory of, an act, entitled, an act concerning the district of Columbia." And the third, an act to incorporate the inhabitants of the city of Washington, in the district of Columbia. L. U. S. 7 Cong. c. 41, 52, and 53. The latter is limited to two years, and from thence to the end of the next session of congress.

210. L. U. S. 7 Cong. c. 40. – The act authorizes the inhabitants of the eastern-division of the territory north-west of the river Ohio, to form for themselves a constitution and state government, and to assume such name as they shall deem proper, and declares, that, the said state when formed, shall be admitted into the union, upon the same footing with the original states, in all respects whatever.

The boundaries of the state, as established for the present, are as follows: On the east, by the Pennsylvania line; on the south, by the Ohio river, to the mouth of the Great Miami river; on the west, by a line drawn due north from the Great Miami river at the mouth; and on the north, by an east and west line drawn through the southerly extreme of like Michigan, running east after intersecting the line from the mouth of the Miami river, until it intersect lake Erie, or the territorial line; and thence with the same through lake Erie to the Pennsylvania line. But congress reserve to themselves the liberty at any time hereafter to attach all the territory lying east of the line to be drawn due north from the mouth of the Miami, to the territorial line, and north of an east and west line drawn through the southerly extreme of lake Michigan, running east to lake Erie, to such state, or dispose of it otherwise, in conformity to the fifth article of the compact between the original states, and the people and states to be formed in the territory north-west of the river Ohio.

The convention have accordingly established a constitution pursuant to the act of congress, and have adopted the name of the river Ohio, as the name their state.

211. Virginia laws, Edi. 1785, p. 214. Edi. 1794. p. 47.

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212. Report of the Secretary of the Treasury, Dec. 18, 1801.

213. Report of Mr. Secretary Hamilton, to congress, January 19, 1795.

214. See Price's Observations on the American Revolution, p. 10, and 1 Blacks. Com. p. 306.

215. L. U. S. 5 Cong. c. 45.

216. See L. U. S. 1 Cong. 1 Sess. c. 6. and 4 Cong. c. 47.

217. An act passed in the 7 Cong. c. 40, to enable the people of the eastern division of the territory north-west of the river Ohio, to form a constitution and state government, and for the admission of such state into the union; by which it is declared, that all that part of the territory of the United States north-west of the river Ohio, heretofore included in the eastern division, of the said territory, and not included within the boundary by that act prescribed for the said state, shall be attached to, and made a part of the Indiana Territory, subject nevertheless to the future disposal of congress, according to the right reserved in the fifth article of the ordinance of congress, (July 13, 1787) for the government of the territory of the United States north-west of the river Ohio. This was necessarily noticed under the last head.

218. See the Federalist, No. 33, and 44.

219. Witness, the act for establishing a bank; the act authorizing the president to appoint officers to volunteer corps of militia; the act declaring that a paper not stamped agreeably thereto, shall not be admitted as evidence in a state court; the alien and sedition laws, &c. "not to multiply proofs on this subject, it may be sufficient to refer to the debates of the federal legislature, for several years, in which arguments have, on different occasions, been drawn with apparent effect from these phrases, in their indefinite meaning." See report of the committee of the general assembly of Virginia, on the alien and sedition laws, January 20, 1800.

220. See the report of the committee of the general assembly of Virginia on the alien and sedition laws. – January 20, 1800.

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NOTE D, PART 6

Restraints on Powers of Congress

The restraints imposed on the legislative powers of the federal government, are briefly comprised in the ninth section of the first article of the constitution, or in the amendments, proposed by the first congress, and since ratified in the mode prescribed by the constitution. Of these we shall take a brief survey, in the order in which they occur.

1. The migration, or importation of such persons, as any of the states now existing shall think proper to admit, shall not be prohibited by congress prior to the year 1808, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person. C. U. S. Art. 1. §. 9.

This article, at the time the constitution was framed, was deemed necessary to prevent an opposition, on that ground, to it's adoption in those states which still permitted the importation of slaves from Africa, and other foreign parts. A more liberal policy has since prevailed, so far as to render it probable that congress will never have occasion to exert the right of prohibiting the importation of slaves, such being now prohibited by the laws of all the states in the union. But should any of them show an inclination to rescind the present prohibitions, congress, after the year 1898, will be able to interpose it's authority to prevent it, and impose some partial restraint upon the farther extension of the miseries of mankind. How to remove the calamities of slavery from among us, is left to the wisdom of the state government; the federal government can only prevent the further importation of slaves after the period limited.

2. The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it. C. U. S. Art. 1. §. 9.

The writ of habeas corpus, is the great and efficacious remedy provided for all cases of illegal confinement; and is directed to the person detaining another, commanding him to produce the body of the prisoner, with the day and cause of his option and detention, to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf. In England this is a high prerogative writ, and issues out of the court of king's-bench, not only in term time, but during the vacation, by a fiat from the chief justice, or any other of the judges, and running into all parts of the king's dominions. In Virginia it may issue of the high court of chancery, the general court, or the court of the district in which the person is confined, and may be awarded by any judge of either of those courts in vacation: and if any judge in vacation, upon view of the copy of the warrant of commitment or detainer, or upon affidavit made, that such copy was denied, shall refuse any writ of habeas corpus, required to be granted by law, such judge shall be liable to the action of the party aggrieved.[221] And by the laws of the United States,[222] all the courts of the United States, and either of the justices of the supreme court, as well as judges of the district courts, have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment. – Provided that writs of habeas corpus shall in no case extend to prisoners in goal, unless they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.[223]

Here a question naturally occurs: if a person be illegally committed to prison in any state, under, or by color of the authority of the United States, can any judge, or court of the state in which he is confined, award a writ of habeas corpus, for the purpose of an inquiry into the cause of his commitment? To which, I answer, that if he be committed or detained for a crime, unless it be for treason or felony, plainly expressed in the warrant of commitment, and be neither convicted thereof, nor in execution by legal process, the writ (due requisites being observed) can not be refused him:[224]

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for the act is imperative, as to awarding the writ. The court or judge, before whom the prisoner is brought, must judge from the return made to the writ, what course he ought to pursue: whether, to discharge him from his imprisonment; or bail him, or remand him again to the custody of the person from whom he may be brought.

In England the benefit of this important writ can only be suspended by authority of parliament. It has been done several times of late years, both in England and in Ireland, to the great oppression of the subject, as has been said. In the United States, it can be suspended, only, by the authority of congress; but not whenever congress may think proper; for it cannot be suspended, unless in cases of actual rebellion or invasion. A suspension under any other circumstances, whatever might be the pretext, would be unconstitutional, and consequently must be disregarded by those whose duty it is to grant the writ. The legislatures of the respective states are left, I presume, to judge of the causes which may induce a suspension within any particular state. This is the case, at least, in Virginia.

3. No bill of attainder, or ex post facto law, shall be passed by congress, or by any state. C. U. S. Art. 1. §. 9. 10.

Bills of attainder are legislative acts passed for the special purpose of attainting particular individuals of treason, of felony, or to inflict pains and penalties beyond, or contrary to the common law. They are state-engines of oppression in the last resort, and of the most powerful and extensive operation, reaching to the absent and the dead, as well as to the present and the living.[225] They supply the want of legal forms, legal evidence,[226] and of every other barrier which the laws provide against tyranny and injustice in ordinary cases: being a legislative declaration of the guilt of the party, without trial, without a hearing, and often without the examination of witnesses, and subjecting his person to condign punishment, and his estate to confiscation and forfeiture. Instances of their application to these nefarious purposes occur in almost every page of the English history for a very considerable period: and very few reigns have passed in which the power has not been exercised, though, to the honor of the nation, I believe, no instance of the kind has occurred for more than half a century.

In May, 1778, an act passed in Virginia, to attaint one Josiah Philips, unless he should render himself to justice, within a limited time: he was taken, after the time had expired, and was brought before the general court to receive sentence of execution pursuant to the directions of the act. But the court refused to pass the sentence, and he was put upon his trial, according to the ordinary course of law. – This is a decisive proof of the importance of the separation of the powers of government, and of the independence of the judiciary; a dependent judiciary might have executed the law, whilst they execrated the principles upon which it was founded.

If any thing yet more formidable, or more odious than a bill of attainder can be found in the catalogue of state-enginery, it is what the constitution prohibits in the same clause, by the name of ex post facto laws: whereby an action indifferent in itself, and not prohibited by any law at the time it is committed, is declared by the legislature to, have been a crime, and punishment in consequence thereof, is inflicted on the person committing it. Happily, for the people of Virginia, I can not cite any case of an ex post facto law, (according to this definition, which I have borrowed from Judge Blackstone,[227]) that has been made in this commonwealth, nor have I heard of any such, in any other of the United States, that I recollect.

4. To check any possible disposition in congress towards partiality in the imposition of burdens, it is further provided, that no capitation or other direct tax shall be laid, unless in proportion to the census, or enumeration, by the constitution directed to be taken. [C. U. S. Art. 1. § 9.] And the fifth

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article of the constitution declares, that no amendment made prior to the year 1808, shall in any manner affect this, and the first clause of the ninth section, above noticed.

The acts of 3 Cong. c. 45, and 4 Cong. c. 37, laying duties upon carriages for the conveyance of persons, were thought to be infringements of this article, it being supposed, that such a tax was a direct tax, and ought to have been apportioned among the states. The question was tried in this state, in the case of the United States, against Hylton, and the court being divided in opinion, was carried to the supreme court of the United States, by consent. It was there argued by the proposer of it, (the first secretary of the treasury,) on behalf of the United States, and by the present chief justice of the United States, on behalf of the defendant. Each of those gentlemen was supposed to have defended his own private opinion. That of the secretary of the treasury prevailed, and the tax was afterwards submitted to, universally, in Virginia.[228]

6. Upon similar principles of equity, and impartiality, the succeeding clause declares, that 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. – And the fourth article of the constitution, Sec. 3, further provides, that nothing in the constitution of the United States shall be so construed as to prejudice any claims of the United States, or of any particular state. The reasons of these several restrictions and explanations having been already noticed, I shall add nothing more to the subject here; they being mentioned in this place only for the sake of method.

6. No title of nobility shall be granted by the United States, or any state: and no person holding any office of profit or trust under the United States, shall, without consent of congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state. C. U. S. Art. 1. Sec. 9, 10.

The first of these prohibitions was indispensably necessary to preserve the several states in their democratic form, tone, and vigor. Distinctions between the citizens of the same state, are utterly incompatible with the principles of such governments. Their admission, therefore, can not be too cautiously guarded against: and their total exclusion seems to be the only mode by which this caution can operate effectually. We have already noticed, that the several acts passed for establishing an uniform rule of naturalization, require of every alien becoming a citizen, of the United States, an absolute renunciation, on oath, of any title of nobility, which he might have borne under any other prince or state. Without this wise provision, this clause of the constitution might have failed of some of those salutary effects which it was intended to produce. The second prohibition is not less important. Corruption is too subtle a poison to be approached, without injury. Nothing can be more dangerous to any state, than influence from without, because it must be invariably bottomed upon corruption within. Presents, pensions, titles and offices are alluring things. In the reign of Charles the second of England, that prince, and almost all his officers of state were either actual pensioners of the court of France, or supposed to be under its influence, directly, or indirectly, from that cause. The reign of that monarch has been, accordingly, proverbially disgraceful to his memory. The economy which ought to prevail in republican governments, with respect to salaries and other emoluments of office, might encourage the offer of presents from abroad, if the constitution and laws did not reprobate their acceptance. Congress, with great propriety, refused their assent to one of their ministers to a foreign court, accepting, what was called the usual presents, upon taking his leave: a precedent which we may reasonably hope will be remembered by all future ministers, and ensure a proper respect to this clause of the constitution, which on a former occasion is said to have been overlooked.

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Thus far the restrictions contained in the constitution extend: "The conventions of a number of the states having, at the time of adopting the constitution, expressed a desire, in order to prevent misconstruction, or abuse of its powers, that further declaratory and restrictive clauses should be added; and as extending the ground of public confidence in the government, will best ensure the beneficent ends of its institution."[229] The following articles were proposed by congress, as amendments to the constitution, which having been duly ratified by the several states, now form a part thereof.

7. Congress shalt 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 Amendments to C. U. S. Art. 3.

On the first of these subjects, our state bill of rights contains, what, if prejudice were not incapable of perceiving truth, might he deemed an axiom, concerning the human mind. That "religion, or the duty we owe to our Creator, and the manner of discharging it, can be dictated only by reason and conviction, not by force or violence." In vain, therefore, may the civil magistrate interpose the authority of human laws, to prescribe that belief, or produce that conviction, which human reason rejects: in vain may the secular arm be extended, the rack stretched, and the flames kindled, to realize the tortures denounced against unbelievers by all the various sects of the various denominations of fanatics and enthusiasts throughout the globe. The martyr at the stake, glories in his tortures, and proves that human laws may punish, but cannot convince. The pretext of religion, and the pretenses of sanctity and humility, have been employed throughout the world, as the most direct means of gaining influence and power. Hence the numberless martyrdoms and massacres which have drenched the whole earth with blood, from the first moment that civil and religious institutions were blended together. To separate them by mounds which can never be overleaped, is the only means by which our duty to God, the peace of mankind, and the genuine fruits of charity and fraternal love, can be preserved or properly discharged. This prohibition, therefore, may be regarded as the most powerful cement of, the federal government, or rather, the violation of it will prove the most powerful engine of separation. Those who prize the union of the states will never think of touching this article with unhallowed hands. The ministry of the unsanctified sons of Aaron scarcely produced a flame, more sudden, more violent, or more destructive, than such an attempt would inevitably excite. – I forbear to say more, in this place, upon this subject, having treated of it somewhat at large in a succeeding note.

The second part of this clause provides, against any law, abridging the freedom of speech, or of the press.

It being one of the great, fundamental principles of the American governments, that the people are the sovereign, and those who administer the government their agents, and servants, not their kings and masters, it would have been a political solecism to have permitted the smallest restraint upon the right of the people to inquire into, censure, approve, punish or reward their agents according to their merit, or demerit. The constitution, therefore, secures to them the unlimited right to do this, either by speaking, writing, printing, or by any other mode of publishing, which they may think proper. This being the only mode by which the responsibility of the agents of the public can be secured, and practically enforced, the smallest infringement of the rights guaranteed by this article, must threaten the total subversion of the government. For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from

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speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it.

Our state bill of rights declares, that the freedom of the press is one of the great bulwarks of liberty, and can never he restrained but by despotic governments. The constitutions of most of the other states in the union contain articles to the same effect. When the constitution of the United States was adopted by the convention of Virginia, they inserted the following declaration in the instrument of ratification: "that among other essential rights, the liberty of conscience, and of the press, cannot be cancelled, abridged, restrained, or modified by any authority of the United States."

An ingenious foreigner seems to have been a good deal puzzled to discover the law which establishes the freedom of the press in England: after many vain researches, he concludes, (very rightly, as it relates to that government,) that the liberty of the press there, is grounded on its not being prohibited.[230] But with us, there is a visible solid foundation to be met with in the constitutional declarations which we have noticed. The English doctrine, therefore, that the liberty of the press consists only in this, that there shall be no previous restraint laid upon the publication of any thing which any person may think proper, as was formerly the case in that country, is not applicable to the nature of our government, and still less to the express tenor of the constitution. That this necessary and invaluable liberty has been sometimes abused, and "carried to excess; that it has sometimes degenerated into licentiousness, is seen and lamented; but the remedy has not been discovered. Perhaps it is an evil inseparable from the good to which it is allied: perhaps it is a shoot which cannot be stripped from the stalk, without wounding vitally the plant from which it is torn. However desirable those measures might be which correct without enslaving the press, they have never yet been devised in America."[231]

It may be asked; is there no protection for any man in America from the wanton, malicious, and unfounded attacks of envenomed calumny? Is there no security for his good name? Is there no value put upon reputation? No reparation for an injury done to it?

To this we may answer with confidence, that the judicial courts of the respective states are open to all persons alike, for the redress of injuries of this nature; there, no distinction is made between one individual and another; the farmer, and the man in authority, stand upon the same ground: both are equally entitled to redress for any false aspersion on their respective characters, nor is there any thing in our laws or constitution which abridges this right. But the genius of our government will not permit the federal legislature to interfere with the subject; and the federal courts are, I presume, equally restrained by the principles of the constitution, and the amendments which have since been adopted.

Such, I contend, is the true interpretation of the constitution of the United States: it has received a very different interpretation both in congress and in the federal courts. This will form a subject for a discussion on the freedom of the press, which the student will find more at large in another place.

The same article secures to the people the right of assembling peaceably; and of petitioning the government for the redress of grievances. The convention of Virginia proposed an article expressed in terms more consonant with the nature of our representative democracy, declaring, that the people have a right, peaceably to assemble together to consult for their common good, or to instruct their representatives: that every freeman has a right to petition, or apply to the legislature, for the redress of grievances. This is the language of a free people asserting their rights: the other savors of that stile of condescension, in which favors are supposed to be granted. In England, no petition to the king, or either house of parliament for any alteration in church or state, shall be signed by above twenty

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persons, unless the matter thereof be approved by three justices of the peace, or a major part of the grand-jury in the county; nor be presented by more than ten persons. In America, there is no such restraint.

8. 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. Amendments to C. U. S. Art. 4.

This may be considered as the true palladium of liberty. – The right of self defense is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any color or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction. In England, the people have been disarmed, generally, under the specious pretext of preserving the game: a never failing lure to bring over the landed aristocracy to support any measure, under that mask, though calculated for very different purposes. True it is, their bill of rights seems at first view to counteract this policy: but the right of bearing arms is confined to protestants, and the words suitable to their condition and degree, have been interpreted to authorize the prohibition of keeping a gun or other engine for the destruction of game, to any farmer, or inferior tradesman, or other person not qualified to kill game. So that not one man in five hundred can keep a gun in his house without being subject to a penalty.

9. 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. Amendments to C. U. S. Art. 5.

Our state bill of rights, conforming to the experience of all nations, declares, that standing armies in time of peace, should be avoided as dangerous to liberty; this article of the constitution, seems by a kind of side wind, to countenance, or at least, not to prohibit them. The billeting of soldiers upon the citizens of a state, has been generally found burdensome to the people, and so far as this article may prevent that evil it may be deemed valuable, but it certainly adds nothing to the national security.

10. 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 warrant shall issue, but upon probable cause supported by oath, or affirmation, and particularly describing the place to be searched, and the person or things to be seized. Amendments to C. U. S. Art. 6, and herewith agrees the tenth article of our state bill of rights.

The case of general warrants; under which term all warrants not comprehended within the description of the preceding article, may be included, was warmly contested in England about thirty or thirty-five years ago, and after much altercation they were finally pronounced to be illegal by the common law.[232] The constitutional sanction here given to the same doctrine, and the test which it affords for trying the legality of any warrant by which a man may be deprived of his liberty, or disturbed in the enjoyment of his property, can not be too highly valued by a free people.

But, notwithstanding this constitutional sanction, and the security which it promises to all persons, an act passed during the second session of the fifth congress, entitled an act concerning aliens, which was supposed to violate this article of the constitution, in the most flagrant and unjustifiable degree: by authorizing the president of the United States to order all such aliens as he should judge dangerous to the peace and safety of the United States, or have reasonable grounds to suspect of any treasonable or secret machinations against the government thereof, to depart out of the territory of the United States within a limited time; and in case of disobedience, every alien so ordered was

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liable on conviction to be imprisoned for any term not exceeding three years. And any alien so ordered to depart, and remaining in the United States without a license from the president might be arrested, and sent out of them, by his order: and, in case of his voluntary return, might be imprisoned so long, as in the opinion of the president, the public safety might require. Alien friends, only, were the objects of this act, another act being passed at the same session, respecting alien enemies. – The general assembly of Virginia at their session in 1798, "protested against the palpable, and alarming infractions of the constitution in this act; which exercises a power no where delegated to the federal government; and which, by uniting legislative and judicial powers to those of executive, subverts the general principles of a free government, as well as the particular organization, and positive provisions of the federal constitution." Kentucky had before adopted a similar conduct.

Among the arguments used by the general assembly of Virginia in their strictures upon this act, the following seem to be more peculiarly apposite to the subject of this article.

In the administration of preventive justice, the following principles have been held sacred; that some probable ground of suspicion be exhibited before some judicial authority; that it be supported by oath or affirmation; that the party may avoid being thrown into confinement, by finding pledges or securities for his legal conduct, sufficient in the judgement of some judicial authority; that he may have the benefit of a writ of habeas corpus, and thus obtain his release, if wrongfully confined; and that he may at any time be discharged from his recognizance, or his confinement, and restored to his former liberty and rights, on the order of the proper judicial authority; if it shall see sufficient cause.[233]

Let the student diligently compare these principles of the only preventive justice known to American jurisprudence, and he will probably find that they are all violated by the alien act. The ground of suspicion is to be judged of, not by any judicial authority, but by the executive magistrate, alone; no oath, or affirmation is required; if the suspicion be held reasonable by the president, (whatever be the grounds of it) he may order the suspected alien to depart, without the opportunity of avoiding the sentence by finding pledges for his future good conduct, as the president may limit the time of departure as he pleases, the benefit of the writ of habeas corpus may he suspended with respect to the party, although the constitution ordains, that it shall not be suspended, unless when the public safety may require it, in case of rebellion, or invasion, neither of which existed at the passage of that act: and the party being, under the sentence of the president, either removed from the United States, or punished by imprisonment, or disqualification ever to become a citizen on conviction of his not obeying the order of removal, or on returning without the leave of the president, he can not be discharged from the proceedings against him, and restored to the benefits of his former situation, although the highest judicial authority should see the most sufficient cause for it.[234]

Among the reasons alleged by a committee of congress, in support of the constitutionality of the alien law, one was; "that the constitution was made for citizens, not for aliens, who of consequence have no rights under it, but remain in the country, and enjoy the benefit of the laws, not as matter of right, but merely as matter of favor and permission; which may be withdrawn whenever the government may judge their further continuance dangerous."[235]

To this it was answered; that, "although aliens are not parties to the constitution, it does not follow that the constitution has vested in Congress an absolute right over them; or that whilst they actually conform to it, they have no right to it's protection. That if they had no rights under it, they might not only be banished, but even capitally punished, without a jury, or other incidents to a fair trial."[236] A doctrine so far from being sound, that a jury, one half of which shall be aliens, is allowed, it is

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believed, by the laws of every state, except in cases of treason. To which we may add that the word "persons" in this, and the subsequent articles of the amendments to the constitution, most clearly designate, that aliens, as persons, must be entitled to the benefits therein secured to all persons alike. – As we shall have occasion to mention the subject of this interesting controversy, again, in another place, I shall only add here, that the act was permitted to expire at the end of two years, without any attempt, I believe, to continue it.

11. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment, or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia in the time of war, or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor be compelled in any criminal case, to be 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. Amendments to C. U. S. Art. 7, and,

12. 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 witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. Amendments to C. U. S. Art. 8.

13. Excessive bail shall not be required, nor excessive fines imposed, nor cruel, and unusual punishments inflicted. Amendments to C. U. S. Art. 10.

The subjects of these three articles are so immediately connected with each other, that I have chosen not to separate them. The first may be considered as liberal exposition, and confirmation of the principles of that important chapter of Magna Charta, which declares, "*Nullus liber Homo aliquo modo destruatur nisi per legale judicium parium suorum*," which words, *aliquo modo destruatur*, according to Sir Edward Coke, include a prohibition not only of killing and maiming, but also of torturing, and of every oppression by color of legal authority: and the words *liber Homo*, extend to every one of the king's subjects, "be he ecclesiastical or temporal, free or bond, man or woman, old or young, or be he outlawed, ex-communicated, or any other, without exception."[237] – for even a villein, as he tells us elsewhere, is comprehended under the term *liber Homo*, except against his lord.[238]

The common law maxim, that no man is to be brought in jeopardy of his life more than once for the same offense, is here rendered a fundamental law of the government of the United States; as, is also, that other inestimable maxim of the common law, that no man shall be compelled in any criminal case to give evidence against himself; that he shall, moreover, be informed of the nature and cause of his accusation; that he shall be confronted with the witnesses against him; that be shall have compulsory process for obtaining witnesses in his favor; – a benefit long denied by the courts in England: and that he shall have the assistance of counsel for his defense; – not as a matter of grace, but of right; – not for his partial defense, upon a point of law; but for his full defense, both on the law, and the evidence: and, that he shall, in no case, be deprived of life, liberty, or property, without due process of law. To all which, is added, the inestimable right of a trial by jury, of the state and district in which the crime shall have been committed. The importance of all which articles will more evidently appear, in the course of our examination of the various subjects to which they relate, in the first and fourth book of the Commentaries, on the Laws of England. That part of the seventh

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article which declares that private property shall not be taken for public use, without just compensation, was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war, without any compensation whatever. A law of the state of Virginia describes by whom, and in what cases, impresses may be made; and authorizes the commitment of the offender in case of any illegal impressment.[239]

We have already noticed the act concerning aliens,[240] as violating the sixth article of the amendments to the constitution. It was said, moreover, to violate the seventh and eighth. To this the congress answered, "that the provisions in the constitution relative to presentment and trial of offenses by juries, do not apply to the revocation of an asylum given to aliens. Those provisions solely respect crimes, and the alien may be removed without having committed any offense, merely from motives of policy, or security. The citizen, being a member of society, has a right to remain in the country, of which he cannot be disfranchised, except for offenses first ascertained, on presentment and trial by jury. – That the removal of aliens, though it may be inconvenient to them, cannot be considered as a punishment inflicted for an offense, but merely the removal, from motives of general safety, of an indulgence, which there is danger of their abusing, and which we are in no manner bound to grant or continue."[241]

To these arguments the general assembly of Virginia replied; that it can never be admitted that the removal of aliens authorized by the act, is to be considered, not as a punishment for an offense, but as a measure of precaution and prevention. If the banishment of an alien from a country into which he has been invited, as the asylum most auspicious to his happiness; a country where he may have formed the most tender connections, where he may have vested his entire property, and acquired property of the real and permanent, as well as the moveable and temporary kind; where he enjoys under the laws, a greater share of the blessings of personal security, and personal liberty, than he can elsewhere hope for, and where he may have nearly completed his probationary title to citizenship; if, moreover, in the execution of the sentence against him, he is to be exposed, not only to the ordinary dangers of sea, but to the peculiar casualties incident to a crisis of war, and of unusual licentiousness on that element, and possibly to vindictive purposes which his emigration itself may have provoked; if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom, to which the name can be applied. And, if it be a punishment, it will remain to be shown, whether, according to the express provisions of these articles, it can be constitutionally inflicted, on mere suspicion, by the single will of the executive magistrate, on persons convicted of no personal offense against the laws of the land, nor involved in any offense against the law of nations, charged on the foreign state of which they were members.[242]

14. 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 the common law. C. U. S. Art. 9, Amendments.

This article provides for the trial by jury in civil cases, as well as criminal, and supplies some omission in the constitution.

15. The enumeration in the constitution, of certain rights, shall not be construed to deny, or disparage others retained by the people. Amendments to C. U. S. Art. 11, and,

16. The powers not delegated, to the United States by the constitution, nor prohibited by it to the

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states, are reserved to the states respectively, or to the people. C. U. S. Art. 12, Amendments.

All the powers of the federal government being either expressly enumerated, or necessary and proper to the execution of some enumerated power; and it being one of the rules of construction which sound reason has adopted; that, as exception strengthens the force of a law in cases not excepted, so enumeration weakens it, in cases not enumerated; it follows, as a regular consequence, that every power which concerns the right of the citizen, must be construed strictly, where it may operate to infringe or impair his liberty; and liberally, and for his benefit, where it may operate to his security and happiness, the avowed object of the constitution: and, in like manner, every power which has been carved out of the states, who, at the time of entering into the confederacy, were in full possession of all the rights of sovereignty, is, in like manner to be construed strictly, wherever a different construction might derogate from the rights and powers, which by the latter of these articles; are expressly acknowledged to be reserved to them respectively.

The want of a bill of rights was among the objections most strongly urged against the constitution in its original form. The author of the Federalist undertakes to show, that a bill of rights was not only unnecessary, but would be dangerous.[243] A bill of rights may be considered, not only as intended to give law, and assign limits to a government about to be established, but as giving information to the people. By reducing speculative truths to fundamental laws, every man of the meanest capacity and understanding may learn his own rights, and know when they are violated; a circumstance, of itself, sufficient, I conceive, to counterbalance every argument against one.

To comprehend the full scope and effect of the twelfth article, by which certain rights are said to be reserved to the states respectively, or to the people, it is to be recollected, that there are powers, exercised by most other governments, which in the United States are withheld by the people, both from the federal government and from the state governments: for instance, a tax on exports can be laid by no constitutional authority whatever, whether of the United States, or of any state; no bill of attainder; or ex post facto law can be passed by either; no title of nobility can be granted by either. Many other powers of government are neither delegated to the federal government, nor prohibited to the states, either by the federal or state constitutions. These belong to that indefinite class of powers which are supposed necessarily to devolve upon every government, in consequence of the very act of its establishment, where no restrictions are imposed on the exercise of them; such as the power of regulating the course in which property may be transmitted by deed, will, or inheritance; the manner in which debts may be recovered, or injuries redressed; the right of defining and punishing offenses against the society, other than such as fall under the express jurisdiction of the federal government; all which, and all others of a similar nature are reserved to, and may be exercised by the state governments. From those powers, which are in express terms granted to the United States, and though not prohibited to the states respectively, are not susceptible of a concurrent exercise of authority by them, the states, notwithstanding this article, will continue to be excluded; such is the power to regulate commerce, and to define and punish piracies and felonies committed upon the high seas; from which the states, respectively, are by necessary and unavoidable construction excluded from any share or participation. On the other hand, such of the powers granted by the constitution to the federal government, as will admit of a concurrent exercise of authority, both in the federal and the state governments; such for example, as the right of imposing taxes, duties; and excises (except duties upon imports or exports, or upon tonnage, which the states cannot do without consent of congress) may be exercised by the states respectively, concurrently with the federal government. And here it may not be improper to take a short review of the powers which are expressly prohibited to the individual states by the constitution; or can be exercised by them only

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with the consent of congress; they have been enumerated elsewhere, but seem to require a more particular notice in this place.

1. First, then; no state shall enter into any treaty, alliance, or confederation. C. U. S. Art. 1. §. 10.

A similar provision was contained in the articles of confederation, the terms of which are in reality more strong and definite than those of the constitution. The federal government being the organ through which the individual states communicate with foreign nations, and the interest of the whole confederacy being paramount to that of any member thereof; the power of making treaties and alliances with foreign nations, is with propriety vested exclusively in the federal government. Moreover, as congress is vested with the power of admitting new states into the union, it was necessary to prohibit any alliance or confederacy with such state, antecedent to its admission into the union; for such an alliance might contravene the principles of the constitution, and prevent or retard the proposed admission. And lastly, to preserve the union entire, and unbroken, no partial confederacy between any two or more states, can be entered into: for that would in fact dissolve the government of the United States, as now established.

2. Secondly; no state shall, without the consent of congress, enter into any agreement or compact with another state, or with any foreign power. C. U. S. Art. 1 §. 10.

Here we find a distinction between treaties, alliances, and confederations; and agreements or compacts. The former relate ordinarily to subjects of great national magnitude and importance, and are often perpetual, or made for a considerable period of time;[244] the power of making these is altogether prohibited to the individual states: but agreements, or compacts, concerning transitory or local affairs, or such as cannot possibly affect any other interest but that of the parties, may still be entered into by the respective states, with the consent of congress. The compact between this state and Maryland, entered into in the year 1786, may serve as an example of this last class of public agreements.[245]

3. No state shall grant letters of marque and reprisal.[246]

As these measures ordinarily precede a declaration of war, the reasons for the total prohibition of the exercise of this power, by the states respectively, have been already mentioned: for otherwise the petulance and precipitation of any one state, whose citizens may have been injured by the subjects of a foreign nation, might plunge the union into a war.

4. No state shall, without consent of congress, keep troops, or ships of war, in time of peace; or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.[247]

The prohibitions contained in this clause are not absolute, but are subject to the consent of congress, or imperious circumstances. The setting on foot an army or navy, in the time of profound peace, is often a just cause of jealousy between neighboring, and even remote nations. But there is not unfrequently a period between the commencement of a quarrel between two nations, and a declaration of war, or commencement of actual hostility, when prudence makes it necessary to prepare for the issue of the dispute. During such a period, it might be necessary to call for the exertions of the several states, in aid of the federal strength. At this epoch, it might be the summit of indiscretion to check the ardor of the respective states, if disposed to raise an army or navy from its own resources. Congress therefore may permit it: and if the danger of an attack upon any particular state be so imminent, as not to admit of delay, or if it be actually invaded, it may adopt measures for its own defense, without waiting for the consent of congress. And when a war is actually begun, under the authority of the federal union, any state may, according to its resources

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and discretion, keep any number of troops or ships: for the prohibition ceases as soon as war begins.

5. No state shall coin money: emit bills of credit, make any thing but gold and silver coin a tender in payment of debts: or pass any law impairing the obligation of contracts.[248]

The right of coining, and regulating the value of coin, being vested in the federal government, a participation in those rights could not be permitted to the respective states with any propriety. For the government must be responsible for the purity and weight of all coin issued under its authority: this could not be if the states were permitted to coin money according to the standard prescribed by the United States, as the officers of the mint would be under the directions of the state government. And if the several states were to issue coin of different standards, or denominations, the inconveniences to commerce would be infinite. They are therefore prohibited altogether from coining money. – The evils of paper money, the injury produced by it to public credit; the utter destruction of the fortunes of numberless individuals, by a rapid and unparalleled depreciation during the revolutionary war; the grievous hardships introduced, at the same period, by the tender laws, (an unhappy, but perhaps unavoidable expedient, to which both the federal, and state governments were constrained to have recourse, at the same time) by which a creditor was in some instances obliged to accept paper in a most deprecated state, for a just debt of an hundred times it's real value, or incur the general odium of his fellow-citizens, probably gave rise to the prohibition against any state's emitting paper money, or making any thing but gold or silver a tender in payment of debts, or passing any law impairing the obligation of contracts. – But why was not the prohibition extended to the federal, as well as to the state governments? The federal government, during the revolutionary war, was not more exempt from just cause of censure upon these grounds, than the States respectively. Many of the laws passed by the states to support the credit of the continental money, by making it a tender in payment of debts, were passed on the recommendation of congress. The forty for one scheme originated there; why not prohibit some future congress from renewing the same breach of faith?

6. No state shall pass any bill of attainder, or ex post facto law; or grant any title of nobility. – Ibid.

These prohibitions being extended equally to the federal government, as to the states, have been already sufficiently noticed.

7. No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing it's inspection laws; and the nett 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 congress. Nor shall any state, without the consent of congress lay any duty of tonnage.

On the subject of these prohibitions, respectively, sufficient has already been said, under the article which authorizes congress to regulate commerce.

Having thus taken a survey of the powers delegated to the congress of the United States, and of those prohibited thereto, by the constitution; as also, of those, which are either altogether prohibited to the states, individually, or can be exercised by them only, with the consent, and under the control of congress; and in the course of that survey, having pointed out according to the best of my abilities, those powers which are exclusively vested in the federal government; secondly, those powers, in which the federal, and state governments, may be presumed to possess concurrent jurisdiction, and authority: thirdly, those powers which are equally prohibited to both; and fourthly, those which are absolutely prohibited to the states, respectively, or can be exercised by them only, with the

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approbation and consent of the federal government; it follows that all other powers of government compatible with the nature and principle of democratic governments, and not prohibited by the bill of rights, or constitution of the respective states, remain with them, and may be exercised by them, respectively, in such manner as their several constitutions, and laws, may permit, or direct. And this right, is expressly recognized, as before-mentioned, by the twelfth article of the amendments to the federal constitution; declaring, that 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. This numerous class of powers relates altogether to the civil institutions, or laws of the states; and the subject of them forms their several municipal codes, according to the constitutions and laws of each state, respectively.

Here, let us again pause, and reflect, how admirably this division, and distribution of legislative power is adapted to preserve the liberty, and to promote the happiness of the people of the United States; by assigning to the federal government, objects which relate only to the common interests of the states, as composing one general confederacy, or nation; and reserving to each member of that confederacy, a power over whatever may affect, or promote its domestic peace, happiness, or prosperity: at the same time limiting, and restraining both from the exercises, or assumption of powers, which experience has demonstrated, either in this, or in other countries, to be too dangerous to be entrusted with any man or body of men whatsoever. – Restraint upon the power of the legislature, says De Lolme,[249] are more necessary than upon the executive; the former does in a moment, what the latter accomplishes only by successive steps. In England, all legislative power, without limitation, and without control, is concentrated in the two houses of parliament, with the king at their head; and their united power according to the maxims of that government, is omnipotent. In the United States, the great and essential rights of the people are secured against legislative as well as executive ambition. – They are secured, not by laws, only, which the legislature who makes them may repeal, and annul at it's pleasure; but by constitutions, paramount to all laws: defining and limiting the powers of the legislature itself, and opposing barriers against encroachments, which it can not pass, without warning the people of their danger. Secondly, by that division, and distribution of power between the federal, and the state governments, by which each is in some degree made a check upon the excesses of the other. For although the states possess no constitutional negative upon the proceedings of the congress of the United States, yet it seems to he a just inference and conclusion, that as the powers of the federal government result from the compact to which the states are parties; and are limited by the plain sense of the instrument constituting that compact; they are no further valid, than as they are authorized by the grants enumerated therein: and, that in case of a deliberate, palpable, and dangerous exercise of other powers, not granted by that compact, the states, who are parties thereto, have the right, and are in duty bound, to interpose, for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights, and liberties appertaining to them.[250] Thirdly, by the constitution of the legislative department itself, and the separation and division of powers, between the different branches, both of the congress, and of the state legislatures: in all which, an immediate dependence, either from the people, or the states, is happily, in a very great degree preserved. Fourthly, by the qualified negative which the constitution of the United States, gives to the president, upon all the proceedings of congress, except a question of adjournment. Fifthly, and lastly; by the separation of the judiciary from the legislative department; and the independence of the former, of the control, or influence of the latter, in any case where any individual may be aggrieved or oppressed, under color of an unconstitutional act of the legislature, or executive. In England, on the contrary, the greatest political object may be attained, by laws, apparently of little importance, or amounting only to a slight

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domestic regulation: the game-laws, as was before observed, have been converted into the means of disarming the body of the people: the statute *de donis conditionalibus* has been the rock, on which the existence and influence of a most powerful aristocracy, has been founded, and erected: the acts directing the mode of petitioning parliament, etc. and those for prohibiting riots: and for suppressing assemblies of free-masons, etc. are so many ways for preventing public meetings of the people to deliberate upon their public, or national concerns. The congress of the United States possesses no power to regulate, or interfere with the domestic concerns, or police of any state: it belongs not to them to establish any rules respecting the rights of property; nor will the constitution permit any prohibition of arms to the people; or of peaceable assemblies by them, for any purposes whatsoever, and in any number, whenever they may see occasion.

NOTES

221. L. V. Edi. 1704. c. 118.

222. L. U. S. 1 Cong. 1 Sess. c. 20. §. 14.

223. Of the nature and efficacy of the writ of habeas corpus the student may be informed. Blacks. Com. 1. 135. 3. 135. 4. 438.

224. L. V. Edi. 1794. c. 118.

225. 1. Hale's Hist. P. C. 82, 342, &c.

226. Sir John Fenwicke was attainted for treason, by act of parliament, because he could not be convicted in the ordinary course of trials; the law requiring two witnesses in cases of treason, and there being but one, who could be had, to give testimony against him. Stat. 8 W 3. c. 6.

227. Blacks Com. 46.

228. The president of the court of appeals in Virginia was one of those who refused to pay the tax, until the question was judicially determined. The opinion of the author of this essay, with the reasons of it have been shown before, page 197.

229. Preamble to the amendments proposed by the 1 Cong. 1 Sess.

230. De Lolme on the English constitution. 317. Phila. printed.

231. Letter from the American envoys to the French minister of foreign affairs. This nervous passage bespeaks its author; a gentleman who now fills the highest judicial office under the federal government.

232. See 3 Burrows Rep. 1743. 1 Blacks. Reports, 555. 4 Blacks Com. 291.

233. Report of the committee of the general assembly of Virginia on the alien and sedition laws, January 20, 1800.

234. Report of the committee of the general assembly of Virginia, &c.

235. Report of the committee of congress, on the petitions for the repeal of the alien and sedition laws; February 25, 1799.

236. Report of the Virginia assembly. – ut supra.

237. 2. Inst. 55.

238. Ibid. c. 45.

239. L. V. Edi. 1794, c. 121.

240. L. U. S. 5 Cong. c. 75.

241. Report of the committee of congress, February 25, 1799.

242. Report of the committee of the general assembly or Virginia, on the alien and sedition laws. – January 20, 1800.

243. Vol. II. 349.

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244. See Vattel, 296, 297.

245. L. V. Edi. 1794, c. 18.

246. C. U. S. Art. 1. §. 10.

247. C. U. S. Act. 1. Sec. 10.

248. Ibidem.

249. On the British Constitution, p. 164.

250. Resolutions of the general assembly of Virginia, December 21, 1798. Also the resolution of the general convention of Virginia, ratifying the constitution of the U. States – for which see ante.

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NOTE D, PART 7
Executive Powers

II. The second article of the federal constitution provides, that the executive power shall he vested in a president of the United States of America; that he shall be a natural born citizen, unless he was a citizen at the time of the adoption of the constitution, and in that case, that he shall have been fourteen years a resident in the United States; that he shall have attained the age of thirty-five years; that he shall continue in office four years; that he shall receive a stated compensation for his services, which shall neither be increased nor diminished during the period for which he is elected, and shall not receive within that period, any other emolument from the United States, or any of them; and that before he enters upon the execution of his office, he shall take an oath, "faithfully to execute the same, and to the best of his ability, preserve, protect, and defend the constitution of the United States."

The author of the Treatise on the English Constitution,[251] considers the unity of the executive among the advantages peculiar to that, as a free government. The advantages ordinarily attributed to that circumstance, are supposed to be a necessary and unavoidable unanimity; promptitude and dispatch, as a consequence of it: and, immediate and obvious, responsibility. If such are the real advantages of a single executive magistrate, we may contend that they are found in a much greater degree in the federal government, than in the English. In the latter it exists, only theoretically, in an individual; the practical exercise of it, being devolved upon ministers, councils, and boards. The king, according to the acknowledged principles of the constitution, not being responsible for any of his acts, the minister upon whom all responsibility devolves, to secure his indemnity acts by the advice of the privy council to whom every measure of importance is submitted, before it is carried into effect. His plans are often digested and canvassed in a still more secret conclave, consisting of the principal officers of state, and styled the cabinet-council, before they are communicated to the privy council:[252] matters are frequently referred to the different boards, for their advice thereon, previously to their discussion, and final decision, in the council. Thus, in fact, the unity of the executive is merely ideal, existing only in the theory of the government; whatever is said of the unanimity, or dispatch arising from the unity of the executive power, is therefore without foundation. And with respect to responsibility, we have already observed that the nominal executive, is absolved from it by the constitution: all the responsibility that the government admits, is shared between the different ministers, privy council, and boards. The unity of the nominal executive, therefore, so far from ensuring responsibility, destroys it. If then the constitution of England be relied on as proving the superior advantages of unity in the executive department, it does not support any part of the position.

In the United States the unity of the executive authority is practically established, in almost every instance. For, the senate are constituted a council, rather for special, than for general purposes. It may reasonably be doubted, whether they have a right to advise the president, in any case, without being first consulted; and whether, when consulted, he is obliged to carry into effect any measure which they may advise: the constitution is perhaps defective in both these cases. To illustrate them, let it be supposed, that the senate, without being consulted should advise the sending an ambassador to a foreign court: is the president bound to nominate one to them for that purpose? Or, suppose an ambassador to have concluded a treaty, which the president disapproves, but, which the senate advise him to ratify; is he bound to do so? The constitution says, "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 shall nominate, and by, and with, the advice and consent of the senate shall appoint ambassadors." These words appear rather to confer a discretionary authority, that to impose a

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mandate, or obligation. – But although the president may perhaps constitutionally decline the ratification of a treaty, or the appointment of an ambassador, notwithstanding the advice of the senate, yet he cannot adopt any measure, which they may advise him to reject, if the constitution requires their advice, or assent: so that, in general, whatever he does must have the sanction of the senate for it's support: whatever he omits doing, is chargeable upon him, only, unless the measure shall have been submitted to the senate and rejected by them. The conduct of the first magistrate of a nation is as frequently liable to censure for his omissions, as for his acts. Whatever, therefore, is left undone, which the public safety may require to have been done, is chargeable upon the neglect of the president, exclusively: whatever may be done amiss is likewise chargeable upon him, in the first instance, as the author and propounder of the measure: although it should afterwards receive the approbation and consent of the senate. Responsibility, then, pursues him in every situation: whether active or passive; sleeping, or awake.

But although a king of England be not responsible, it is said that his ministers are; for they may be impeached: so may a president of the United States.[253] – But I lay no stress upon this point, as a practical means of enforcing responsibility, for reasons that will be more fully explained hereafter. The, true point of responsibility rests upon the shortness of the period for which a president of the United States is elected, and the power which the people possess, of rejecting him at a succeeding election: a power, the more formidable, an energetic, as it remains in their hands, is untrammeled by forms, and the exercise of it depends more upon opinion, than upon evidence. When brought before such a tribunal, in vain would a culpable president seek shelter under the flimsy veil, of advice of council; such a cobweb, like the net of Vulcan, would only expose him, more effectually.

On the ground of responsibility, then, an immense preference is due to the constitution of the United States: it is at least equal to that of Great-Britain on the ground of unanimity: for, as every executive measure must originate in the breast of the president, his plans will have all the benefit of uniformity, that can be expected to flow from the operations of any individual mind: let it be supposed that the senate reject one of his proposed measures; possessing a perfect acquaintance with the whole system of his own administration, he will naturally be led to adopt some other course, which shall neither retard, nor counteract any other part of his system. No British minister, whose measures are opposed in the cabinet, can do more; probably not so much: for a substitute may, perhaps, be obtruded upon him, by some other influential minister. But no such substitute can be obtruded upon a president of the United States; the power of the senate consisting rather in approving, or rejecting, than in advising or propounding, as already hinted.

The advantages of information, and dispatch, are probably equally in favor of the constitution of the American executive. The constitution of the United States has made ample provision for his aid in these respects, by assigning to him ministers to whom the conduct of each of the executive departments may be committed; from whom be may require all necessary information, as also their opinions in writing, upon any subject relating to the duties of their respective offices; and whom, he may, moreover, remove at pleasure.[254] Here we find a single executive officer substituted for a numerous board, where responsibility is divided, till it is entirely lost, and where the chance of unanimity lessens in geometrical proportion to the number that compose it.

The perpetuity of the office, is another boasted advantage of the constitution of the supreme executive magistrate in Great Britain. "The king never dies." But Henry, Edward, or George may die, may be an infant in swaddling clothes, a superannuated dotard, or a raving maniac. Of what benefit is the immortality of the kingly office, in any of these instances? Can the puling infant, or the feeble hand of palsied age wield the scepter, or can it be entrusted to the raving Bedlamite? A

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president of the United States cannot be the first: it is highly improbable that he will ever be the second; the constitution has provided for the third case; and for all others, of a similar kind. For, in case of the removal of the president of the United States from office, or of his death, resignation, or inability to discharge the powers and duties of his office, the same shall devolve on the vice-president; and 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.[255] Such provision has been accordingly made by law, and the executive authority in such a case, would immediately devolve upon the president of the senate pro tempore; or if there be no president of the senate, upon the speaker of the house of representatives, for the time being.[256] Nothing is wanting to the perpetuity of the office, but a provision for it's continuance in case no president shall be elected at the period prescribed by the constitution. Such a case will probably not happen, until the people of the United States shall be weary of the present constitution and government, and adopt that method of putting a period to both. And it is, perhaps, among the recommendations of the constitution, that it thus furnishes the means of a peaceable dissolution of the government, if ever the crisis should arrive that may render such a measure eligible, or necessary. A crisis to be deprecated by every friend to his country.

To pursue the parallel between a king of England, and the president of the United States, a little further. A king of England is the fountain of honor, of office, and of privilege. Honors, as distinct from offices, are unknown in the U. States; so likewise are privileges. At least there are none, which a president of the United States can constitutionally create, or bestow. It is not so with respect to offices; these he can not constitutionally create; they must first be established by law.[257] But when established, he has the exclusive right of nomination to all offices, whose appointments are not otherwise provided for by the constitution; or by some act of congress, to which his assent may be necessary, or may have been previously given. The influence which this power gives him, personally, is one of those parts of the constitution, which assimilates the government, in its administration, infinitely more nearly to that of Great Britain, than seems to consist with those republican principles, which ought to pervade every part of the federal constitution: at least so long as the union is composed of democratic states. On this subject we shall offer some further remarks hereafter.

The heir of a king of England may be born with all the vices of a Richard; with the tyrannical disposition, and cruelty of the eighth Henry; with the empty pride and folly of a James; with the cowardice and imbecility of a John; or with the stupid obstinacy, bigotry; or other depravity of temper, of any of his successors; he must nevertheless succeed to the throne of his fathers; his person is sacred and inviolable as if he were an Alfred; and unless his misdeeds are so rank as to bring him to the block, or force him to an abdication, he continues the lord's anointed all his days. A president of the United States must have attained the middle age of life, before he is eligible to that office: if not a native, he must have been fourteen years a resident in the United States: his talents and character must consequently be known. The faculties of his mind must have attained their full vigor: the character must be formed, and formed of active, not of passive materials, to attract, and secure the attention, and approbation of a people dispersed through such a variety of climate and situation, as the American people are. This activity of mind and of talent, must have manifested itself on the side of virtue, before it can engage the favor of those who acknowledge no superiority of rights among individuals, and who are conscious that in promoting to office, they should choose a faithful agent, not a ruler, without responsibility. And should it happen, that they are after all deceived in their estimate of his character and worth, the lapse of four years enables them to correct their error,

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and dismiss him from their service. What nation governed by an hereditary monarch has an equal chance of happiness!

But, the tumult of popular elections, and the danger in elective monarchies, will be insisted on, as counterbalancing the advantage which we claim in behalf of the constitution of the executive magistrate in the United States. With regard to the latter, something will be said hereafter, when we examine the mode of electing a president of the United States. As to the former: if the sovereignty of the people of the United States, like that of the Roman, and Grecian republics, resided in the inhabitants of a single city, or a small territory, the influence of men of popular talents would doubtless produce in certain conjunctures, similar events to those recorded in the annals of those republics. But nature, herself seems to be enlisted on the side of the liberty and independence of the citizens of United America. Our cities are few; the population inconsiderable, compared with many of the capitals of ancient, or modern, Europe: that population (from the unfavorable influence of climate for some years past) seems not likely to be extended very far beyond its present bounds, and probably will never bear any great proportion to the population of the country at large. This circumstance alone, would probably defeat any attempt to establish an undue influence in any part of the union. Agriculture is, and probably will for ages continue to be, the principal object of pursuit in the United States; and the period seems to be yet very far removed, when their population will be equal to the extent, and fertility of the soil. Europe has so far got the start of us in manufactures, that it is also probable, our population will not depend upon, nor derive any great increase from, them. Until it does, our towns will be principally confined to the sea coast, and, the interior of the United States will continue, as at present, the nurse of a hardy, independent yeomanry. A strong, barrier between the United States and the countries which abound in the precious metals is devoutly to be wished by all, who can appreciate, properly, the blessings of liberty and peace. Whilst the ambition of America is limited to the cultivation of the arts of peace, and the science of free government; to the improvement, instead of the extension of her territory, and to the fortifying herself against enemies from within, as well as from without, by fostering, and encouraging the principles of genuine liberty; local influence can never be so formidable, as to endanger the peace or happiness of the union on any occasion. But, whenever our evil genius shall prompt us to aspire to the character of a military republic, and invite us to the field of glory: when, rapacity, under the less odious name of ambition, shall lead us on to conquest; when a bold, though raw, militia shall be exchanged for a well trained, well disciplined and well appointed army; ready to take the field at the nod of an ambitious president, and to believe that the finger of heaven points to that course which his directs; then, may we regard the day of our happiness as past, or as hasting rapidly to its decline.

That provision in the constitution which requires that the president shall be a native-born citizen (unless he were a citizen of the United States when the constitution was adopted,) is a happy means of security against foreign influence, which, wherever it is capable of being exerted, is to he dreaded more than the plague. The admission of foreigners into our councils, consequently, cannot be too much guarded against; their total exclusion from a station to which foreign nations have been accustomed to, attach ideas of sovereign power, sacredness of character, and hereditary right, is a measure of the most consummate policy and wisdom. It was by means of foreign connections that the stadtholder of Holland, whose powers at first were probably not equal to those of a president of the United States, became a sovereign hereditary prince before the late revolution in that country. Nor is it with levity that I remark, that the very title of our first magistrate, in some measure exempts us from the danger of those calamities by which European nations are almost perpetually visited. The title of king, prince, emperor, or czar, without the smallest addition to his powers, would have

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rendered him a member of the fraternity of crowned heads: their common cause has more than once threatened the desolation of Europe. To have added a member to this sacred family in America, would have invited and perpetuated among us all the evils of Pandora's Box.

The personal independence of the president is secured by that clause, which provides that he shall receive a compensation at stated periods, which shall not be diminished during his continuance in office. To guard against avarice, corruption, and venality, it is also provided, that it shall not be increased during the same period, nor shall he receive within that period any other emolument from the United States, or either of them. His salary, as now fixed by law, seems to be fully adequate, though far below the income of many private persons in England, and even in America.

The political independence of the president of the United States, so far as it is necessary to the preservation, protection, and defense of the constitution, is secured, not only by the limitations and restrictions which the constitution imposes upon the powers of congress, but by a qualified negative on all their proceedings, as has been already mentioned elsewhere. This share in the proceedings of the federal legislature, which the constitution assigns to him, consists, like that of a king of England, in the power of rejecting, rather than resolving; a circumstance on which both judge Blackstone, and de Lolme, lay considerable stress;[258] and is one of the grounds upon which the latter founds his preference of that constitution to the republican system. In republics, he tells us, the laws usually originate with the executive; it is otherwise in all the American states. In England, the laws do, in fact, originate with the executive: a revenue bill is always proposed by the chancellor of the exchequer, or some member of that department;[259] and it is understood to be the practice, that every other measure of considerable magnitude and importance is first discussed in the privy council, before it is brought into parliament; where it is generally introduced, and the bill prepared by some of the officers of the crown. The preference which de Lolme gives to the English constitution, therefore, is not altogether well founded. The negative of the president of the United States is not final, like that of the king of England, but suspensive. Neither is the expression of his assent absolutely necessary to the establishment of a law, for if he withholds his decision beyond the period of ten days (exclusive of Sundays) his assent shall be presumed. He may retard for a few days, but cannot prevent any beneficial measure, provided two-thirds of both houses concur in the opinion of its expediency. Thus, the part assigned to him by the constitution is strictly preventative, and not creative; yet this preventative is so modified as never to operate conclusively, but in those cases where it may be presumed the congress have acted unadvisedly through haste or oversight: and we may safely conclude, that where the deliberate sense of two-thirds of both houses of congress shall induce them to persist in any measure to which the president shall have given his negative, it will neither militate with the constitution, nor with the interest of their constituents. There is one instance (besides a question of adjournment), in which his assent appears not to be required; this is, when two-thirds of both houses have concurred in proposing to the states any amendment of the constitution: in this case, the concurrence of two-thirds of both houses being required in the first instance, his assent is dispensed with, as his dissent would be unavailing.

Let us now take a short view of the manner in which a president of the United States is appointed.

Each state shall, within thirty-four days prior to the first Wednesday in December, in every fourth year succeeding the last election, appoint a number of electors equal to the whole number of representatives and senators, to which such state may be entitled in congress, who shall meet and give their votes on that day, at such place in each state as the legislature thereof may direct, for two persons, of whom one at least shall not be an inhabitant of such state; three lists of the votes shall be made, one of which shall be sent by an express, and another by post, to the president of the

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senate; or, if there be no such officer at the seat of government, to the secretary of state; and the third, to the judge of the district. The president of the senate shall, in the presence of both houses of congress, open the certificates on the second Wednesday in February next succeeding, and the votes shall then be counted and the choice ascertained; the person having the greatest number of votes, if they be a majority of the whole number of electors appointed, shall be president, and the person having the next greatest number of votes shall be vice-president. If the votes be equal for two persons having such majority, the house of representatives shall immediately choose by ballot one of them for president; but in such cases they shall vote by states, 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 be necessary to the choice. If no person have a majority of the electors, the house shall in like manner choose the president from the five highest on the list. The periods for which the president and vice-president are elected, shall always commence on the fourth day of March next succeeding such election. No senator or representative, or person holding an office of trust or profit under the United States, shall be an elector.

Such are the precautions which the constitution has provided for securing the tranquility of elections; the independence and integrity of the electors, and the wisdom of their choice; and such are the auxiliary regulations established by congress for the same purposes.[260] Electors have been differently appointed in the different states. In some they have been appointed immediately by the legislature; in others they have been chosen by a general ticket throughout the state; in others, the state has been divided into districts, one elector being chosen by the freeholders of each district. This method was adopted in Virginia at first; but on a late occasion a general ticket was preferred. The reasons for this change seem to have been, that the whole strength of the state may be combined and united, instead of being divided, as on a former occasion.

The electors, we perceive, are to assemble on one and the same day, in all the different states, at as many different places, at a very considerable distance from each other, and on that day are simply to give their votes; no embarrassment can arise among them from the circumstance of an equality of votes, for different persons: they are to vote only; not to decide upon the result of their votes: they then disperse, and return to their respective habitations, and occupations, immediately. No pretext can be bad for delay; no opportunity is furnished for intrigue, and cabal. The certificates of their votes are to be forwarded to different persons, and by different conveyances: they are to be publicly opened, and counted in the presence of the whole national legislature: there is no obligation of secrecy on the electors to conceal their votes; they are consequently known immediately, throughout the state, long before the opening the certificates at the scat of government: should any fraud be attempted, it must immediately he detected: whilst the constitution expressly incapacitates any man who may be presumed to labor under any undue bias, from serving as an elector, in the first instance, the salutary provisions which it contains, in other respects, seem to afford a sufficient guarantee against the arts of ambition, and the venality of corrupt minds. There is no room for the turbulence of a Campus Martius, or a Polish Diet, on the one hand, nor for the intrigues of the sacred college, or a Venetian senate, on the other, unless, when it unfortunately happens, that two persons, having a majority of the whole number of electors, in their favor, have likewise an equal number of votes; or, where by any other means, the election may devolve upon the house of representatives. Then, indeed, intrigue and cabal may have their full scope: then, may the existence of the union be put in extreme hazard: then might a bold and desperate party, having the command of an armed force, and of all the resources of government, attempt to establish themselves permanently in power, without the future aid of forms, or the control of elections. Upon what principle, we may ask, is it that state influence is in this case permitted to operate in an inverse proportion to the ratio of population, and

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thus predominate over it. Upon what principle is it, that that ratio which gives to all the citizens of the United States an equal voice in the election of a president, in the first instance, shall give to the representative of the citizens of Delaware, in the second, a weight equal to nineteen representatives of the citizens of Virginia? Why then should the house of representatives vote by states on this great occasion? It is, perhaps, susceptible of proof, that if the arts of corruption should ever be practiced with success, in the election of a president, it will arise from this circumstance; the votes of a few individuals, in this instance, more than counterbalancing four times their number.[261] Had the senate been associated with the other house in the election, and each vote been separately counted, the mode of election might, at first view, appear less exceptionable: but their exclusion from any participation in the election of a president, is certainly founded upon the wisest policy: being associated with him in the exercise of his most important powers, and being chosen for a much longer period than the representatives, the presumption of undue influence, where the contest might be between a president in office, and any other person, would be altogether unavoidable.

Nothing in the constitution prohibits the re-election of a president as often as the approbation of his country may confer that distinction upon him. If his re-election were to depend entirely upon a majority of votes in the first instance, I should think the argument would be in favor of the principle. But what if a president of the United States should so far have lost the confidence of the people of the respective states, as not to have a majority of the votes of the state electors, in his favor? What, if he should so far have forfeited their esteem, as to be the lowest of five candidates, on the list, neither of whom should have such a majority, as to decide the election? Should we not, in such a case, with indignation behold him continued in office, by the votes of one fourth part of the house of representatives, against the other three? This might be sufficiently guarded against, by an amendment, providing that no president, for the time being, should ever be re-elected, unless he had not only the greatest number of votes in his favor, but a majority of the votes of all the electors appointed. As corruption can only be dreaded on the part of bad men, and is always to be dreaded from them, a president who may have lost the confidence of the citizens of the United States at large, would be the first person with whom the practice of corruption may be expected to commence.

The period for which a president is elected, as has been already noticed, is four years. By many it is thought too long: it seems long enough to give him an opportunity of bringing to a mature conclusion any measures which he may have undertaken for the good of the nation; and, it has been thought short enough, for the people to displace him in sufficient time, where his conduct may not have merited approbation, on the one hand, or impeachment, on the other. Much evil, however, may be generated, and even matured, in the compass of four years. – Of removal from office by impeachment, no president will ever be in danger. But of this hereafter. I can see no inconvenience that would result from more frequent elections; there may be danger, if the constitution be not so amended as to provide for them. – The convention of this state proposed as an amendment to the constitution, that no person should be capable of being president of the United States for more than eight years, in any term of sixteen years. It might have been better to have selected the half of these periods, respectively.

The powers, or more properly, the duties, of the president of the United States, are various and extensive; though happily abridged of many others, which are considered as inseparable from the executive authority in monarchies: of these last, we have had frequent occasion to notice such as are transferred by the constitution to the congress of the United States; and of those which are assigned to the president,

1. The first is, That he shall be commander in chief of the army and navy of the United States, and

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of the militia of the several states, when called into the service of the United States,[262] a power similar to that of the king of England, and of the stadtholder of Holland, before the late revolution; yet qualified, by some important restrictions, which I believe were not to be found in either of those governments. As, first; he cannot make rules for the regulation and government of the army and navy, himself, but they must be governed according to regulations established by congress.[263] But notwithstanding this provision in the constitution, the act of 5 Cong. c. 74, authorized the president to make and establish such rules for training and disciplining the corps of volunteers, authorized to be raised by that act, as should be thought necessary to prepare them for actual service. – Secondly; the president of the United States has not an unqualified right to appoint what officers he pleases; but such appointment (if there be no provision to the contrary made by law) must be made with the advice and consent of the senate: a restriction, perhaps of little importance, whilst the right of nomination, in all cases, and the right of filling up vacancies during the recess of the senate, remain uncontrollably in his power; to which may be added, the authority given him by the act for raising a provisional army, (and perhaps some others) to appoint such officers as he may think proper in the recess of the senate; "the appointment of field officers to be submitted to the advice and consent of the senate, at their next subsequent meeting;" leaving the appointment of all officers of inferior rank to the discretion of the president, alone.[264] The stadtholder of Holland derived his power and influence in great measure from a similar authority. – A third and infinitely more important check, than either of the former, so long as elections continue as frequent, as at present, is that no appropriation for the support of an army can be made for a longer term than two years, the period for which congress is chosen. This puts it in the power of the people, by changing the representatives, to give an effectual check to the power of the executive at the end of that period. – In England, the power of raising armies, ad libitum, is vested in the king, though he is said to be dependent upon the parliament for their support; a supply bill, which is always limited to one year, passes accordingly, every session. Should it be refused, (a case which I believe has not happened for more than a century), a dissolution would pave the way, immediately, for a more complying parliament. Fourthly; the militia of the several states, though subject to his command when called into actual service, can only be called into service by the authority of congress, and must be governed according to law: the states, moreover, have the right of appointing the officers, and training the militia, according to the discipline prescribed by congress, reserved to them by the constitution. But we have seen in what manner this very important clause has been evaded, by the acts of 5 Cong. c. 64, and 74, authorizing the president to accept companies of volunteers, and to appoint their officers, etc. A precedent, which if it be drawn into authority and practice in future, may be regarded as superceding every part of the constitution, which reserves to the states any effectual authority over their militia.

2. The president has power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. C. U. S. Art. 2. §. 2.

The power of granting pardons, says judge Blackstone, is the most amiable prerogative of a king of England; and is one of the great advantages of monarchy, above any other form of government: in democracies, he adds, this power of pardon can never subsist.[265] It is happy for the people of America that many speculative notions concerning the disadvantages and imperfections of democratic forms of government, have been found to be practically false. In all the democratic states of North America, the power of pardoning is regularly vested (as in the federal government of the United States) in the supreme executive magistrate; and this flower of monarchical prerogative has been found to flourish in a perfect republican soil, not less than in it's native climate. The president of the United States is not, like a governor of Virginia, constrained to act by advice of a council, but

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the power of pardoning is left entirely to the dictates of his own bosom. The cases in which it has been exercised, manifest the propriety of the existence of such a power in every state, whatever be the form of it's government. In cases of impeachment, as the prosecution is carried on by the representatives of the people, and the judgment can only extend to removal from, and disqualification to hold or enjoy any office under the United States, in future, the constitution has wisely provided, that the same person in whom the right of nomination to office is vested, shall not have the power to remove that disqualification, which the guilt of the offender has brought upon himself.[266] In England, no pardon can be pleaded in bar of an impeachment; but the king may pardon after conviction upon an impeachment.[267] He can not by an exercise of his prerogative avert the disgrace of a conviction; but he can avert it's effects, and restore the offender to his credit.

3. The president has power, by and with the advice and consent of the senate, to make treaties, provided two thirds of the senators present concur; and the treaties so made, constitute a part of the supreme law of the land. C. U. S. Art. 2. §. 2. and Art. 6.

Treaties, as defined by Pufendorf,[268] are certain agreements made by sovereigns, between one another, of great use both in war, and peace; of these, there are two kinds; the one such as reinforce the observance of what by the law of nature we were before obliged to; as the mutual exercise of civility, and humanity, or the prevention of injuries on either side; the second, such as add some new engagement to the duties of natural law; or at least determine what was before too general and indefinite in the same, to some thing particular, and precise.[269] Of those which add some new engagement to those duties which natural law imposes upon all nations, the most usual relate to, or in their operation may affect, the sovereignty of the state; the unity of its parts, it's territory, or other property; it's commerce with foreign nations, and vice versa; the mutual privileges and immunities of the citizens, or subjects of the contracting powers, or the mutual aid of the contracting nations, in case of an attack, or hostility, from any other quarter. To all these objects, if there be nothing in the fundamental laws of the state which contradicts it, the power of making treaties extends, and is vested in the conductors of states, according to the opinion of Vattel.

In our constitution, there is no restriction as to the subjects of treaties, unless perhaps the guarantee of a republican form of government, and of protection from invasion, contained in the fourth article, may be construed to impose such a restriction, in behalf of the several states, against the dismemberment of the federal republic.[270] But whether this restriction may extend to prevent the alienation, by cession, of the western territory, not being a part of any state, may be somewhat more doubtful. The act of cession from Virginia militates, expressly, against such an alienation of that part of the western territory which was ceded by this state.[271] Nevertheless, it is said to have been in contemplation soon after the establishment of the federal government, to cede the right of preemption to the lands in that territory to the Indians, who were then supposed to be in treaty for the same with the crown of Great Britain. The president, who had not authorized any such article, and who is said to have disapproved of it, in submitting the treaty to the consideration of the senate, called their attention particularly to that part of it; in consequence of which it was rejected, though warmly supported in the senate, as has been said. If the power of making such a dismemberment be questionable at any rate, it is much more so, when it is recollected, that the constitution seems to have vested congress, collectively, and not any one or two branches of it only, with the power to dispose of that territory.[272] The effect of this extraordinary treaty, if it had been ratified by the senate and the president, may easily be conceived. Great Britain, at that time not a little disposed to enmity towards the United States, would no doubt have insisted upon such an acquisition of territory, made under the faith of a treaty between the United States and the Indians; and thus the United States

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might either have been deprived of their territory by an unconstitutional treaty, or involved in a war for it's preservation, by the proceedings of a body, whose authority does not extend to a final decision upon a question, whether war be necessary and expedient. This shows the collision which may possibly arise between the several branches of the congress, in consequence of this modification of the treaty-making power. For, being entrusted to a branch of the congress only, without the possibility of control or check by the other branch, so far as respects the conclusion and ratification of any treaty whatsoever, it may well happen, at some time or other, that the president and senate may overstep the limits of their just authority, and the house of representatives be so tenacious of their own constitutional rights, as not to yield to the obligations imposed upon them by a treaty, the terms of which they do not approve.[273]

But the senate, in matters of treaty, are not only without control, they may be said also to be without even the least shadow of responsibility in the individuals who compose that body. In England, says judge Blackstone, lest this plenitude of authority should be abused to the detriment of the public, the constitution has interposed a check by means of parliamentary impeachment, for the punishment of such members as from criminal motives advise or conclude any treaty, which shall afterwards be judged to derogate from the honor and interest of the nation. But where shall we find this responsibility in our constitution? Does it arise from the power of impeachment vested in the house of representatives by the constitution?. It has been solemnly decided, that a senator is not a civil officer of the United States, and therefore not liable to impeachment.[274] Even were it otherwise, the power of impeachment would, in the case we are now speaking of; be nugatory, as will presently appear. – Does it consist then in the power of impeaching the ambassador, by whom it was concluded, or the president, by whom it has been ratified, both of whom are unquestionably impeachable, I presume? The ambassador is appointed by the president, with the advice and consent of the senate: it may be presumed that his instructions have been submitted to and approved by them, though a different practice is said to have been established. If the treaty be ratified, and the minister be impeached for concluding it, because it is derogatory to the honor, the interest, or perhaps to the sovereignty and independence of the nation, who are to be his judges? The senate by whom it has been approved and ratified. If the president be impeached for giving improper instructions to the ambassador, and for ratifying the treaty concluded by him pursuant to his instructions, who are to be his judges? The senate, to whom the treaty has been submitted, by whom it has been approved, and by whose advice it has been ratified. The Constitution requires, that a majority of two-thirds of the senate, at least, must advise the conclusion of a treaty, before it can be ratified by the president; it likewise requires that a majority of two-thirds at least must concur in the judgment in case of conviction. A quorum for the trial upon an impeachment, consequently cannot possibly be formed, without calling in some of those senators to be judges, who had either actually advised or dissented from the ratification of the treaty.[275] Can such judges be deemed impartial? If they can, from which class shall they be chosen; from those who proposed the rejection of the treaty, or from those who advised its final ratification? Sophistry itself might be puzzled by the dilemma.

The Federalist attempts to vindicate this part of the constitution of the United States, with that seal and ingenuity which runs through the work. "What other body, besides the senate," he asks, "would be likely to feel confidence enough in its own situation to preserve unawed, and uninfluenced the necessary impartiality between an individual, accused, and the representatives of the people, his accusers? Could the supreme court have been relied on, as answering this description? It is much to be doubted whether the members of that tribunal would at all times be endowed with so eminent a portion of fortitude, as would be called for in the execution of so difficult a task; and it is still more to be doubted, whether they would possess the degree of credit and authority, which might on certain

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occasions be indispensable towards reconciling the people to a decision that should happen to clash with an accusation brought forward by their immediate representatives."[276] The author seems to have forgot, that senators may be discontinued from their seats, merely from the effect of popular disapprobation, but that the judges of the supreme court can not. He seems also to have forgot, that whenever the president of the United States is impeached, the constitution expressly requires that the chief justice of the supreme court shall preside, at the trial. Are all the confidence, all the firmness, and all the impartiality of that court supposed to be concentrated in the chief justice, and to reside in his breast, only? If that court could not be relied on for the trial of impeachments, much less would it seem worthy of reliance for the determination of any question between the United States, and any particular state: much less to decide upon the life and death of a person whose crimes might subject him to an impeachment, but whose influence might avert a conviction. Yet the courts of the United States are by the constitution regarded as the only proper tribunals, where a party convicted upon an impeachment, may receive that condign punishment, which the nature of his crimes may require: for it must not be forgotten, that a person convicted upon an impeachment, shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law.[277] And all this in those very courts, which the Federalist deems not sufficiently confident in their own situation to preserve unawed, and uninfluenced the necessary impartiality, to try him upon an impeachment. The question then might be retorted: can it be supposed that the senate, a part of whom must have been either *particeps criminis*, with the person impeached, by advising the measure for which he is to be tried, or must have joined the opposition to that measure, when proposed and debated in the senate, would be a more independent, or more unprejudiced tribunal, than a court composed of judges holding their officers during good behavior; and who could neither be presumed to have participated in the crime, nor to have prejudged the criminal? Wisely, then, was it proposed by the convention of this state, and some others, that some tribunal other than the senate should be provided for trying impeachments.[278] In the state of Virginia, the trial of impeachments is to be in the general court of the commonwealth, except when a judge of that court may happen to he impeached, in which case the trial is to be in the court of appeals: the fact, as in other cases, is to be tried by a jury; to be summoned from the different counties of that senatorial district, in which the accused shall reside: and to prevent any undue influence front the sitting of the house of delegates, in whom the power of impeachment is vested, it is wisely provided, that no impeachment shall be tried during a session of the general assembly.[279] A tribunal constituted upon similar principles for the trial of impeachments in the federal government, would probably produce some degree of responsibility, where there now seems to be none.

I have chosen to consider the power of trying impeachments, which the constitution vests in the senate, here, in order to place that of making treaties, which are to become a part of the supreme law of the land, and in which that body has a principle agency; in a stronger point of view. The union of these powers, in that body; and the total exemption of senators from an impeachment, seems to render this part of the federal constitution, the most defective and unsound, of any part of the fabric.

But, to return to the treaty-making-power, it appears to be somewhat extraordinary, that that branch of the federal government, who are by the constitution required to concur, in a declaration of war, before any such declaration can be made, should be wholly precluded from voting at all, upon a question of peace. – They are judges of the causes of war; of the existence of those causes; of the resources, and ability of the states to prosecute and support a war; of the expediency of applying those resources to the obtaining redress, or satisfaction for the injury received; in short, of every possible circumstance that can induce the nation to incur the hazard, or expense of a war: and yet, if through timidity, venality, or corruption, the president, and two thirds of a majority of the senate

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can be prevailed upon to relinquish the prosecution of the war, and conclude a treaty, the house of representatives have not power to prevent, or retard the measure; although it should appear to them, that the object for which the war has been undertaken, has not been attained, and that it was neither relinquished from necessity, or inability to prosecute it, with effect.

These objections are not intended, to extend to the agency which the president and senate may have, in the formation of a treaty; nor to the principle that treaties with foreign nations should be regarded as a part of the supreme law of the land. – The honor and peace of the nation certainly require that it's compacts should be duly observed, and carried into effect with perfect good faith. And though it may be the result of sound discretion to confide the formation of a treaty, in the first instance, to the president and senate, only; yet the safety of the nation seems to require that the final ratification of any compact, which is to form a part of the supreme law of the land, should, as well as other laws of the federal government, depend upon the concurrent approbation of every branch of the congress, before they acquire such a sanction as to become irrevocable, without the consent of a foreign nation; or without hazarding an imputation against the honor and faith of the nation, in the performance of it's contracts.

It may not be improper here to add something on the subject of that part of the constitution, which declares that treaties made by the president and senate shall be a part of the supreme law of the land: acts of congress made pursuant to the powers delegated by the constitution are to be regarded in the same light. What then is the effect of a treaty made by the president and senate, some of the articles of which may contain stipulations on legislative objects, or such as are expressly vested in congress by the constitution, until congress shall make a law carrying them into effect? Is congress bound to carry such stipulations into effect, whether they approve or disapprove of them? Have they no negative, no discretion upon the subject? The answer seems to be, that it is in some respects, an inchoate act. It is the law of the land, and binding upon the nation in all it's parts, except so far as relates to those stipulations. It's final fate, in case of refusal on the part of congress, to carry those stipulations into effect, would depend on the will of the other nation. If they were satisfied that the treaty should subsist, although some of the original conditions should not be fulfilled on our part, the whole, except those stipulations embracing legislative objects, might remain a treaty. But if the other nation chose not to be bound, they would be at liberty to say so, and the treaty would be defeated.[280] And this construction seems to be consonant with that resolution, of the house of representatives,[281] wherein they declare, "That when a treaty stipulates regulations on any of the subjects submitted by the constitution to the power of congress, it must depend for it's execution, as to such stipulations, on a law or laws to be passed by congress; and it is the constitutional right and duty of the house of representatives, in all such cases, to deliberate on the expediency, or inexpediency, of carrying such treaty into effect, and to determine and act thereon, as in their judgment, may be most conducive to the public good." – A contrary construction would render the power of the president and senate paramount to that of the whole congress, even upon those subjects upon which every branch of congress is, by the constitution, required to deliberate.[282] Let it be supposed, for example, that the president and senate should stipulate by treaty with any foreign nation, that in case of war between that nation and any other, the United States should immediately declare war against that nation: Can it be supposed that such a treaty would be so far the law of the land, as to take from the house of representatives their constitutional right to deliberate on the expediency or inexpediency of such a declaration of war, and to determine and act thereon, according to their own judgment?

4. and 5. The president shall nominate, and by and with the advice and consent of the senate, shall

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appoint ambassadors, other public ministers, and consuls: and he shall receive ambassadors, and other public ministers. C. U. S. Art. 2. §. 2, 3.

The intercourse with foreign nations requiring that ambassadors should be sent from one to another, the appointment of such ministers, is by our constitution vested in the same departments of government as the treaty making power; the exclusive right of nomination being vested in the president; the senate in this case, as in other cases of appointment in which they have any concurrence, having simply the right of approving, or of rejecting, if they think proper; but they cannot propose any other person in the room of him whom they may reject; they may prevent the appointment of an agent in whom they have not a proper degree of confidence, but they cannot substitute a more fit one in his stead.

The president, alone, has authority to receive foreign ministers; a power of some importance, as it may sometimes involve in the exercise of it, questions of delicacy; especially in the recognition of authorities of a doubtful nature. A scruple is said to have been entertained by the president of the United States, as to the reception of the first ambassador from the French republic. But it did not prevent, or retard his reception, in that character. – These powers are respectively branches of the royal prerogative in England.

6. The president shall, moreover, nominate, and by and with the advice and consent of the senate, shall appoint judges of the supreme court, and all other officers of the United States, whose appointments are not otherwise provided for by the constitution, and which shall be established by law. But congress may, by law, vest the appointment of such inferior officers as they think proper, in the president alone, in the courts of law, or in the heads of departments. C. U. S. Art. 2. §. 2. And the president shall commission all the officers of the United States. – Ibid. §. 3.

Although the authority of the president of the United States, does not extend, as has been already remarked, to the creation of offices, by his own authority, it is nevertheless astonishing to view the number to which he has been authorized in his discretion, to give existence. In the army, navy, and volunteer corps, only, this discretionary power, with which congress have from time to time most liberally vested him, must have amounted to the appointment of several thousand officers.[283] If to these we add the civil officers whose appointments depend either upon the president, alone; or upon his nomination or influence in the senate; we shall find that the influence and patronage of that department are already as great, and probably greater than any friend to his country could wish to see them.[284] It is however, still more increased by the next clause.

7. 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.

The act of 5 Cong. c. 153, authorized the president to make appointments to fill any vacancies in the army and navy which may have happened during that session of the senate. And this without any reservation of the right of the senate to approve, or reject, at a succeeding session. This was among the manifold acts of that period for increasing the power of the president, far beyond the limits assigned by the constitution; limits already sufficiently large for every beneficial purpose. The right of nomination to office in all cases where the senate are to be consulted upon the appointment, being the undoubted privilege of the president under the constitution, should he persist in the nomination of a person to office after the senate have rejected him, there is no constitutional control over him, by which he may be compelled to nominate any other person. The office then may be kept vacant through this disagreement between them. But if it should have happened that the office became vacant during the recess of the senate, and the vacancy were filled by a commission which should

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expire, not at the meeting of the senate, but at the end of their session, then, in case such a disagreement between the president and the senate, if the president should persist in his opinion, and make no other nomination, the person appointed by him during the recess of the senate would continue to hold his commission, until the end of their session so that the vacancy would happen a second time during the recess of the senate, and the president consequently, would have the sole right of appointing a second time; and the person whom the senate have rejected, may be instantly replaced by a new commission. And thus it is evidently in the power of the president to continue any person in office, whom he shall once have appointed in the recess of the senate, as long as he may think proper. A circumstance which renders the power of nomination, and of filling up vacancies during the recess of the senate, too great, to require any further extension. Even the control of elections loses it's force, in great measure, in such cases: the influence of a president, and the activity and zeal of his partisans increasing in proportion to the number of offices which he has power to fill, and to the measure of obligation which the persons preferred by his favor, may suppose they owe to him, for the distinction.

Perhaps these inconveniences might have been avoided, if the constitution had required more than one person to have been put in nomination by the president for those offices, where the concurrence of the senate is required to complete the appointment, or, that in case of disagreement between the president and senate, two thirds of the latter might appoint, without a previous nomination by the president, in case be should decline any further nomination, after the first had been rejected.

8. The president shall, from time to time, give to congress information of the state of the union, and recommend to their consideration such measures, as he may judge necessary and expedient. He may also 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. C. U. S. Art. 2. Sec. 3.

As from the nature of the executive office it possesses more immediately the sources, and means of information than the other departments of government; and as it is indispensably necessary to wise deliberations and mature decisions, that they should be founded upon the correct knowledge of facts, and not upon presumptions, which are often false, and always unsatisfactory; the constitution has made it the duty of the supreme executive functionary, to lay before the federal legislature, a state of such facts as may be necessary to assist their deliberations on the several subjects confided to them by the constitution. And as any inconveniences resulting from new laws, or for the want of adequate laws upon any subject, more immediately occur to those who are entrusted with the administration of the government, than to others, less immediately concerned therein; it is likewise provided, that the first magistrate of the union should recommend to the consideration of congress such measures as he shall judge necessary, and proper. But this power of recommending any subject to the consideration of congress, carries no obligation with it. It stands precisely on the same footing, as a message from the king of England to parliament; proposing a subject for deliberation, not pointing out the mode of doing the thing which it recommends. This is considered by De Lolme,[285] as one of the favorable peculiarities of the English constitution, uniting the advantages of originating laws in select assemblies, with the freedom of the legislature, as vested in the representatives of the people. In France, under the present constitution, all laws originate with the executive department: than which, there can not exist a stronger characteristic of a despotic government.

The power of the president to convene either or both houses of congress, was a provision indispensably necessary in a government organized as the federal government is by the constitution. Occasions may occur during the recess of congress, for taking the most vigorous and decisive

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measures to repel injury, or provide for defense: congress, only, is competent to these objects: the president may therefore convene them for that purpose. Or it may happen that an important treaty has been negotiated during the recess of the senate, and their advice thereupon be required, without delay, either, that the ratification may be exchanged in due time, or for some other important reason. On such extraordinary occasions as these, if there were not a power lodged in the president to convene the senate, or the congress, as the case might require, the affairs of the nation might be thrown into confusion and perplexity, or worse. The power of adjourning congress, in case of a disagreement between the two houses, as to the time of adjournment, was likewise necessary to prevent any inconvenience from that source, as, is too obvious to require any further remarks upon it.

9. Ninthly; the president, as was observed, elsewhere is *sub modo* a branch of the legislative department; since every bill, order, resolution, or vote, to which the concurrence of both houses of congress is necessary, must be presented to him for his approbation, before it can take effect.[286] If he approve it, the measure is immediately final: if he disapprove, it must be sent back to congress for further consideration, as has been already shown. The importance which the executive department derives from this share in the legislative, has been sufficiently discussed in its proper place, being here brought into view again, merely for the sake of method.

10. Lastly; it is the duty of the president to take care that the laws be faithfully executed; and, in the words of his oath, "to preserve, protect, and defend the constitution of the United States."[287]

The obligation of oaths upon the consciences of ambitious men has always been very slight, as the general history of mankind but too clearly evinces. Among the Romans, indeed, they were held in great sanctity during the purer ages of the republic, but began to be disregarded as the nation approached to a state of debasement, that fitted them for slavery.[288] Among Christian princes, they seem only to have been calculated for the worst, instead of the best purposes:[289] monarchs having long exercised, and seeming to claim, not less than the successors of St. Peter, a kind of dispensing power on this subject, in all cases affecting themselves. A due sense of religion must not only be wanting in such cases, but the moral character of the man must be wholly debased, and corrupted. Whilst these remain unsullied, in the United States, oaths may operate in support of the constitution they have adopted, but no longer. After that period an oath of office will serve merely to designate its duties, and not to secure the faithful performance of them; or, to restrain those who are disposed to violate them.

The right of issuing proclamations is one of the prerogatives of the crown of England. No such power being expressly given by the federal constitution, it was doubted, upon a particular occasion, whether the president possessed any such authority under it: Both houses of congress appear to have recognized the power as one that may be constitutionally exercised by him.[290] Independent of such authority, we might perhaps be justified, in concluding that the obligation upon the president to take care that the laws be faithfully executed, drew after it this power, as a necessary incident thereto. The commencement or determination of laws is frequently made to depend upon events, of which the executive may be presumed to receive and communicate the first authentic information: the notification of such facts seems therefore to be the peculiar province and duty of that department. If the nation be in a state of war with another nation, acts of hostility are justifiable, on the part of our citizens towards theirs; if a truce he concluded; such acts are no longer to be permitted. The fact that such a truce has been made, must be announced by the competent authority; and the law arising from the promulgation of this fact, according to the rules of war and peace, among civilized nations, is such, as to give to the proclamation the apparent effect of a new law to the people. But this is not

really the case; it is the established law of nations which operates upon the fact disclosed by the proclamation, viz. That a truce has been concluded between the two nations, who were before at war. But if a proclamation should enjoin any thing to be done, which neither the law of nations, nor any previous act of the legislature, nor any treaty or compact should have made a duty, such injunction would not only be merely void, but an infringement of the constitution.[291] Proclamations are then only binding, when they reinforce the observance of a duty, enjoined by law, but connected with some particular fact, which it may be the duty of the executive to make known.

The president of the United States may be removed from office on impeachment for, and conviction of treason, bribery, or other high crimes and misdemeanors: and the chief justice of the United States shall preside at his trial. C. U. S. Art. 2, Sec. 4. Art. 1, Sec. 3.

The exclusion of the vice-president in such cases, from his ordinary constitutional seat, as president of the senate, seems to have been both necessary and proper, not only in order to remove all suspicion of undue bias upon the mind of any member of the court; (since in case of conviction, the duties of the office of the president would devolve immediately upon the vice-president) but because it is presumable, that whenever a president may he actually impeached, he would be instantly incapacitated thereby from discharging the duties of his office, until a decision should take place; in which case also, the duties of the office of president, must devolve upon the vice-president. Machiavel ascribes the ruin of the republic of Florence, to the want of this mode of proceeding by impeachment against those who offend against the state. If the want of a proper tribunal for the trial of impeachments can endanger the liberties of the United States, some future Machiavel may, perhaps, trace their destruction to the same source.

In England, as we have more than once had occasion to remark, the law will not suppose the king capable of doing wrong. His person is sacred; he is above the reach of the laws, none having power to accuse, or to judge him. The people must be driven to a total violation, and subversion of the constitution, before he can be made responsible for the most flagrant act of tyranny, or abuse of authority. Our constitution, on the contrary, considers the president as a man, and fallible; it contemplates the possibility of his being not only corrupt, but, in the highest degree criminal; even to the commission of treason, against the government which he is appointed to administer. How such a case may happen, will be the subject of future inquiry. Suffice it to say, the constitution supposes it, and has provided, however inadequately, for his punishment.

The administration of the federal government, from it's first institution, has repeatedly given rise to doubts in my own breast, whether some important amendments are not necessary for the preservation of the liberty of the people of the United States, the necessary and proper independence of the several states, and the union of the confederacy. The limitations which the constitution has provided to the powers of the president, seem not to be sufficient to restrain this department within it's proper bounds, or, to preserve it from acquiring and exerting more than a due share of influence. To this cause it may be attributed, that in addition to the very extensive powers, influence, and patronage which the constitution gives to the president of the United States, congress have, from time to time, with a liberal hand, conferred others still more extensive; many of them altogether discretionary, and not unfrequently questionable, as to their constitutionality. These circumstances but too well justify the remark, that if a single executive do not exhibit all the features of monarchy at first, like the infant Hercules, it requires only time to mature it's strength, to evince the extent of it's powers. *Crescit occulto velut arbor avo.*

Under the former confederation, the United States in congress assembled, had authority to appoint

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a committee to sit in the recess of congress, to be denominated "a committee of the states," and to consist of one delegate from each state: and to appoint one of their number to preside, provided that no person should be allowed to serve in the office of president more than one year, in any term of three years. This committee, or any nine of them, were authorized to execute, in the recess of congress, such of the powers of congress, as the United States in congress assembled, by the consent of nine states, might from time to time think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the articles of confederation, the voice of nine states, in the congress of the United States assembled, was requisite.[292] An executive constituted somewhat upon this plan, composed of a member from each state, would, I conceive, have been more consistent with the principles of a federal union: it might have been so modified, as that a smaller number (consisting of one member from each quarter of the union,) might execute ah the powers which are now vested in the president alone, whilst the whole should be consulted upon all points to which the advice and consent of the senate is now required by the constitution. The senate might then have been divested entirely of it's executive powers, and confined to such as might properly be vested in a second branch of the legislature Such an arrangement would have removed many of those objections which now apply to the union of legislative, executive, and judiciary powers, in that body, I well know that there are many objections to a numerous executive: but I conceive them to be fewer in a federal, than in a national government. One of the principal objections to the former congress, as an executive body, seems to have arisen from the plurality of members from the states, whose united voice was often necessary to give the state a vote. If the delegates from the same state were equally divided upon any question, the state had no vote. And as this not unfrequently happened in the delegations from several states, upon the same question, the result was, that no determination could be had thereupon, for want of a sufficient number of states, voting either in the affirmative or negative. But where the representation from a state is confined to an individual, the former of these inconveniences could never happen, and the latter very rarely. How far experience, under the former articles of confederation, might have prompted or justified the preference given by the convention to a single executive, I cannot pretend to judge.

NOTES

251. De Lolme, p. 149.

252. 1 Blacks. Com. 229.

253. C. U. S. Art. 1. Sec. 3. Art. 2. Sec. 4.

254. C. U. S. Art. 2 L. U. S. 1 Cong. 1 Sess. c. 4, 7, 12, 20. Sec. 35. 5 Cong. c. 52.

255. C. U. S. Art. 2. Sec. 1.

256. L. U. S. 2 Cong. c. 8.

257. C. U. S. Art. 2. Sec. 2.

258. 1 Blacks. Com. 154. De Lolme on the English Constitution, 171.

259. 1 Blacks. Com. 308.

260. C. U. S. Art. 2. L. U. S. 2. Cong. c. 8.

261. It may be demonstrated, that twenty representatives, at the last election, of a president and vice-president, might have carried the election against eighty-six: this supposes all the small states to have voted together.

262. C. U. S. Art. 2. §. 2.

263. Ibid. Art. 1. §. 8.

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264. L. U. S. 5 Cong. c. 64. The establishment of a large corps of officers, to be provisionally employed, might be compared to the establishment of the Legion of Honor, in France. The corps of volunteers, the officers of which were likewise to be appointed by the president, alone, may be regarded in the same light. Can it be doubted that such distinguished mark, of presidential favor, must produce correspondent effects? Men ambitious of distinctions, are rarely ungrateful to their patrons in power.

265. 4 Blacks. Com. 396, 397.

266. C. U. S. Art. 1. §. 3. Art. 2. §. 2.

267. 4 Blacks. Com. 399, 400.

268. Spaven's Pufendorf, vol. 2. 346.

269. Grotius, 339, &c.

270. C. U. S. Art. 4. Sec. 4.

271. L. V. Edi. 1794. c. 40.

272. C. U. S. Art. 4. §. 3.

273. On the 24th of March, 1796, the house of representatives came to the following resolution:

> "That the president of the United States he requested to lay before this house a copy of the instructions to the minister of the United States, who negotiated the treaty with the king of Great Britain, communicated by his message of the first of March, together with his correspondence and other documents relative to the said treaty; excepting such of said papers as any existing negotiation may render improper to be disclosed."

The president answered,

> "That the power of making treaties is exclusively vested in the president, by and with the advice and consent of the Senate, provided two-thirds of the senators present concur; and that every treaty so made, and promulgated, thenceforward becomes the law of the land." "That the necessity of caution and secrecy in foreign negotiations, was one cogent reason for vesting the power in that manner." "That to admit a right in the house of representatives to demand, and to have, as a matter of course, all the papers respecting a negotiation with a foreign power, would be to establish a dangerous precedent." "That it being perfectly clear to his understanding, that the assent of the house of representatives is not necessary to the validity of a treaty; as the treaty with Great Britain exhibits in itself all the objects requiring legislative provision, and on these, the papers called for can throw no light; and as it is essential to the due administration of the government, that the boundaries fixed by the constitution between the different departments should be preserved. A just regard to the constitution, and to the duty of his office, under all the circumstances of the case, forbad a compliance with their request."

On the 6th of April following, the house of representatives came to the following resolution:

> "Resolved, that it being declared by the second section of the second article of the constitution, that the president shall have power, by, and with the advice and consent of the senate, to make treaties, provided two thirds of the senators present concur, the house of representatives do not claim any agency in making treaties; but, that when a treaty stipulates regulations on any of the subjects submitted by the constitution to the power of congress, it must depend for its execution, as to such stipulations, on a law or laws to be passed by congress; and it is the constitutional right and duty of the house of representatives in all such cases, to deliberate on the expediency or inexpediency of carrying such treaty into effect, and to determine and act thereon, as in their judgment may be most conducive to the public good."

> "Resolved, that it is not necessary to the propriety of any application from this house to the executive for information desired by them, and which may relate to any constitutional functions of the house, that the purposes for which such information may be wanted, or to which the same may be applied, should be stated in the application."

274. See the trial of William Blount, upon an impeachment, in which it was decided that a senator is not a civil officer within the meaning of the constitution of the United States, and therefore not liable to be impeached. January 7, and 10, 1799.

275. A majority of two thirds of the senate being required to concur in opinion in both cases, and a majority of the senate being necessary to form a quorum in all cases, such a majority can never be formed on the trial of an impeachment without

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calling in at least two members of the former majority of the senate.

276. 2 Federalist, 210.

277. C. U. S. Art. 1. Sec. 3. And as a conviction upon an impeachment, is no bar to a prosecution upon an indictment, so perhaps, an acquittal may not be a bar.

278. Amendments proposed by the convention of Virginia, Art. 19. New York and North Carolina, proposed amendments to the like effect.

279. Constitution of Virginia Art. 16. 17. L. V. Edi. 1794. c. 72.

280. Debates on the treaty making power, p. 345.

281. Resolution of the house of representatives, April 6, 1796.

282. Such a doctrine appears to have been strenuously advocated in congress, some years ago. See debates on the treaty making power: March and April 1796. Philadelphia, printed 1796.

283. The commission-officers for an army of 85,000 men (including the volunteer corps which were authorised to be raised by the president) would amount to more than 4,500. See the acts of 5 Cong. c. 7 and 48. Sec 3. c. 56. Sec. 2. c. 64. Sec. 2. 7. c. 74. Sec. 2. 4. c. 81. c. 93. Sec. 7. 8. c. 128. Sec. 99. c. 137. Sec 2. 6. c. 153, with many others.

284. See the speech of Mr. Gallatin on the foreign intercourse bill; by which it appears that the patronage of the executive (even before the passage of the law mentioned in the last note,) amounted in March, 1798, to the enormous sum of two millions of dollars, annually. It probably is not less at this day, notwithstanding the immense changes that have been made.

285. On the English Constitution, B. 2. c. 4.

286. C. U. S. Art. 1. Sect, 7.

287. C. U. S. Art. 2. Sect. 1, 3.

288. Montesquieu's Spirit of Laws, Vol. 1. p.173. Grotius, p.313.

289. Vattel, p. 348. &c. Grotius, 330.

290. The occasion here alluded to, was the president's proclamation of neutrality in June, 1793. This was merely an admonition, to the people of the U. States, of the duty imposed on them by the law of nations, and an annunciation of the fact that we were at peace with all nations. Both houses of congress in their addresses to the president approved of the proclamation, 3 Cong. 1 Session.

291. The proclamation of the two former presidents recommending fasting and prayer, were of this nature; they were an assumption of power not warranted by the constitution, or rather prohibited, by the true spirit of the third article of amendments. Some persons excused the act as amounting only to the advice of the president as an individual. Why then was it clothed with all the forms of authority, the seal of the United States, and the attestation of the secretary of state?

292. Articles of confederation and perpetual union, Art. 9, and 10.

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NOTE D, PART 8

Judicial Powers

III. The constitution and powers of the judiciary department of the federal government have been equally the subject of applause and censure; of confidence and jealousy.[293] The unexceptionable mode of appointing the judges, and their constitutional independence[294] of every other branch of the government merit an eulogium, which all would have concurred in bestowing on this part of the constitution of the United States, had not the powers of that department been extended to objects which might hazard the tranquility of the union in attempting to secure it. No one doubted the necessity and propriety of a federal judiciary, where an ultimate decision might be had upon such questions as might arise under the law of nations, and eventually embroil the American nation with other sovereign powers: nor was it doubted that such a tribunal was necessary to decide such differences as might possibly arise between the several members of the confederacy, or between parties claiming lands under grants from different states. But the objects of the federal jurisdiction were originally far more numerous; extending to "all cases in law and equity arising under the constitution, the laws of the United States, and treaties made, or to 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; and 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."[295] "These objects," a writer on the subject remarks, "are so numerous, and the shades of distinction between civil causes are oftentimes so slight, that it is more than probable the state judicatories will be wholly superceded; for in contests about jurisdiction, the federal court, as the most powerful, will ever prevail."[296] This conclusion will not appear to be ill-founded, if we advert to the ingenious fictions which have been from time to time adopted in the courts of Great Britain, in order to countenance the claim of jurisdiction.[297] But more solid objections seemed to arise from the want of a sufficient security for the liberty of the citizen in criminal prosecutions: the defect of an adequate provision for the trial by jury in civil cases, and the burdens and mischiefs which might arise from the re-examination of facts, upon an appeal. These objections, however, seem to be completely removed by the amendments proposed by the first congress, and since ratified, and made a part of the constitution.[298] Another important objection has been likewise in some degree obviated, by the act of 1 Cong. 1 Sess. c. 20. §. 11, which declares, that no district or circuit court shall have cognizance of any suit upon a promissory note, or other chose in action in favor of an assignee, except in cases of foreign bills of exchange, unless a suit might have been prosecuted in such court if no assignment had been made: it is, however, to be wished, that this provision had formed a part of the amendments to the constitution, which were proposed at the same session, since the objection, upon constitutional grounds, still remains: more especially, as a very serious attempt was made during the last session of the sixth congress to repeal this legislative provision. But the grand objection, that the states were made subject to the action of an individual, still remained for several years, notwithstanding the concurring dissent of several states at the time of accepting the constitution.[299] Nor was it till after several of the states[300] had actually been sued in the federal courts, that the third congress proposed an amendment, which declares, "that 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 the citizens of another state, or by the citizens or subjects of a foreign state." This amendment having been duly ratified now forms a part of the federal constitution. It is well calculated to secure the peace of the confederacy from the dangers which the former power might have produced, had any

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compulsory method been adopted for carrying into effect the judgment of a federal court against a state, at the suit of an individual. But whilst the propriety of the amendment is acknowledged, candor requires a further acknowledgment, that in order to render the judicial power completely efficacious, both in the federal and in the state governments, some mode ought to be provided, by which a pecuniary right, established by the judicial sentence of a court against a state, or against the government of the United States, may be enforced. It is believed, that instances might be adduced, where, although such rights have been judicially established, the claimants have not received any benefit from the judgment in their favor, because the legislature have neglected (perhaps wilfully) to provide a fund, or make the necessary appropriation required by the constitution, for the discharge of the debt. In this instance, the constitutions both of the federal and state governments seem to stand in need of reform.[301] For what avails it, that an impartial tribunal have decided, that a debt is due from the public to an individual, if those who hold the purse-strings of the government, may nevertheless refuse the payment of a just debt?

But whatever objection may be made to the extent of the judicial power of the federal government; in other respects, as it is now organized, and limited by the constitution itself, by the amendments before mentioned, and by the act referred to, it seems worthy of every encomium, that has ever been pronounced upon the judiciary of Great Britain, to which it's constitution is in no respect inferior; being, indeed, in all respects assimilated to it, with the addition of a constitutional, instead of a legal independence, only. Whatever then has been said by Baron Montesquieu, De Lolme, or Judge Blackstone, or any other writer, on the security derived to the subject from the independence of the judiciary of Great Britain, will apply at least as forcibly to that of the United States. We may go still further. In England the judiciary may be overwhelmed by a combination between the executive and the legislature. In America (according to the true theory of our constitution,) it is rendered absolutely independent of, and superior to the attempts of both, to control, or crush it: First, by the tenure of office, which is during good behavior; these words (by a long train of decisions in England, even as far back as the reign of Edward the third) in all commissions and grants, public or private, importing an office, or estate for the life of the grantee, determinable only by his death, or breach of good behavior.[302] Secondly, by the independence of the judges, in respect to their salaries, which cannot be diminished.

Thirdly, by the letter of the constitution which defines and limits the powers of the several coordinate branches of the government; and the spirit of it, which forbids any attempt on the part of either to subvert the constitutional independence of the others. Lastly, by that uncontrollable authority in all cases of litigation, criminal or civil, which, from the very nature of things is exclusively vested in this department, and extends to every supposable case which can affect the life, liberty, or property of the citizens of America under the authority of the federal constitution, and laws, except in the case of an impeachment.

The American constitutions appear to be the first in which this absolute independence of the judiciary has formed one of the fundamental principles of the government. Doctor Rutherforth considers the judiciary as a branch only, of the executive authority; and such, in strictness, perhaps, it is in other countries, it's province being to advise the executive, rather than to act independently of it: thus when Titius demands a debt, or a parcel of land of Sempronius, the judgment of the court is, it's advice to the executive, to whom the execution of the laws appertains, to levy the debt for the plaintiff, or put him in possession of the lands which he claims, or to dismiss his demand as unjust and ill founded. So also if Titius be accused of treason, murder, or other crime; and be thereof convicted, the judgment of the court, is it's advice in what manner he shall be punished according

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to law; which advice is to be carried into effect by the executive officer. Or if he be acquitted, the judgment of the court is it's advice that he be discharged from his confinement, and from further prosecution. In this sense it is, that the judges of the courts of law in England are reckoned among the number of the king's councils, they being his advisers in all cases where the subject matter is of a legal nature.[303] But in the United States of America, the judicial power is a distinct, separate, independent, and co-ordinate branch of the government; expressly recognized as such in our state bill of rights, and constitution, and demonstrably so, likewise, by the federal constitution, from which the courts of the United States derive all their powers, in like manner as the legislative and executive departments derive theirs. The obligation which the constitution imposes upon the judiciary department to support the constitution of the United States, would be nugatory, if it were dependent upon either of the other branches of the government, or in any manner subject to their control, since such control might operate to the destruction, instead of the support, of the constitution. Nor can it escape observation, that to require such an oath on the part of the judges, on the one hand, and yet suppose them bound by acts of the legislature, which may violate the constitution which they have sworn to support, carries with it such a degree of impiety, as well as absurdity, as no man who pays any regard to the obligations of an oath can be supposed either to contend for, or to defend.

This absolute independence of the judiciary, both of the executive and the legislative departments, which I contend is to be found, both in the letter, and spirit of our constitutions, is not less necessary to the liberty and security of the citizen, and his property, in a republican government, than in a monarchy: if in the latter, the will of the prince may be considered as likely to influence the conduct of judges created occasionally, and holding their offices only during his pleasure, more especially in cases where a criminal prosecution may be carried on by his orders, and supported by his influence; in a republic, on the other hand, the violence and malignity of party spirit, as well in the legislature, as in the executive, requires not less the intervention of a calm, temperate, upright, and independent judiciary, to prevent that violence and malignity from exerting itself "to crush in dust and ashes" all opponents to it's tyrannical administration, or ambitious projects. Such an independence can never be perfectly attained, but by a constitutional tenure of office, equally independent of the frowns and smiles of the other branches of the government. Judges ought not only to be incapable of holding any other office at the same time, but even of appointment to any but a judicial office. For the hope of favor is always more alluring, and generally more dangerous, than the fear of offending. In England, according to the principles of the common law, a judge cannot hold any other office; and according to the practice there for more than a century, no instance can, I believe, be shown, where a judge has been appointed to any other than a judicial office, unless it be the honorary post of privy counselor, to which no emolument is attached. And even this honorary distinction is seldom conferred but upon the chief justice of the king's bench, if I have been rightly informed.[304] To this cause, not less than to the tenure of their offices during good behavior, may we ascribe that pre-eminent integrity, which amidst surrounding corruption, beams with genuine luster from the English courts of judicature, as from the sun through surrounding clouds, and mists. To emulate both their wisdom and integrity is an ambition worthy of the greatest characters in any country.

If we consider the nature of the judicial authority, and the manner in which it operates, we shall discover that it cannot, of itself, oppress any individual; for the executive authority must lend it's aid in every instance where oppression can ensue from it's decisions: whilst on the contrary, it's decisions in favor of the citizen are carried into instantaneous effect, by delivering him from the custody and restraint of the executive officer, the moment that an acquittal is pronounced. And

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herein consists one of the great excellencies of our constitution: that no individual can be oppressed whilst this branch of the government remains independent, and uncorrupted; it being a necessary check upon the encroachments, or usurpations of power, by either of the other. Thus, if the legislature should pass a law dangerous to the liberties of the people, the judiciary are bound to pronounce, not only whether the party accused has been guilty of any violation of it, but whether such a law be permitted by the constitution. If, for example, a law be passed by congress, prohibiting the free exercise of religion, according to the dictates, or persuasions of a man's own conscience or abridging the freedom of speech, or of the press; or the right of the people to assemble peaceably, or to keep and bear arms; it would, in any of these cases, be the province of the judiciary to pronounce whether any such act were constitutional, or not; and if not, to acquit the accused from any penalty which might be annexed to the breach of such unconstitutional act. If an individual be persecuted by the executive authority, (as if any alien, the subject of a nation with whom the United States were at that time at peace, had been imprisoned by order of the president under the authority of the alien act, 5 Cong. c. 75) it is then the province of the judiciary to decide whether there be any law that authorizes the proceedings against him, and if there be none, to acquit him, not only of the present, but of all future prosecutions for the same cause: or if there be, then to examine it's validity under the constitution, as before-mentioned. The power of pardon, which is vested in the executive, in it's turn, constitutes a proper check upon the too great rigor, or abuse of power in the judiciary department. On this circumstance, however, no great stress ought to be laid; since in criminal prosecutions, the executive is in the eye of the law, always plaintiff; and where the prosecution is carried on by it's direction, the purity of the judiciary is the only security for the rights of the citizen. The judiciary, therefore, is that department of the government to whom the protection of the rights of the individual is by the constitution especially confided, interposing it's shield between him and the sword of usurped authority, the darts of oppression, and the shafts of faction and violence. Let us see in what manner this protection, is thus confided to the judiciary department by the constitution.

I. First, then; the judicial power of the United States extends to all cases in law and equity, arising under the constitution, the laws of the United States, and treaties made by their authority. 2. No person shall be deprived of life, liberty, or property, (and these are the objects of all rights) without due process of law; which is the peculiar province of the judiciary to furnish him with. 3. No person shall be held to answer for any crime, unless on presentment or indictment of 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. 4. In criminal cases the accused shall have a speedy and public trial, by an impartial jury of the state and district, where the crime shall be committed. 5. He shall be informed of the nature and cause of his accusation. 6. He shall be confronted by the witnesses against him; and 7, Shall have compulsory process for obtaining witnesses in his favor.[305] 8. He shall not be compelled to be a witness against himself. 9. He shall not be subject, for the same offense, to be twice put in jeopardy of life or limb. 10. He shall have the aid of counsel for his defense. 11. His person, house, papers, and effects, shall be free from search or seizure, except upon warrants issued upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person, or things to be seized. 12. Excessive bail shall not be required of him. 13 The benefit of the writ of habeas corpus shall not be denied him, unless in case of actual invasion, or rebellion, the public safety (of which congress are to judge, and suspend the benefit accordingly) may require the suspension of that privilege generally, and not in his particular case, only. 14. Excessive fines shall not be imposed, nor unusual punishments inflicted on him. 15. His private property shall not be taken for the public use without just compensation. 16. He shall not be

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convicted upon any charge of treason, unless on the testimony of two witnesses, at least, to the same overt act, or on confession in open court. In all these respects, the constitution, by a positive injunction, prescribes the duty of the judiciary department;[306] extending it's powers, on the one hand, so far as to arrest the hand of oppression from any other quarter; and on the other prescribing limits to it's authority, which if violated would be good cause of impeachment, and of removal from office. Thus if the privilege of the writ of habeas corpus should be suspended by congress, when there was neither an invasion, nor rebellion in the United States, it would be the duty of the judiciary, nevertheless, to grant the writ, because the act of suspension in that case, being contrary to the express terms of the constitution, would be void. On the other hand, if the benefit of the writ of habeas corpus, should be granted to any person, contrary to the provisions of an act for suspending it, during the time of an invasion or rebellion, this would be a good ground for impeaching a judge who should conduct himself in that manner. So, if a judge were to instruct a jury upon the trial of a person for treason, that he might be convicted upon the testimony of a single witness, if such instruction were advisedly, and corruptly given, (and not the mere effect of mistake and misapprehension) it would furnish a good ground for impeachment, and removal of such judge from his office. And any other gross misconduct of a judge in the execution of his office may be punished in like manner.

That absolute independence of the judiciary, for which we contend is not, then, incompatible with the strictest responsibility; (for a judge is no more exempt from it than any other servant of the people, according to the true principles of the constitution;) but such an independence of the other co-ordinate branches of the government as seems absolutely necessary to secure to them the free exercise of their constitutional functions, without the hope of pleasing, or the fear of offending. And, as from the natural feebleness of the judiciary it is in continual jeopardy of being overpowered, awed, or influenced by it's coordinate branches, who have the custody of the purse and sword of the confederacy; and as nothing can contribute so much to it's firmness and independence as permanency in office, this quality therefore may be justly regarded as an indispensable ingredient in it's constitution; and in great measure as the citadel of the public justice and the public security.[307] Nor was it imagined that there was more than one opinion, upon this subject, in the United States, until a recent event proved the contrary.[308] It was supposed that there could not be a doubt that those tribunals in which justice is to be dispensed according to the constitution and laws of the confederacy; in which life, liberty and property are to be decided upon; in which questions might arise as to the constitutional powers of the executive, or the constitutional obligation of an act of the legislature; and in the decision of which the judges might find themselves constrained by duty, and, by their oaths, to pronounce against the authority of either, should be stable and permanent; and not dependent upon the will of the executive or legislature, or both, for their existence. That without this degree of permanence, the tenure of office during good behavior, could not secure to that department the necessary firmness to meet unshaken every question, and to decide as justice and the constitution should dictate without regard to consequences. These considerations induced an opinion which it was presumed was general, if not universal, that the power vested in congress to erect from time to time, tribunals inferior to the supreme court, did not authorize them, at pleasure, to demolish them. Being built upon the rock of the constitution, their foundations were supposed to partake of it's permanency, and to be equally incapable of being shaken by the other branches of the government. But a different construction of the constitution has lately prevailed; it has been determined that a power to ordain and establish from time to time, carries with it a discretionary power to discontinue, or demolish. That although the tenure of office be, during good behavior, this does not prevent the separation of the office from the officer, by putting down the office; but only secures to the officer

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his station, upon the terms of good behavior, so long as the office itself remains. – Painful indeed is the remark, that this interpretation seems calculated to subvert one of the fundamental pillars of free governments, and to have laid the foundation of one of the most dangerous political schisms that has ever happened in the United States of America.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court of the United States shall have original jurisdiction. This, I presume, was intended to give the greater solemnity as well as dispatch to the decision of such important cases, by taking away all unnecessary delays, by appeal. But congress appears to have considered, that it was not necessary that the supreme court should have original jurisdiction, but that it might, in the discretion of congress, be invested with it in those cases.[309] By the constitution, originally, the supreme court might have had appellate jurisdiction, both as to law and fact, in all cases. But, the ninth article of amendments provides that no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rule of the common law. A provision which has removed one of the most powerful objections made to this department.

The organization of the federal courts will form the subject of a future note; in which also will be attempted to give the student a view of the state courts.

NOTES

293. The papers in the Federalist, on the subject of the judiciary of the United States, are, in general, equal to any that will be found in that publication. See vol. 1. p. 140, and vol. 2, p. 290, &c.

294. C. U. S. Art. 2. Sec. 2. Art. 3. Sec. 1.

295. C. U. S. Att. 3. Sec. 2.

296. Centinel, p. 15.

297. See 3 Blacks. Com. p. 41, 55.

298. Amendments to C. U. S. Art. 6, 7, 8, 9, 10.

299. The several conventions of Massachusetts, New Hampshire, Rhode-Island, New York, Virginia, and North Carolina, proposed amendments in this respect.

300. Massachusetts, Virginia, and Georgia, were sued by individuals in the federal courts.

301. By the constitution of the United States, "no money can be drawn from the treasury, but in consequence of appropriations made by law. How shall an individual having a judgment against the United States, in his favor, recover his money, if the legislature choose to keep him out of it? The case seems to be equally as bad in the state governments.

302. 3 Cess 43. Edw. 3. — 3 Inst. 117. The barons of the exchequer were the only judges in England, who, at the time Sir Edward Coke wrote, held their office during good behavior, or for life. The student will likewise find the import of these words solemnly argued and decided, by that great man Lord Chief Justice Holt, and his associates; 1 Shower's Reports, 426, 506, to 536, 557.Their judgment was affirmed in parliament. Shower's Cases in Parliament, 158.

303. 1 Blacks. Com. 229. 1 Inst. 110. 3 Inst. 125.

304. Much is it to be regretted that a similar conduct towards the judges of the courts of the United States, has not prevailed in the federal government. Already have we seen two chief justices of the United States, whose duties cannot, certainly, be performed in foreign parts, appointed envoys to distant nations, and still holding their offices in the supreme court of the federal government; offices altogether incompatible, yet held at the same time in manifest violation of every constitutional principle. For surely nothing is more incompatible with the nature of the federal government, than to suppose an office of such high trust and responsibility to have been intended as a sine cure; much less that it could have been intended as the means of extending executive influence, or of shielding the president against the effect of an impeachment. For what could more effectually strengthen the hands of an usurping president, than the power of sending into an honorable exile, the very officer whom the constitution expressly requires to preside at his trial, in case of his impeachment? To preserve the luster of judicial

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purity, perfectly unsullied, it seems necessary, by an express amendment of the constitution, to disqualify the federal judges from appointment to any other than a judicial office; since such appointments have a natural tendency to excite hopes, and secure compliance, from the prospect or expectation of additional emolument, accumulated honors, or greater pre-eminence of station.

305. On the trial of Mr. Thomas Cooper, in the federal circuit court in Pennsylvania, for a libel against the president of the United States, under the sedition law, it is said, that Mr. Cooper applied to the court for a subpoena to summon the president as a witness in his behalf, and that the court refused to grant one. Upon what principle the application was refused, (notwithstanding this article) I have never been able to obtain satisfactory information. The case was certainly delicate, and might have been perplexing.

306. See C. U. S. Art. 3. Art. 1. §. 9. Amendments to C. U. S. Art. 6, 7, 8, 9, 10.

307. Federalist, vol. 2 No. 78.

308. See the act of 7 Cong. repealing the act of the preceding congress for the more convenient organization of the courts of the United States, and the debates thereon.

309. L. U. S. 1 Cong. 1 Sess. c. 20. Sect. 13. In the case of Mr. Ravara the Genoese consul, who pleaded to the jurisdiction of the circuit court, the court overruled his plea. Wilson and Peters judges, contra Iredel judge, who was for sustaining it. 2. Dallas's Reports, 297.

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NOTE D, PART 9

Miscellaneous Provisions

It now only remains to examine some miscellaneous articles, which have either not yet been noticed, or have been but slightly mentioned.

1. No money shall be drawn from the treasury, but in consequence of appropriations made by law.

All the expenses of government being paid by the people, it is the right of the people, not only, not to be taxed without their own consent, or that of their representatives freely chosen, but also to be actually consulted upon the disposal of the money which they have brought into the treasury; it is therefore stipulated that no money shall be drawn from the treasury, but in consequence of appropriations, previously made by law: and, that the people may have an opportunity of judging not only of the propriety of such appropriations, but of seeing whether their money has been actually expended only, in pursuance of the same; it is further provided, that a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.[310] These provisions form a salutary check, not only upon the extravagance, and profusion, in which the executive department might otherwise indulge itself, and its adherents and dependents; but also against any misappropriation, which a rapacious, ambitious, or otherwise unfaithful executive might he disposed to make. In those governments where the people are taxed by the executive, no such check can be interposed. The prince levies whatever sums he thinks proper; disposes of them as he thinks proper; and would deem it sedition against him and his government, if any account were required of him, in what manner he had disposed of any part of them. Such is the difference between governments, where there is responsibility, and where there is none.

Yet even this excellent regulation has an inconvenience attending it, which was formerly hinted at. According to the theory of the American constitutions, the judiciary ought to be enabled to afford complete redress in all cases, where a man may have a just claim for compensation for any injury done him, or for any service which he may have rendered another, in expectation of a just recompense. According to the laws of Virginia, if a claim against the commonwealth be disallowed or abated by the auditor of public accounts, any person who may think himself aggrieved thereby may petition the high court of chancery, or the district court held at Richmond, according to the nature of his case, for redress; and such court shall proceed to do right thereon; and a like petition shall be allowed in all other cases to any person who is entitled to demand against the commonwealth any right in law or equity.[311] But although redress is thus intended to be afforded in such cases, yet it seems to be held, that the treasurer can not pay the money for which the claimant may have obtained a judgment, or decree, until the general assembly have passed a law making an appropriation, for that purpose, if no law authorizing such payment be previously passed. But whatever doubt there may be upon the subject, under the laws of the state, it seems to be altogether without a question, that no claim against the United States (by whatever authority it may be established,) can be paid, but in consequence of a previous appropriation made by law; unless, perhaps, it might be considered as falling properly under the head of contingent charges against the government. An interpretation which may be somewhat strained, and which the executive department of the government, to which the management of the fund appropriated for contingent charges is committed, might be as little disposed to admit, as congress might be to pass a law making a specific appropriation.

Both the constitution and laws of the United States appear, then, to be defective upon this subject; inasmuch, as they neither provide in what manner a just claim against the United States, which may

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happen to be disallowed by the auditor and comptroller of the treasury, shall be judicially examined;[312] nor for the payment of any just claim which might be judicially established, without submitting it to the discretion of congress, whether they will make an appropriation for that purpose. As the congress are supposed, in all pecuniary cases, to have the same common interest with their constituents, they can hardly be considered in any other light than as parties, whenever a demand is made against the public. They cannot then be presumed to be altogether as impartial judges in such cases, as those who are sworn to do equal right to all persons, without distinction: and although the practice has been to petition them for any disputed claim against the United States, cases may arise where such a petition might be highly improper, and yet the nature of the case be such, as to entitle the party to obtain redress according to the dictates of moral obligation. A judicial court is, according to the true spirit of the constitution, the proper place in which such a right should be inquired into, and from which redress might be finally obtained: and that, without impediment from any other department of the government. This might be effected by an amendment, declaring, that no money shall be drawn from the treasury but in consequence of appropriations made by law; or, of a judicial sentence of a court of United States.

2. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And congress may by general laws, prescribe the manner in which the same shall be proved, and the effect thereof.[313] The act of 1 Cong. 2 Sess. c. 11, accordingly declares, that the acts of the legislature of the several states shall be authenticated by having the seal of their respective states affixed thereto; that the records and judicial proceedings of the courts of any state, shall be proved or admitted in any other court within the United States, by attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that such attestation is in due form. And records and judicial proceedings so authenticated, shall have such faith in every court within the United States, as they have by law or usage in the courts of the state, from whence they may be taken. The propriety and necessity of such a provision to be made between members of an extensive confederacy, are too obvious to escape observation. A similar provision was accordingly made by the former articles of confederation and perpetual union, Art. 4.

3. The citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.[314]

This article, with some variation, formed a part of the confederation: we have in another place supposed, that the states retain the power of admitting aliens to become denizens of the states respectively, notwithstanding the several acts of congress establishing an uniform rule of naturalization. But such denizens, not being properly citizens, would not, I apprehend, be entitled to the benefit of this article in any other state. They would still be regarded as aliens in every state, but in that of which they may be denizens. Consequently, an alien before he is completely naturalized, may be capable of holding lands in the state, but not of holding them in any other.

4. 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.[315]

This article likewise formed a part of the former confederation, and was necessary to cement and secure the harmony of the union. The act of 1784, c. 35. [V. L. Edi. 1794, c. 118.] provided for the mode of carrying it into execution; but a different provision is made by the act of 2 Cong. 51. – Either mode may be adopted, I apprehend, according to the nature of the case. If the party accused

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be already in custody of the law, by virtue of process from the state courts, he may, on demand of the executive authority of the state from whence he fled, be sent thither in custody by order of the general court, or warrant of any two judges thereof in vacation: if he be not already in custody, the act of congress makes it the duty of the executive authority of the state to which he flees, upon a copy of an indictment found, or affidavit made before a magistrate of any state, charging him with any crime, to cause him to be arrested and secured, and notice to be given to the executive authority making the demand, or his agent, and the fugitive to be delivered up. But if no agent appear, within six months from the time of the arrest, the prisoner may be discharged.

5. No person held to service in one state, under the laws thereof, and escaping into another state, 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 is due.[316]

This necessary provision had not a place in the former articles of confederation; in consequence of which numberless inconveniences were felt by the citizens of those states, where slavery prevails, from the escaping of their slaves into other states, where slavery was not tolerated by law, and where it was supposed no aid ought to be given to any other person claiming another as his slave. The act of 2 Cong. c. 31, prescribes the mode of proceeding in such cases; authorizing the master to seize his slave, and making it the duty of the district judge of the United States, and of the magistrates of the state to aid him therein; and imposing a penalty of five hundred dollars upon any person obstructing him.

6. The United States shall guarantee to every state in the 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. C. U. S. Art. 4. Sec. 4.

It is an observation of the enlightened Montesquieu, that mankind would have been at length obliged to submit to the government of a single person, if they had not contrived a kind of constitution, by which the internal advantages of a republic might be united with the external force of a monarchy; and this constitution is that of a confederacy of smaller states, to form one large one for their common defense. But these associations ought only to be formed, he tells us, between states whose form of government is not only similar, but also republican. The spirit of monarchy is war, and the enlargement of dominion; peace and moderation is the spirit of a republic. These two kinds of government cannot naturally subsist together in a confederate republic. Greece, he adds, was undone, as soon as the kings of Macedon obtained a seat among the Amphictyons.[317] If the United States wish to preserve themselves from a similar fate, they will consider the guarantee contained in this clause as a corner stone of their liberties.[318]

The possibility of an undue partiality in the federal government in affording it's protection to one part of the union in preference to another, which may be invaded at the same time, seems to be provided against, by that part of this clause which guarantees such protection to each of them. So that every state which may be invaded must be protected by the united force of the confederacy. It may not he amiss further to observe, that every pretext for intermeddling with the domestic concerns of any state, under color of protecting it against domestic violence is taken away, by that part of the provision which renders an application from the legislative, or executive authority of the state endangered, necessary to be made to the federal government, before it's interference can be at all proper. On the other hand, this article secures an immense acquisition of strength; and additional force to the aid of any of the state governments, in case of an internal rebellion or insurrection

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against authority. – The southern states being more peculiarly open to danger from this quarter, ought to be particularly tenacious of a constitution from which they may derive such assistance in the most critical periods.

7. All debts contracted, and engagements entered into, before the adoption of the constitution, are declared to be as valid against the United States under the same, as under the confederation. This declaration was probably inserted for the satisfaction, as well as the security of the public creditors, both foreign and domestic. The articles of confederation contained a similar stipulation in respect to the bills of credit emitted, monies borrowed, and debts contracted, by or under the authority of congress, before the ratification of the confederation. These declarations are merely acknowledgments of that which moral obligation imposed upon the United States as a duty. It might seem as if this act prohibited the making of any act of limitation in bar of such debts; but a different interpretation has been given to it by congress. L. U. S. 2 Cong. 2 Sess. c. 6.

8. The ratification of the conventions of nine states was declared to be sufficient for establishing the constitution between the states ratifying the same.

This article may now be regarded of little importance, the constitution having been ratified by all the members of the former confederacy. – Had it been otherwise, after nine states had ratified the constitution, it might have been a question of some delicacy, in what relation those which failed to ratify, stood to the others which had. The adoption of the constitution the establishing a new form of government by nine states only, would have been an undoubted breach of the articles of confederation, on their parts:[319] the remaining states might, at their election, have considered the confederacy as dissolved, or not. If they considered it as dissolved, they would have stood in the relation of other foreign states. If as still existing, they would have had a right to insist upon the performance of all mutual stipulations on the part of the other states, so long as they continued to perform their own, with good faith. The Federalist advances a different opinion.[320] Happily for the United States it is now unnecessary to discuss the question any further.

9. The constitution, and the laws of the United States, made in pursuance of it; and all treaties made, and to 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.[321]

It may seem very extraordinary, that a people jealous of their liberty, and not insensible of the allurements of power, should have entrusted the federal government with such extensive authority as this article conveys: controlling not only the acts of their ordinary legislatures, but their very constitutions, also.

The most satisfactory answer seems to be, that the powers entrusted to the federal government being all positive, enumerated, defined, and limited to particular objects; and those objects such as relate more immediately to the intercourse with foreign nations, or the relation in respect to war or peace, in which we may stand with them; there can, in these respects, be little room for collision, or interference between the states, whose jurisdiction may be regarded as confided to their own domestic concerns, and the United States, who have no right to interfere, or exercise a power in any case not delegated to them; or absolutely necessary to the execution of some delegated power. That, as this control cannot possibly extend beyond those objects to which the federal government is competent, under the constitution, and under the declaration contained in the twelfth article, so neither ought the laws, or even the constitution of any state to impede the operation of the federal government in any case within the limits of it's constitutional powers. That a law limited to such

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objects as may be authorized by the constitution, would, under the true construction of this clause, be the supreme law of the land; but a law not limited to those objects, or not made pursuant to the constitution, would not be the supreme law of the land, but an act of usurpation, and consequently void. A further answer seems also to be, that without this provision the constitution could not have taken effect in those states where the articles of confederation were sanctioned by the constitution; nor could it be supposed that the constitution of the United States would possess any stability so long as it was liable to be affected by any future change in the constitution of any of the states. Other reasons are assigned by the Federalist, for which I shall refer the student to that work.[322]

10. The senators and representatives in congress, and the members of the several state legislatures, and all executive and judicial officers of the United states, and of the several states, shall be bound by oath or affirmation to support the constitution.[323]

That all those who are entrusted with the execution of the powers vested in the federal government, should, under the most solemn sanction, be bound to the due execution of the trusts reposed in them, could not be doubted. But the propriety of requiring a similar engagement from the members of the state legislatures, and the other public functionaries in the several states, was doubted. But it should be remembered, that the members and officers of the state governments will have an essential agency in giving effect to the federal government. The election of the senate depends upon the immediate agency of the state legislatures. In some of the states the electors for president and vice-president are chosen in the same manner. In all, the legislature must direct the mode in which they shall be appointed. The election of representatives must probably depend upon them also for aid; at least until congress, shall pass a general law upon the subject. The judges of the state courts will not unfrequently have to decide according to the constitution and laws of the United States. Decisions ought to be uniform, whether had in the federal courts, or the state courts. This uniformity can only be obtained by uniformity of obligation. The executive authority of the states will also have an immediate agency in the appointment of senators, in case of vacancy during the recess of the legislature: in issuing writs of election to fill up vacancies in the house of representatives; in giving effect to the laws for calling the militia into the service of the United States; in officering the militia, and a variety of other occasions, all of which require that no adverse spirit, nor doubts of authority, or obligation, should be permitted to counteract, or retard the necessary operations of the federal government.

11. Lastly the fifth article provides the mode by which future amendments to. the constitution may be proposed, discussed, and carried into effect, without hazarding a dissolution of the confederacy, or suspending the operations of the existing government. And this may be effected in two different modes: the first on recommendation from congress, whenever two thirds of both houses shall concur in the expediency of any amendment. The second, which secures to the states an influence in case congress should neglect to recommend such amendments, provides, that congress shall, on application from the legislatures of two thirds of the states, call a convention for proposing amendments; which in either case shall be valid to all intents and purposes as part of the 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 the ratification may be proposed by the congress. Both of these provisions appear excellent. Of the utility and practicability of the former, we have already had most satisfactory experience. The latter will probably never be resorted to, unless the federal government should betray symptoms of corruption, which may render it expedient for the states to exert themselves in order to the application of some radical and effectual remedy. Nor can we too much applaud a constitution, which thus provides a safe, and peaceable remedy for

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its own defects, as they may from time to time be discovered. A change of government in other countries is almost always attended with convulsions which threaten its entire dissolution; and with scenes of horror, which deter mankind from any attempt to correct abuses, or remove oppressions until they have become altogether intolerable. In America we may reasonably hope, that neither of these evils need be apprehended; nor is there any reason to fear that this provision in the constitution will produce any degree of instability in the government; the mode both of originating and of ratifying amendments, in either mode which the constitution directs, must necessarily be attended with such obstacles, and delays, as must prove a sufficient bar against light, or frequent innovations. And as a further security against them, the same article further provides, that no amendment which may be made, prior to the year one thousand eight hundred and eight, shall, in any manner, affect those clauses of the ninth section of the first article, which relate to the migration or importation of such persons as the states may think proper to allow; and to the manner in which direct taxes shall be laid: and that no state, without its consent shall be deprived of its equal suffrage in the senate.

Among the amendments proposed by the several state conventions, some appear to have been proposed only for greater precaution, and security against misconstruction, or an undue extension of the powers vested in the federal government; whilst others seem to have been calculated to remedy some radical defects in the system.[324] The most important of those which have not yet received the approbation of both houses of congress may not improperly be brought into view in this place, although we have occasionally offered some remarks upon several of them in other parts of this essay.

1. That some tribunal other than the senate be provided for trying impeachments of senators. – This amendment seems to be the more necessary in consequence of the decision in William Blount's case, that a senator is not a civil officer, and therefore not impeachable. On this subject we have already spoken somewhat at large.

2. That some reform be made, in the mode of choosing a president of the U. States in those cases where the election may now devolve upon the house of representatives.

The necessity of such a reform, and the danger to which the federal union, may be exposed if it be not effected, have been brought into full view by the struggle between two parties almost equally balanced, at the election of a president of the U. States in the year 1801. On this subject also, we have offered some remarks elsewhere. I shall only add, that sound policy dictate that no president should be capable of being re-elected, that had not a majority of the whole number of votes of the state electors, in his favor; and that no preponderance ought to be given to the vote of one member of the house of representatives over that of another.

3. That all commercial treaties, and such whereby any cession of territory or of jurisdiction, or the right of fishing upon the coasts of the United States, or of the adjacent continent and islands, be made subject to the final ratification of congress, before they shall be deemed conclusive, on the part of the United States.

4. That the judiciary power of the United States be not construed to extend to any civil suit, where the cause of action was not originally cognizable in the federal courts; nor to any crime or misdemeanor whatsoever, which is not defined, and the punishment thereof prescribed, either in the constitution of the United States, or in some act of congress, made pursuant thereto; except the same be committed out of the jurisdiction of any particular state, and within the exclusive jurisdiction of the federal government.

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The reasons for some further limitation of the judicial power of the United States have been repeatedly touched upon, already; some further reasons will be offered hereafter in the tract, upon the authority and obligation of the common law of England, in the United States. At the conclusion of the latter the student will find the sentiments of the general assembly of Virginia, upon that important subject, as connected with the extent of the judicial power of the United States; expressed in the most nervous language, that a just apprehension of the fatal consequences to be expected from the doctrine, that the common law of England has been adopted as the law of the federal government, could dictate.

5. That the articles which relate to direct taxes, and excises, might if possible be so modified as to remove the objections which have been made to them, by the several states.

6. That the exclusive power of legislation over the seat of government, etc. be limited to such regulations as respect the police and good government thereof.

7. That congress shall not alter, modify, or interfere in, the time, place, or manner, of holding elections for senators or representatives, except when the legislature of any state may neglect, or refuse, or be disabled by invasion or rebellion, to prescribe the same.

8. That no standing army, or regular forces, be kept up in time of peace, except for the necessary protection and defense of forts, dock yards, and arsenals, without consent of two thirds of both houses of congress.

9. That congress shall not have power to grant monopolies, or to erect any companies with exclusive advantages of commerce.

10. That the president shall not command an army in person, without the consent, or desire of congress.

11. That congress shall not declare war, without the consent of two thirds of both houses.

12. That no law for the regulation of commerce, or navigation act, shall be made, unless with the consent of two-thirds, of the members of both houses.

13. That the state legislatures may have power to recall, when they think it expedient, their senators, and to send others in their stead.

14. That the senators and representatives in congress shall be ineligible to any post or place under the United States during the term for which they were elected. – To which I will take the liberty of suggesting – "or for one year thereafter."

The practical exercise of the federal government has evinced the indispensable necessity of an amendment upon this subject. It cannot be made too strict, or too rigorous. – The man who seeks a seat in congress, with the hopes by that means to retire upon a lucrative office, will be a venal sycophant towards those who have the power of fulfilling his wishes. We have seen that the most ready road to preferment in the federal government has been found to pass through the two houses of congress; offices have (almost invariably) been conferred on those, who have been the most distinguished supporters and promoters of the extension of the power and influence of the executive: that employments (lucrative in their nature) have been occasionally carved out for them, even during the time for which they have been elected.[325] He that can doubt that political corruption unavoidably springs from such a source, may, if he pleases, doubt that animal putrefaction is produced by the combined action of air, heat, and moisture. But neither the real philosopher, nor the enlightened

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politician, will feel a doubt upon either of these questions.

I have now finished the survey of the constitution of the United States, which I proposed making in this essay. Attached, from principle, and confirmed in that attachment from past experience, to a federal union of the American States, and to the principles of a democratic government, I have probably regarded with a jealous eye those parts of the constitution which seem to savor of monarchy, or aristocracy, or tend to a consolidated, instead of a federal, union of the states. I have been equally zealous in my endeavors to point out the excellencies of the constitution, as to expose it's defects: a sincere attachment to the former will always lead an ingenuous mind to a candid investigation, and correction of the latter. Happily for us, and for our country, this correction has been found to be practicable without hazard, without tumult, and without the smallest interruption to the ordinary course of administering the government. To shut our eyes against this inestimable advantage which we possess, beyond any other nation in the universe, would be an unpardonable act of ingratitude to that divine being, under whose providence we have accomplished the great work of our independence, and the establishment of free government, in every state, and an union of the whole upon such a solid foundation, as nothing but our own folly, or wickedness, can undermine. The man who first espies any defect, or decay in the fabric, should, therefore, be the first to point it out; that it may be amended, before the injury which it may have occasioned is too great to be repaired. Those who, perceiving the defect, deny that it exists; or wilfully obstruct the amendment, are the real enemies of the constitution: it's real friends ought to pursue a different conduct. Governments of force may be preserved for a time by an obstinate perseverance in the same course, however pernicious: but a government of the people has no foundation but the confidence of the people: if that be withdrawn, the government inevitably falls.

The very elaborate and masterly discussion of the constitution, in the Federalist, to which I have repeatedly referred the student in the course of this essay, would probably have saved me the labor of this attempt, if the defects of the constitution had been treated with equal candor, as the authors have manifested abilities in the development of its eminent advantages. But, notwithstanding, those letters are not altogether free from objectionable parts, yet the far greater proportion of them contain so just a commentary upon the principles of republican government, and of a federal union of the states, that I cannot too warmly recommend the perusal of them to those who wish to make themselves perfectly acquainted with a subject so truly interesting to every American citizen, as the federal government of the United States.

NOTES

310. C. U. S. Art. 1, Sec. 9.

311. L. V. Edi. 1794, c. 85.

312. It has been said on the floor of the house of representatives of the United States, "that it had been repeatedly decided, that the United States would not permit themselves to be brought into their own courts." The editor had supposed that that clause of the constitution, which declares that "the judicial power shall extend to all cases, in law and equity, arising under the constitution," &c. had prescribed a different rule of decision. Nor can he, even now, form a different opinion upon the subject; believing that there is as much reason that a legal or equitable claim against the United States, should receive a judicial discussion, and decision, as any similar claim which might be made on their behalf. And though he doubts, as to the mode in which a judicial enquiry into the justice of a pecuniary claim against them may be instituted, yet he cannot doubt that the constitution meant to afford the right to every citizen of the United States.

313. C. U. S. Art. 4.

314. C. U. S. Art. 4.

315. Ibid.

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316. C. U. S. Art. 4.

317. Spirit of Laws, B. 9. c. l and 2.

318. On this subject, see Federalist, vol. 2. p. 60 to 64.

319. The articles of this confederation shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a congress of the United States, and be afterwards confirmed by the legislatures of every state. Confederation, Art. 13.

320. See Federalist, vol. II. p. 66.

321. C. U. S. Art. 6.

322. Federalist, Vol. I. No. 33. Vol. II. No. 44.

323. C. U. S. Art. 6.

324. The following amendments were proposed by one or more of the following states; viz. Virginia, New York, North Carolina, Massachusetts, New Hampshire, Rhode-Island, or South Carolina, in convention; or may be found in an address to the people of Maryland, or in the proceedings at Harrisburg in Pennsylvania. The whole being collected in Carey's Museum, Vol 3, 4, 7, and 8, to which I must here refer the student.

325. The mission of a senator, during a recess of congress, to visit the western posts, with a salary of eight dollars a day, and his expenses paid, may serve as an instance of this practice.

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NOTE E

Of the Unwritten, or Common Law of England; and Its Introduction Into, and Authority Within the United American States

HAVING accompanied the commentator, to the fountain head, from whence he deduces the common law of England, it becomes us to trace its progress to our own shores. This, as it respects the commonwealth of Virginia, considered as an independent state, unconnected with any other, might have been regarded as an unnecessary trouble at this day; the convention, by which the constitution of the commonwealth was established, having expressly declared, "That the common law of England, and all statutes, or acts of parliament made in aid of the common law, prior to the fourth year, of James the first, which are of a general nature not local to that kingdom, together with the several acts of the colony then in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be considered as in full force, until the same shall be altered by the legislative power of the commonwealth." Ordinances of Convention May, 1776, c. 5. Chancellor's Revisal, p. 37.

But some late incidents having given rise to an opinion, that the common law of England, is not only the law of the American States, respectively, according to the mode in which they may, severally have adopted it, but that it is likewise the law of the federal government, a much wider field for investigation is thereby opened; of the importance of which, the general assembly of Virginia, at their session in the winter of 1799, have thus expressed their sentiments, in behalf of themselves, and their constituents.

> "It is distressing to reflect, that it ever should have been made a question, whether the constitution of the United States on the whole face, of which, is seen so much labor to enumerate and define the several objects of federal power, could intend to introduce in the lump, in an indirect manner, and by a forced construction of a few phrases, the vast and multifarious jurisdiction involved in the common law; a law filling so many ample volumes; a law overspreading the entire field of legislation; a law that would sap the foundation of the constitution, as a system of limited, and specified powers."

My present purpose, therefore, is, in the compass of this note to inquire, how far the common law of England, is the law of the federal government of the United States? Should the inquiry seem long, to some of my readers, the importance of the subject I trust, will be deemed a sufficient apology for it.

A question has lately been agitated, whether the common, or, unwritten law of England, has been adopted in America, by the establishment of the constitution of the United States; or, in other words, how far the laws of England, both civil and criminal, make a part of the law of the American States, in their united and national capacity.

Judge Ellsworth is reported, on a late occasion, to have laid it down as a general rule, that the common law of England is the unwritten law of the United States, in their national or federal capacity.[1] Judge Washington, also, is said to have delivered a similar opinion, upon another occasion. The like opinion has been advanced on the floor of the federal house of representatives – concurrent opinions from such respectable authority deserve to be candidly, and respectfully examined, where any doubt is entertained of their correctness; and where any such doubt is entertained, they ought to receive an early and full discussion; otherwise they will soon acquire the force of precedents. These are often more difficult to be shaken than the most cogent arguments, when drawn from reason alone.

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This question is of very great importance, not only as it regards the limits of the jurisdiction of the federal courts; but also, as it relates to the extent of the powers vested in the federal government. For, if it be true that the common law of England, has been adopted by the United States in their national, or federal capacity, the jurisdiction of the federal courts must be co-extensive with it; or, in other words, unlimited: so also, must be the jurisdiction, and authority of the other branches of the federal government; that is to say, their powers respectively must be, likewise, unlimited. How far this may be the case, it is my present purpose to examine with candor.

In the prosecution of this subject it will be necessary to inquire,

1. Whether the several colonies of Great Britain, which now compose the United States of America, brought with them the laws of the mother-country, so far as they were applicable to the situation and circumstances of the colonies respectively or not.

2. What part of those laws might be deemed applicable to the situation and circumstances of the colonies, respectively; and as such, adopted by them severally.

3. What part of those laws which might have been deemed applicable to their situations, respectively, as colonies, were abrogated and annulled by the revolution, or retained by the states, respectively, when they became independent and sovereign republics.

4. Lastly, how far that portion of the laws of England, which may have been retained by the states, respectively, has been engrafted upon, and made a part of, the constitution of the United States.

I. We are to inquire, whether the several colonies of Great Britain, which now compose the United States of America, brought with them the laws of the mother country, so far as they were applicable to the situation and circumstances of the colonies, respectively, or not.

Although very little doubt upon this part of our inquiry was, perhaps, ever entertained in America, yet the celebrated judge Blackstone in his commentaries on the laws of England, expressly denies that the common law of England, as such, had any allowance or authority in the British American colonies. "Plantations, or colonies in distant countries, as he observes, are either such where the lands are claimed by the right of occupancy, only, by finding them desert and uncultivated, and peopling them from the mother country; or where, when already cultivated they have been either gained by conquest, or ceded by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between the two species of colonies, with respect to the laws by which they are bound. For it has been held, that if any uninhabited country be discovered, and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force" – Afterwards he adds: "But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but till he does actually change them, the ancient laws of the country remain, unless such as are against the laws of God, as in the case of an infidel country. Our American plantations are principally of this latter sort; being obtained in the last century, by right of conquest, and driving out the natives, or by treaties. And therefore the common law, as such, has no allowance or authority there."[2]

As I apprehend the opinion here cited is not as correct as many others of the learned commentator, I shall venture to state some objections to it: observing by the way, that his conclusion is applicable only to the colony of New York, which was originally settled by the Dutch, and afterwards conquered by the English, and ceded to the crown by the treaty of Breda in 1667; and perhaps, to the adjacent colony of Jersey, which was likewise ceded by the same treaty, and was also peopled

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at that time by the Dutch, the boundaries between the two colonies being not then established.[3] But with respect to the other colonies; whether they were obtained by purchase from the Indian natives, as was certainly the case with Pennsylvania, and as it has been said, was the case with several others; or whether the territory was acquired by conquest; or by cession; in either case, as those persons by whom the colony was settled, were neither the people who were conquered, nor those who were ceded by treaty, to a different sovereignty; but the conquerors, themselves, or colonists, settling a vacant territory ceded by treaty, the conclusion here made by judge Blackstone will appear to be erroneous. For baron Pufendorf informs us, that sovereignty, by way of conquest, is acquired when a nation, having just reason to make war upon another people, reduces them by the superiority of their arms to the necessity of thenceforward submitting to the government of the conquerors.[4] And with respect to countries ceded by treaty, Grotius tells us, it is not the people that are alienated, but the perpetual right of governing them as a people.[5] Now the British emigrants by whom the colonies were settled were neither a conquered nor a ceded people, but free citizens of that state, by which, the conquest was made, or, to which, the territory was ceded; the Indians, the former people, having uniformly withdrawn themselves from the conquered, or ceded territory. What is here said by Mr. Blackstone, cannot, therefore, be applicable to any colony, which was settled by English emigrants, after the Indian natives had ceded, or withdrawn themselves from, the territory, however applicable it may be to New York, where the Dutch settlers remained, after they were conquered, and after the perpetual right of governing them as a people, was ceded by the treaty of Breda before mentioned.

This distinction between the English emigrants, and the Indian natives, being once understood, we shall be able to apply to the former, what Grotius says upon this subject, viz. "When a people, by one consent, go to form colonies, it is the original of a new and independent people; for they are not sent out to be slaves, but to enjoy equal privileges and freedom."[6] This sentiment he adopts from Thucydides, who, speaking of the second colony sent by the Corinthians to Epidamnus, says, they ordered public notice to be given, that such as were willing to go thither, should enjoy the same rights and privileges as those who staid at home; which corresponds precisely with the declaration contained in Queen Elizabeth's charter to Sir Walter Raleigh, bearing date March 25, 1584, whereby she promises and engages that for the purpose of "uniting in more perfect league and amity such lands and countries as the patentees should settle with the realms of England and Ireland, and for the better encouragement of those who would engage in the enterprise, the said countries so to be possessed and inhabited, should from thenceforth be in allegiance and protection of her, her heirs and successors; and further grants to the said Sir Walter Raleigh, his, heirs and assigns, and to every other person or persons, to their and every of their heirs, that they and every of them that should thereafter be inhabiting in the said lands, countries, and territories, should and might have and enjoy all the privileges of free denizens, or persons native of England."[7] The like engagements and stipulations were contained in all the successive charters granted by King James, to the colony of Virginia; from whence it seems probable that the charters of all the other colonies contained the same. If this were the case, we may, without recurring to the authority of the writers on the law of nations, decide upon the ground of compact alone, that the English emigrants who came out to settle in America, did bring with them all the rights and privileges of free natives of England; and, consequently, did bring with them that portion of the laws of the mother country, which was necessary to the conservation and protection of those rights. A people about to establish themselves in a new country, remote from the parent state, would equally stand in need of some municipal laws, and want leisure, and experience to form a code adapted to their situation and circumstances. The municipal laws of the parent state being better known to them, than those of any other nation, a recurrence to them would naturally be had, for the decision of all questions of right and wrong,

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which should arise among them, until leisure and experience should enable them to make laws better adapted to their own peculiar situation. The laws of the parent state would from this circumstance acquire a tacit authority, and reception in all cases to which they were applicable. Of this applicability, the colonists themselves could be the only competent judges; the grant of a legislature of it's own, to each colony, was a full recognition of this principle, on the part of the crown; and sanctioned the exercise of the right, thereby recognized, on all future occasions.

II. Let us now inquire, what part of the laws of the mother country might be deemed applicable to the situation of the colonies, respectively; and as such adopted by them severally.

I shall endeavor to consider this question, first, in a strictly legal point of view; secondly, in a more general, and political light; and lastly, I shall examine the conduct of the colonies, respectively, in the practical exercise of the right before spoken of; viz. of judging for themselves what parts of the laws of the mother country were applicable, or inapplicable, to their respective situations and circumstances.

1. It seems to be generally understood, that all the colonies were inhibited by the terms of their several charters, and provincial constitutions, from passing any act derogatory from the sovereignty and supremacy of the crown of England, as the head of the nation; and it was further provided by their charters, that all the laws which they should make should conform, as nearly as might be, to the laws and statutes of England, and not be repugnant thereto.

As, according to strict legal construction, all the laws and statutes of England in force at the time of their migration, might be considered as potentially existing in the colonies, so might they be regarded as actually existing there, whenever co-relative subjects occurred, upon which they could operate; except so far, and so far only, as their several charters might have permitted a departure from this general principle. The colonies under this construction, might be compared to corporations within the realm of England, many of which have power to make bye-laws, for the regulation of their own internal police; but in so doing, are bound to conform to the general laws of the realm, which are in all cases paramount to their own local institutions.

But this strict construction, however applicable to domestic corporations within the realm, where the administration of justice in a regular course was already established in courts of the most extensive jurisdiction; and where any defects in the existing laws of the realm, must be supposed to be subject to the immediate observation of the supreme legislature of the nation, by whom, if expedient, they could be immediately remedied; this construction, I say, must have been perfectly inapplicable to the circumstances of infant and remote colonies, surrounded by hostile savage nations, and equally destitute of support from the crown, as the supreme executive, for aid, or authority to repel their aggressions, and incursions; and of the means of application to the judicial courts of the realm for the redress of private injuries, or the punishment of such as were of a public nature: and not less destitute of the means of application to the national legislature for the remedy of such inconveniences of a public nature, as must continually have manifested themselves, under such circumstances. Some of the first charters, indeed, seem to have been intended to constitute a body politic, or trading company within the kingdom, rather than to establish foreign governments, beyond it's limits; to which circumstance we may ascribe the omission of those more general and extensive powers contained in some subsequent charters. These omissions the colonists themselves endeavored to supply by voluntary consent and agreement among themselves, as was done in Massachusetts in the election of a representative body to assist in making laws;[8] an innovation, which was not confined to that colony, but, which was acquiesced in, and even sanctioned by the

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crown, in it's more recent charters, and provincial establishments. The highest act of sovereign authority likewise became necessary to be exercised upon criminals, in the privation of life, concerning which the first Massachusetts charter made no mention: but the government of that colony undertook to inflict capital punishments without recourse to the crown, for additional powers; without which, such a conduct was in strictness murder, in all concerned. In the same manner did they supply a defect of authority to erect judicatories for the probate of wills; to constitute courts of admiralty jurisdiction; to impose taxes; and to create towns, and other bodies corporate,[9] Although what is here said relates only to the colony of Massachusetts, there is reason to believe that a similar conduct was observed in the other New-England colonies, and perhaps in all those which were settled about the same time.

In examining this question, we must, therefore, abandon the ground of strict, legal, technical construction; since upon that ground the colonies must either have been swallowed in the vortex of anarchy, or have expired under the *peine forte et dure* of submission to rigid, and impracticable rules.

2. I shall, therefore, now proceed to consider this part of the question under the more liberal light of general policy.

We must here recollect, that the laws of England are divided into two distinct classes; the unwritten, and the written law: the former consisting of ancient, immemorial, general rules, maxims, and usages; the latter of written statutes, or acts of parliament, from time to time made in affirmance, or for the amendment, of the ancient unwritten law; or to remedy some defect, mischief, or inconvenience therein; or finally, to repeal and annul it, altogether. Consequently, the common, or unwritten law must have been in a state of continual change, from the first institution of parliaments, in the thirteenth century, to the present time; a period of more than five hundred years; two centuries whereof have elapsed since the first migrations were made to America, under the authority of charters granted by the crown of England; though not quite half a century passed over, between the establishment of the colony of Georgia, and the declaration of independence.

The ancient, immemorial, unwritten law of England, may be divided into the *jus commune*, common law, or folk-right, of which the ancient English were so tenacious,[10] and which they struggled so hard to maintain under the first princes of the Norman line: which subsequent princes so frequently promised to keep and restore, as the most popular act they could do, when pressed by foreign emergencies, or domestic discontents, and which depended solely upon custom; which carries this internal evidence of freedom along with it, that it was probably introduced by the voluntary consent of the people.[11] And, secondly, the *jura coronae*, or prerogatives of the crown, as contra-distinguished from the rights and privileges of the people: the foundation of which could only be discovered in many respects, to rest upon immemorial usurpations, exactions, and oppressions, generated by feudal tyranny, and enforced by irresistible military authority. From these two copious, and opposite springs are derived all those rules and maxims, which constitute the ground and foundation of the common law, generally so called. And it is in the admixture of these opposite characters and principles, that we discover, according as the scale of liberty, or prerogative has preponderated, a greater or less proportion of the one, or the other, in every subordinate rule and maxim, which, together, compose the whole body of the English common law.

The *jus commune*, or folk-right, above-mentioned, had for its object, the rights of persons; comprehending the rules, maxims, and usages adopted to ensure the legal and uninterrupted enjoyment of a man's life, his limbs, his body, his health, and his reputation; with the power of

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locomotion, or changing his situation, or moving to whatever place his own inclination may direct; and generally, of doing every thing that his own disposition might prompt, or suggest to him to do, that is not attended with injury to any other, or to the society at large, without imprisonment, molestation or restraint; and lastly, the free use, enjoyment, and disposal, of all his lawful acquisitions, without any control or diminution. These being the rights and privileges which were expressly guaranteed by the royal charters, there can be no reason to doubt that it was the intention of the colonists to adopt them, in all cases where they might be found applicable to their new condition. To judge of this applicability, time, and experience were both requisite; since it might happen that a rule which might have been highly beneficial and practicable in the mother country, might from local circumstances, or other considerations, be deemed inexpedient, or impracticable, in an infant colony. Thus we find that in Massachusetts they very soon disregarded that ancient rule of the common law, which constitutes the eldest son sole heir to his father, and divided the estate, whether personal, or real, according to circumstances, among all the branches of the family:[12] A departure from the principles of the feudal law, of the propriety of which few Americans at this day entertain any doubt, yet certainly not authorized by the terms of their charter. Local circumstances, likewise, gave an early rise to a less justifiable departure from the principles of the common law in some of the colonies, in the establishment of slavery; a measure not to be reconciled either to the principles of the law of nature, nor even to the most arbitrary establishments in the English government at that period; absolute slavery, if it ever had existence in England, having been abolished long before. These instances show that the colonists in judging of the applicability of the laws of the mother country to their own situations and circumstances, did not confine themselves to very strict, and narrow limits.

The *jura corona*, or *lex prerogativa* as denominated by Sir Matthew Hale, may be divided into two heads. First, those prerogatives which appertained strictly to the person of the prince; and secondly, such as regarded him in his political capacity, only; as the supreme head and ruler of the nation. Though all these which were not expressly given up by the crown in it's charters, might, in strictness, be considered as potentially existing in every part of the nation, yet the exercise, or violation, of them, or a great part of them, being perfectly impracticable in remote colonies, such parts may well be considered as in abeyance, or perfectly dormant, there. All those prerogatives which were annexed to the person of the prince, as an individual, in whose case, that was law, which was not law in any case of a subject,[13] must have been of this latter description; since the colonies could have nothing to do with them, in the internal administration of their affairs. – On the other hand those parts of the *jura coronae* which regard the prince, in his political capacity, only; that is, as the chief magistrate of the nation; the representative of his people; the administrator of the laws, and general conservator of the peace of his dominions, were applicable, or inapplicable, I apprehend, as circumstances might direct. Those laws, for example, which regard the king as supreme head of the national church, and punished non-conformity to its doctrines, and discipline, could not have been deemed applicable to the circumstances of a colony in which universal toleration in matters of religion was established by charter; and still less, perhaps, where the established, or prevailing religion of the colony differed from the church of England both in discipline, and in doctrine. Neither can we suppose the laws which regarded the king as supreme lord of the soil of his dominions, and those who held under him as military vassals, would be applicable to the condition of colonists who held their lands in free and common socage: yet the military tenures were not abolished in England, till near a century after the first charters granted to the colonies; and consequently that part of the common law which was founded upon the nature of these tenures remained in full force there, whilst it would have been perfectly absurd to suppose it could have

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been at all applicable to the colonies. Upon this ground we may infer that all the rules and maxims of the common law which sprung from that source, were equally inapplicable to the colonies; for *cessante ratione, cessat et ipsa lex*.

As to crimes and misdemeanors, no doubt the laws relating to such are *mala in se*, as murder, mayhem, and other offenses which are universally admitted to be against the laws of God, and of nature, might have been deemed applicable to the situation of each colony; since the prevention and punishment of such offenses are among the first objects of civil polity. But this was the case only with regard to such offenses as might be strictly termed *mala in se*; and, as such, by the general consent of all civilized nations, admitted to be against the laws of God. Therefore the laws against heresy, witchcraft, sorcery, apostasy, and blasphemy, which, in some of the colonies, were regarded as among the most crying sins against God, and as such, punished with more severity than murder itself, could not have been deemed applicable, as was before observed, to those colonies, where universal toleration, in matters of religion, was established by charter. And as to that class of offenses which are denominated *mala prohibita*, as not being contrary either to the laws of God, or to those of nature, but merely prohibited by the positive laws of society; the laws by which they were defined, restrained, or punished in the mother country, could not be deemed generally applicable to the colonies, because, in some of them there might be no co-relative subject for them to operate upon; as in the case of non-conformity to the worship of the church of England, before mentioned; which, although an offense in England which was punished with much severity, could not be deemed an offense in a colony, where universal toleration, or a different denomination of religion, was established; however it might continue to be deemed an offense in those colonies where the church of England was established as the religion of the colony. To this head we may likewise refer the whole class of offenses against the prince, as an individual; whose personal prerogatives could be in no danger of violation in a colony, situated at the distance of a thousand leagues from his kingdom and residence. And many of those which were attached to the kingly office, must have been equally out of the reach of invasion, or attack, from so remote and feeble a quarter; and consequently could not have been deemed applicable to the situation and circumstances of colonies, of that description.

Nor must the motives and intentions of the colonists, in their respective migrations, be disregarded in an inquiry of this nature. Such of them, as allured by the hopes or prospects of immense riches, or a comfortable subsistence, at least, were induced by such motives, only, to leave their native country; to which, perhaps, they looked forward to return, may well be supposed to retain for its government and laws the same filial attachment as they felt for their *natale solum*, and would, consequently, conform as near as possible both in doctrine and in practice to all the institutions of the mother country. On the contrary, those who fled from what they accounted tyranny, both in church and state, and quitted their native country as a prison, in which they were exposed to all the terrors of persecution; preferring to it an asylum in the howling wilderness, where they might establish and enjoy freedom in a remote and unknown quarter of the globe, must have carried with them prejudices against the laws and government of the parent state, which would induce a general rejection of all such as were inimical to those principles, which prompted them to migrate. And as two strait lines, which diverge from each other at the same point, can never after meet, or become parallel, so the institutions of two countries, founded upon such discordant principles, could never after be assimilated to each other.

In addition to these sources of endless variety, and disagreement, between the civil institutions of the several colonies, there remain two others, equally copious, which have not yet been noticed, or

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but very slightly. The first, arising from the changes introduced by the English statute law, or acts of parliament made between the periods, when the several colonies were respectively settled; the whole amounting to somewhat more than one hundred and fifty years.[14] Now it was held, that those English laws, only, which were in being, at the time of the settlement of each colony, respectively, were in force in such colony. Consequently the statutes made in England, between the period when Virginia was first settled, and that when Georgia was settled, amounting to one hundred and fifty-two years, and the consequent changes which those statutes made in the common law, had no effect or operation in Virginia; although, according to the principles which are generally agreed upon, those statutes, and the changes in the common law thereby produced, must have had' an operation and authority in Georgia, so far as they were applicable to the situation and circumstances of that colony. Those who are acquainted with the prodigious changes made in the laws of England, during the period above-mentioned, will at once discover that there could be no common rule of law between those two colonies, unless that rule could be deduced, without alteration, from a period antecedent to the charter of Virginia. The same observation will hold as to all the other colonies, neither of which were bound by any English law that was not in being at the time of its own establishment. – The second source of variety and disagreement here referred to, and by far the most copious, had its rise in the power which the legislatures of the several colonies were perpetually engaged in exercising, viz. that of making laws adapted to the views, principles, situation, and circumstances of their respective inhabitants and countries. Being perfectly independent of each other, and without any other political relation or connection, except that of acknowledging the same common sovereign; and equally ignorant and regardless of the municipal institutions, or domestic policy of each other; each pursued that course which a regard to their own domestic concerns prompted them to take; until, like the radii of a circle, they arrived from the same common center to points diametrically opposite, or receding from each other in proportion to the length they were extended.

Nor must we forget, what was also before slightly mentioned, that a part of the present United States was first settled by a Dutch colony; and another part, by Swedes. The tract claimed by those two nations extended from the thirty-eighth to the forty-first degree of latitude, and was called the New Netherlands, comprehending the present states of New York, New Jersey, Pennsylvania, Delaware, and the Eastern Shore of Maryland: it was conquered by the English, and confirmed to the crown of England by the treaty of Breda in 1667. The Dutch inhabitants remained in their settlements in New York, and a part of Jersey; the Swedes, if I mistake not, were removed from Delaware to New York, where they likewise remained. According to judge Blackstone, the laws of England, as such, could have no allowance, or authority there; this being a conquered and ceded country, and not a colony originally planted by Englishmen: and according to his principles, also, the laws of Holland, and of Sweden, were the municipal laws of those provinces, until the period of their conquest; and so continued until other laws were imposed upon them by the crown of England. When, and in what degree, a change was made in this manner; or whether any such change was ever formally made, can only be determined by recurrence to documents not within the reach of the author of these sheets.

From all these considerations it will appear, that in our inquiries how far the common law and statutes of England were adopted in the British colonies; or, in other words, what parts of those laws might be deemed applicable to their respective situations and circumstances, we must again abandon all hope of satisfaction from any general theory, and resort to their several charters, provincial establishments, legislative codes, and civil histories, for information. For although the colonial legislatures are understood to have been inhibited from passing any law derogatory from the sovereignty of the crown, or repugnant to the laws and statutes of England; which seems to have

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been the only common rule imposed upon them, yet the application of this rule in the several colonies will be found to have been as various as their respective soils, climates, and productions.

A research of this extensive nature is equally beyond the proposed limits of this essay, and the sources of information which its author possesses. Yet it may be neither unuseful, nor uninstructive, to turn our attention for a few moments towards such an inquiry; from whence we may possibly be made sensible how fruitless would be the labor of a further search after an uniform system of law in the British colonies.

The legislature of Virginia, the most ancient of the British colonies, was constituted by letters patent of March the 9th, 1607, in the fourth year of king James the first; the first charter granted by queen Elizabeth, to Sir Walter Raleigh, bore date March 25th, 1584, about three and twenty years before: it is not of much consequence from which of these periods we date the obligation of the laws of England. They seem to have been adopted by consent of the settlers, which might easily enough be done, whilst they were few, and living altogether. Of such adoption, however, we have no other proof, than their practice till the year 1661,[15] when they were expressly adopted by an act of the assembly, which declares, "that they had endeavored, in all things, as near as the capacity and constitution of the country would admit, to adhere to those excellent and often refined laws of England, to which they profess and acknowledge all reverence and obedience; and that the laws made by them are intended by them but as brief memorials of that which the capacity of the courts is utterly unable to collect out of its vast volumes, though sometimes perhaps, for the difference of condition, varying in small things."[16] The several charters of queen Elizabeth and king James, stipulated that lands in Virginia should be held of the crown in free and common socage.[17]

The first acts to be found in the colonial code of Virginia provide for building churches, appointing vestries, and laying out glebes in every parish. And by an act dated in 1643, it is provided, that for the preservation of purity and unity of doctrine, and discipline in the church, and the right administration of the sacraments, no minister should be admitted to officiate in Virginia, without producing to the governor a testimonial of his ordination from some bishop in England, and subscribing to be conformable to the orders and constitutions of the church of England, and the laws there established.[18] All persons not having a lawful excuse, were obliged to attend their parish church every Sunday, under penalty of fifty pounds of tobacco; "but Quakers and other recusants, who, out of non-conformity to the church, totally absented themselves, were made liable to such fines and punishments as by stat. 23, Eliza. were imposed upon them; being for every month's absence, twenty pounds sterling; and if they forbore a twelvemonth, then to give security for their good behavior, besides payment of the before-mentioned fine. And all Quakers, for assembling in unlawful assemblies, and conventicles, were farther subject to a fine of two hundred pounds of tobacco, for each offense."[19] The like penalty was extended two years after to any other separatist whatsoever, and the third offense, made the offender liable to banishment.[20] Any person entertaining a Quaker to teach, or preach, was subject to a fine of 5000 pounds of tobacco, and any justice of the peace, or other officer, neglecting the duties prescribed thereby for suppressing Quakers, was subjected, likewise, to a penalty: and any master of a vessel bringing a Quaker into the colony, was moreover liable to the penalty of 5000 pounds of tobacco.

Here then, we find not only the common law and statutes of England, so far as they were applicable to the situation of the colony, but also the hierarchy of the church of England, in it's full vigor, established and adopted in Virginia.

But this general adoption of the laws of England was probably confined to the colony of Virginia,

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which, even to the period when the revolution commenced, was distinguished for it's loyalty, beyond any other of the plantations. The New-England colonies owed their establishment to that spirit of independency, which afterwards shone forth there, in it's full luster, and received new accession from the aspiring character of those, who being discontented with the established church, and with regal government, sought for freedom amidst those savage deserts.[21] But, even in Virginia, we find the distinction made, between acts of parliament antecedent to their settlement, and such as were subsequent thereto. Many of the latter were from time to time, either expressly declared to be in force in the colony, or, were introduced into the colonial code, in form of acts of the general assembly. The statute of 7 and 8 of William the third, which declares that "the solemn affirmation of Quakers shall be accepted instead of an oath," for so much thereof as relates to such affirmation, was, by an act of assembly, passed in the year, 1705, declared to be in force in Virginia; the statute of 3 W. and M. c. 14. For relief of creditors against fraudulent devises, was in like manner declared to be in force in Virginia, by an act passed in the year 1726, and re-enacted in the year. 1748. The statutes of limitations, 32 H. 8. c. 2. and 21 Ja. 1. c. 16. were enacted in the year 1710, with alterations in the former. The statutes of 21 Ja. 1. c. 27, to prevent the destroying of bastard children; and c. 24, concerning persons dying in execution, were likewise enacted about the same time. So was a part of the statute 16, and 17. Car. 2. c. 5, for preventing delays of execution by writ of *audita querela*; as also several clauses of the statute for preventing frauds and perjuries, 29 Car. 2. c. 3, whilst other parts of the same statute were either entirely omitted, or materially changed; as in the case of a will of lands: the statute requires 3 or 4 witnesses; the act of the Virginia assembly requires only two.[22] Many other instances, if necessary, could be adduced to the like effect.

The Massachusetts colony may be considered as the parent of the other colonies of New-England; there being no importation of planters from England to any part of the continent northward of Maryland, except to Massachusetts, for more than fifty years after the colony began.[23] The first settlement attempted in the year 1607, (the same in which the charter of James the first to Virginia bears date) soon failed.

The colony of New-Plymouth, which may be regarded as the most ancient establishment in New-England, owed it's existence to that bigotry and persecution which prevailed at that time among Christians of every sect and denomination.[24] The adventurers procured a patent from the Virginia - company in 1620, and, eight years after, a charter was obtained from the crown: the settlement having been previously effected. This charter, according to governor Hutchinson, was intended to constitute a corporation in England, like that of the East India company; but on the proposal of several gentlemen of figure and estate, who were dissatisfied with the arbitrary proceedings both in church and state, and pleased themselves with the prospect of the enjoyment of liberty in both, in America, it was resolved the succeeding year, by the general consent of the company, that the government and patent should be settled in New-England.[25] In 1630, they established rules for proceeding in all civil actions, and instituted subordinate powers for punishing offenders. In civil actions, equity, according to the circumstances of the case, seems to have been their rule of determining; the judges had recourse to no authority but common reason and understanding.[26] In 1634, they began to think about a body of laws suited to the circumstances of the colony, civil and religious; and in the year 1648, (the same in which the regal government was subverted in England) the whole collected together, were ratified by the general court, and then first printed).[27] The principal characters in Massachusetts during this period were the intimate friends of the leading members of parliament, Pym, Hampden, etc. and whilst Cromwell was at the head of affairs, he showed them all the indulgence they desired; from 1640 to 1660, they approached very near to an independent commonwealth.

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In the system of laws and government which they established they departed from their charter, and instead of making the laws of England the ground work of their code, they preferred the laws of Moses.[28] In that branch of law more especially, which is distinguished by the name of crown law, they professed to have no regard to the rules of the common law of England.[29] It seems to have been the general opinion that acts of parliament had no other force than what they derived from acts made by the general court to establish, or confirm them.[30] High treason was not mentioned,[31] conspiracy to invade their own commonwealth, or any treacherous perfidious attempt to alter and subvert fundamentally the frame of their polity and government, was made capital.[32] Murder, sodomy, witchcraft, arson, and rape of a child under ten years of age, were the only crimes made capital in the colony, which were capital in England. They made no distinction between murder and manslaughter, and the statutes which allowed, or denied the benefit of clergy were disregarded. The worship of any other God besides the Lord God, was capital. Governor Hutchinson doubts whether a Roman catholic for the adoration of the host, might not have come within that law. Blasphemy, man-stealing, adultery with a married woman, wilful perjury in certain cases, cursing, or smiting a parent by a child above the age of sixteen years, except in one or two particular cases, were all capital offenses. A stubborn and rebellious son, according to Deuteronomy c. 21. upon conviction was also to suffer death. There were several trials under this law. Rape was left to the court to punish with death or other grievous punishment at discretion. Several offenses were capital upon a second conviction; as the returning of a Romish priest, or a Quaker, after banishment upon the first conviction: The denial of either of the books of the old and new testament, to be the written and infallible word of God, was either banishment, or death, for the second offense, at the discretion of the court. Burglary and theft in a house, or field, on the Lord's day, were capital upon a third conviction; larceny, or theft was punishable by fine or whipping, and restitution of treble the value; fornication, by enjoining marriage, by fine, or corporal punishment. Common fowlers, tobacco-takers, and idlers, the constables were required to present to the next magistrate; and the select men of every town were required to oversee the families: to distribute the children into classes, and to take care that they were employed in spinning and other labor according to their age and condition. Contempt of authority was punished with great severity, by fine, imprisonment, or corporal punishment. Lesser offenses were punished at the discretion of the court.[33] Such are the outlines of their penal code: it would be misspending time to attempt to show the numerous departures therein, from the principles both of the common, and statute law of England.

Nor were many of the civil regulations less dissimilar. Marriages from the first settlement of the colony were celebrated by magistrates, and not by clergymen. At the revolution they were solemnized by the clergy. A man who struck his wile, or a woman her husband, was liable to a penalty of ten pounds, or corporal punishment. In testamentary causes they at first so far allowed the civil law, as to consider real estates, as mere bona, and did not confine themselves to any rules of distribution in England. They considered the family and estate in all their circumstances, as was before mentioned, and sometimes assigned a greater portion to one branch than another; and sometimes they settled all upon the widow; executors or administrators were not held, as at the common law, to prefer a debt due by judgement, or bond, to a simple contract debt; fee-simple estates descended to every child; but estates tail to the eldest son, or other heir at common law. Traitors and felons might dispose of their estates, real and personal, by will, after sentence; and if they died intestate, distribution was made as in other cases. No free inhabitant of any town could sell his lands therein, but to some other free inhabitant of the same town; unless the town gave consent, or refused to give what others offered without fraud; which was agreeable to the law of Moses, which forbad the alienation of lands from one tribe to another. The clergy were at all times exempted

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from taxes, on their persons, or estates, under their own improvement.[34] Nor was their ecclesiastical polity at less variance with the laws and statutes of England, which regard the king as the supreme head of the church, and make it penal not to conform to the doctrine and discipline of that church. Upon their removal they supposed their relation both to the civil and ecclesiastical government, except so far as a special reserve was made by their charter, was at an end; and that they had a right to form such new model of both, as best pleased them.[35] Accordingly they established an ecclesiastical polity of their own, totally differing from the mother country, it being one of the principles upon which their platform, or church-government was formed, "that there is no jurisdiction to which particular churches are, or ought to be subject, by way of authoritative censure, nor any other church power, extrinsic to such churches, which they ought to depend upon any other sort of men for the exercise of."[36] In general the ordination of ministers was by imposition of the hands of their brethren in the ministry; but some churches called for the aid of no ministers of other churches, but ordained their ministers by the imposition of the hands of some of their own brethren.[37] They laid aside the fasts and feasts, as well as the doctrine and discipline of the church of England; yet they appointed days of fasting and thanksgiving occasionally, and any person absenting himself from public worship on those days, was liable to a fine:[38] and non-conformity was attended with the deprivation of more civil privileges than in England.[39] This intolerant spirit occasioned complaints to be preferred against the colony, after the restoration, not only by Episcopalians, but by Baptists, Quakers, and other sectarists, which, together with other reasons, produced the abrogation of their charter, by a decree of the high court of chancery in England, in the year 1684. A new charter was obtained in 1691, upwards of sixty years after the date of the former, and seventy years from the first settlement of the colony of New-Plymouth, and near half a century from the period when a system of laws the most discordant to those of the mother country had been established.[40] In the mean time the laws of England had undergone many very material alterations, and the system of government had twice been wholly changed. The new charter contained nothing of an ecclesiastical constitution. Liberty of conscience was allowed to all except papists.[41] On the publication of the new charter, there was room to question what was the law in civil and criminal matters, and how far the common law and what statutes took place. The general court soon after passed an act declaring that all the laws of the colony of Massachusetts, and the colony of New-Plymouth, not being repugnant to the laws of England, nor inconsistent with the charter, should be in force in the respective colonies to the 10th of November, 1692, except where other provision should be made by act of assembly.[42] Instead of committing to a few select and able men, the duty of preparing, and digesting a complete code, or system of laws, upon a preconcerted plan, the whole of which each person should have kept in view: which after being submitted to, and approved by the general assembly, might have been sent to England, to be finally ratified there, by the crown; it was proposed that the members of the general court should, during the recess, consider of such laws as were necessary to be established. This improvident step according to governor Hutchinson, produced consequences by which the people of the province were ever after sufferers; "the construction of many laws," he tells us, "has been doubtful and varying, it being impossible to reconcile the several parts to any general principle of law whatever." Many of the subsequent acts of assembly were passed from time to time, one after another, as they happened to be brought in; and when sent to England for allowance, some were disapproved; others, which depended upon, or had some connection with those which were disapproved, were allowed.[43] The legislature consisting of many of the same persons who had composed the same body under the old charter, the same spirit prevailed in most of the laws which were passed, as in the former code: many of them were consequently disallowed; others were approved, among which is enumerated an act for punishing criminal offenses, in many parts mitigating the penalties at common law; as also an act for the settlement of intestates' estates, which

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continued in force until the period when Hutchinson wrote his history; and is, not improbably, the law of the land at this day. By this act such estates were to be divided among all the children, giving to the eldest son a double portion; and where there were no children, the whole was to go to the next of kin to the intestate. This act was variously interpreted, the courts, where there were no children, at first adjudging that the estate should go to the heir at common law; but later judgments have assigned it to the half blood, to the father, and also to the mother. Notwithstanding which general entails were adjudged not to be partible.[44]

A body of people receding from the established government and religion of a country can not, as was before remarked, be supposed to have carried with them any great affection for it's laws. To this cause we must attribute that immediate departure from the conditions of their first charter, which prohibited the making any laws repugnant to those of England. A strict compliance with this condition would require the aid of learned counsel, whose professional pursuits might enable them to point out the conformity required by the charter. Of such counsel the general court are said to have acknowledged the want.[45] Under such circumstances, had there been every disposition to adhere strictly to the terms of their charter, it would have been impossible. A single instance will show what extensive consequences flowed from these causes. By the charter of Massachusetts, (which agrees perfectly with the charters of the other colonies, in this respect,) it was stipulated that the colonists should hold their lands in free and common socage, as of the manor of East-Greenwich in the county of Kent. In Massachusetts this was interpreted to include all the properties and customs of gavel-kind; one of which is, that lands are partible among all the sons; and another, that they are not subject to forfeiture for treason or felony, according to the maxim, the father to the bough, the son to the plow.[46] This Interpretation gave a correspondent stamp to their laws, before noticed. In Virginia that part of the charter was interpreted to establish the common law rule of descents, in favor of the eldest son, or next collateral kinsman of the whole blood, in exclusion of all others in equal degree; and the law of forfeiture, in cases of treason or felony, was adopted in it's fullest latitude. Two ships sailing from the equator to the opposite poles would scarcely pursue more different courses, or arrive at more opposite points. If such different interpretations could be made where the text was so short, familiar, and explicit, what irreconcilable variances might we not expect in the construction of the numerous, and often discordant dogmas, contained in the vast volumes of common law reports, and statutory provisions?

The colonies of Connecticut and New-Hampshire, which, according to governor Hutchinson, grew out of Massachusetts, severally adopted institutions, both civil and religious, which bore a great conformity to those of Massachusetts. Perhaps the spirit of civil independence run higher in Connecticut, even than in Massachusetts; and that of religious intolerance towards all who differed from them in doctrine, or in discipline, was certainly equal in both.[47] Toleration was preached against as a sin in rulers, which would bring down the judgments of heaven upon the land.[48] This spirit of intolerance in Massachusetts produced the settlement of Rhode-Island, where religious freedom seems first to have erected her standard, under the protection of the charter granted by Charles the second, in the fourteenth year of his reign, A. D. 1662, which declared, that no person within that colony, at any time thereafter, should be any wise molested, punished, disquieted, or called in question for any differences of opinion in matters of religion, who do not actually disturb the civil peace of the colony. Universal toleration was not long after established in Pennsylvania, and there flourished more than in any other country. Popery, the abomination of the religious bigots of New England, seems to have been rather favored, than discouraged in Maryland. In no other colony, except Rhode-Island and Pennsylvania was it tolerated. It is not improbable that in every colony the prevailing sentiments and laws respecting religion, had a corresponding effect upon their

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civil institutions. Of this Peters mentions a remarkable instance in Connecticut, not many years before the American revolution. A negro was brought to trial before the superior court at Hertford for castrating his master's son: the court could find no law to punish him. The lawyers quoted the English statute against maiming; the court were of opinion that statute did not reach the colony, because it had not been passed in the general assembly.[49] At length, however, the court had recourse to the vote of the first settlers at New-Haven, viz. that the bible should be their law, till they could make others more suitable to their circumstances. The court were of opinion that vote was in full force, as it had not been revoked; and thereupon tried the negro by the Jewish law, "eye for eye, tooth for tooth;" and he suffered accordingly.[50] Mr. Swift, in his system of the laws of Connecticut, tells us, that the English common law had never been considered as more obligatory there, than the Roman laws had been in England. That there is no general rule to ascertain what part of it is binding; that the running the line of distinction is a subject of embarrassment to the courts; and that it has no other foundation there, than the voluntary reception of it by the general (implied) consent of the people, (in particular cases, I presume.) That the first settlers there instead of considering it to be the basis of their jurisprudence, and in all cases binding, have only considered it as auxiliary to their statutes. – That a consequence of this doctrine has been, the introduction of many new rules and principles, which have greatly improved the legal system of that state; from whence he adduces a second branch of what he stiles the common law of the state, founded upon the adjudications of the courts, in all cases of defect of the common law not supplied by statute.[51] In Virginia, it would be a violation of the constitution for the courts to undertake to supply all defects of the common law not already supplied by statute. That is the exclusive province of the legislature.

From this specimen, my readers will readily perceive that it would require the talents of an Alfred to harmonize and digest into one system such opposite, discordant, and conflicting municipal institutions, as composed the codes of the several colonies at the period of the revolution; united with the coercive arm of the Norman tyrant to enforce obedience to it, when digested. In vain then should we attempt, by any general theory, to establish an uniform authority and obligation in the common law of England, over the American colonies, at any period between the first migrations to this country, and that epoch, which annihilated the sovereignty of the crown of England over them. I shall, therefore, proceed to consider,

3. Thirdly; what part of the laws of England were abrogated by the revolution, or retained by the several states, when they became sovereign, and independent republics.

And here we may premise, that by the rejection of the sovereignty of the crown of England, not only all the laws of that country by which the dependence of the colonies was secured, but the whole *lex prerogativa* (or *Jura Coronae* before mentioned) so far as respected the person of the sovereign and his prerogatives as an individual, was utterly abolished: and, that so far as respected the kingly office, and government, it was either modified, abridged, or annulled, according to the several constitutions and laws of the states, respectively: consequently, that every rule of the common law, and every statute of England, founded on the nature of regal government, in derogation of the natural and unalienable rights of mankind; or, inconsistent with the nature and principles of democratic governments, were absolutely abrogated, repealed, and annulled, by the establishment of such a form of government in the states, respectively. This is a natural and necessary consequence of the revolution, and the correspondent changes in the nature of the governments, unless we could suppose that the laws of England, like those of the Almighty Ruler of the universe, carry with them an intrinsic moral obligation upon all mankind. A supposition too gross and absurd to require refutation.

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In like manner, all other parts of the common law and statutes of England, which, from their inapplicability, had not been brought into use and practice during the existence of the colonial governments, must, from the period of their dissolution, be regarded not only as obsolete, but as incapable of revival, except by constitutional, or legislative authority. For they no longer possessed even a potential existence, (as being the laws of the British nation, and as such, extending, in theoretical strictness, to the remotest part of the empire,) because the connection, upon which this theoretical conclusion might have been founded, was entirely at an end: and having never obtained any authority from usage, and custom, they were destitute of every foundation upon which any supposed obligation could be built. – This is a regular consequence of that undisputed right which every free state possesses, of being governed by its own laws. – And as all laws are either written; or acquire their force and obligation by long usage and custom, which imply a tacit consent;[52] it follows, that where these evidences are wanting, there can be no obligation in any supposed law.

Another regular consequence of the revolution was this: when the American states declared themselves independent of the crown of Great-Britain, each state from that moment became sovereign, and independent, not only of Great-Britain, but of all other powers, whatsoever. Each had it's own separate constitution and laws, which could not, in any manner, be affected or controlled by the laws, or constitutions of any other. From that moment there was no common law amongst them but the general law of nations, to which all civilized nations conform. And as no law could thereafter be imposed upon the people of any state, but by the legislature thereof, so no law could be obligatory in one state, merely because it was obligatory in another. And how much soever their municipal institutions might agree, one with another, yet as it was in the power of their legislatures, respectively, to alter the whole, or any part of them, whenever they should think proper, therefore, such coincidence by no means established a common rule amongst them; because, as was before observed, the establishment of a law within the jurisdiction of one state, gave it no authority within the jurisdiction of any other. From hence it follows, that the adoption of the common law, or statutes of England, in one state, or in several, or even in all, although it might produce a general conformity in their municipal codes, yet as such adoption was the separate act of each state, it could not operate so as to give to those laws a sanction superior, to any other laws of the states, respectively; inasmuch as each state would still have retained the power of changing, or rejecting them, whenever it should think proper: and much less, could the adoption of them under various modifications, limitations, and restrictions, (as was actually the case,) create such a superior sanction, as thereafter to render them paramount, not only to the legislative authority, but even to the constitutions, of the respective states.

These things being premised, we shall now proceed to inquire what was actually done by the several states, in regard to the subject, here spoken of.

The constitution of Massachoosetts,[53] declares, that, "the people of that commonwealth have the sole and exclusive right of governing themselves as a free, sovereign, and independent state; and do, and forever thereafter shall, exercise and enjoy every power, jurisdiction, and right, which is not, or may not thereafter, be by them expressly delegated to the United States of America, in congress assembled." – This is merely a declaration of the law of nations:[54] and as such, applies equally to every other state in the union, as to the commonwealth of Massachusetts. And though, perhaps, it will be objected, that by the confederation formed between the states, they were, respectively abridged of a very large portion of that sovereignty, which some other nations exercise; yet this objection admits of several answers, viz. First, The articles of confederation, were not agreed upon, nor ratified, till several years after the states became independent.[55] Secondly, when agreed upon,

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and ratified, they contained an express declaration, in conformity to the law of nations,[56] that each state retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not thereby expressly delegated to the United States in congress assembled." – Thirdly, that no power is therein delegated to congress, whereby that body was authorized to introduce, or to establish the common law, or statutes of England, or of any other country or nation, in the United States, as the general law of the land, therein.

The constitution of Massachusetts further declares, that, "all the laws which had been theretofore adopted, used and approved, in the province, colony, or state of Massachusetts-bay, and usually practiced on, in the courts of law, shall still remain and be in full force, until altered, or repealed by the legislature; such parts only excepted, as are repugnant to the rights, and liberties contained in that constitution." Among those rights we find the following declaration, that, "all power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority whether legislative, executive, or judicial, are their substitutes, and agents, and are, at all times, accountable to them." Again – That government is instituted for the common good; for the protection, safety, prosperity, and happiness of the people and not for the profit, honor, or private interest of any one man, family, or class of men." – And again; that, "the people have a right to require of their law-givers and magistrates an exact, and constant observance of the fundamental principles of the constitution, in the formation and execution of all laws." And further; that, "the liberty of the press, is essential to the security of freedom, in a state; and ought not, therefore, to be restrained in that commonwealth."

These constitutional declarations (among many others of a similar nature, contained, not only in the constitution of Massachusetts, but in those of the far greater part of the states in the union) establish, beyond the reach of doubt, I apprehend, the several points premised, under this head. And here we may remark, in the way, that by these constitutional declarations all the colonial laws, (of whose validity, as being repugnant to the common law, and statutes of England, great doubts had been entertained during the colonial government), were, thenceforth, unquestionably established, how repugnant, soever, they might have been to the common law, or statutes of England, or the conditions of their charter. The adoption of the laws of England, we see was confined to such as had been theretofore adopted, used, and approved, within the colony, and usually practiced on, in the courts of law; with an exception as to such parts as were repugnant to the rights and liberties contained in the constitution. It was therefore essential to the force and obligation of any rule of the common law, that it had been before that time actually adopted, used, or approved, in the colony: and further, that it should not be repugnant to the rights and liberties contained in the constitution. Otherwise, although it might be found in every law treatise from Bracton, and Glanville, to Coke, Hale, Hawkins, and Blackstone; or in every reporter from the year-books to the days of Lord Mansfield, it would have no more force in Massachusetts, than an edict of the emperor of China.

But let us now proceed to inquire what other states have done upon this subject.

The constitution of New York, ordains, and declares, that such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony on the 19th day of April, 1775, shall be, and continue the law of the land, subject to such alterations and provisions, as the legislature of the state shall, from time to time make, concerning the same. That all such parts thereof as may be construed to establish any particular denomination of Christians, or concerns the allegiance, theretofore yielded to, and the supremacy, sovereignty, government, or prerogatives, claimed or exercised by the king of England or his predecessors, over the colony or its inhabitants, or are

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repugnant to that constitution, are thereby abrogated, and rejected.

The constitution of New Jersey, declares, that, the common law of England, as well as so much of the statute law, as had been theretofore practiced in that colony, shall still remain in force, until they shall be altered by a future law of the legislature; such parts only excepted, as are repugnant to the rights and privileges contained in that charter.

The constitution of Delaware, declares, nearly in the same words, that the common law of England, as well as so much of the statute law, as had theretofore been adopted in practice in that state, shall remain in force; unless they shall be altered by a future act of the legislature; such parts only excepted, as are repugnant to the rights and privileges contained in that constitution.

The constitution of Maryland declares, that the inhabitants thereof are entitled to the common law of England, and the trial by jury according to the course of that law, and to the benefit of such English statutes as existed, at the time of their first emigration, and which by experience have been found applicable to their local and other circumstances, and of such others as have since been made in England, or Great-Britain, and have been since introduced, used, and practiced by the courts, etc. except such as may be altered by acts of convention, or that declaration of rights, subject to the revision, amendment, or repeal, of the legislature of that state.

The convention of Virginia, declared, that the common law of England, and all statutes or acts of parliament made in aid of the common law, prior to the fourth year of James the first, which are of a general nature, not local to that kingdom, together with the several acts of the colony then in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be considered as in full force, until the same shall be altered by the legislative power of the commonwealth. This has since been done, and at this day, no statute of England, or Great-Britain, as such, has any authority in Virginia, except in one or two special cases, particularly saved by the act of repealing them; and the common law, both in criminal and civil cases, has undergone a most extensive change.

The constitution of South Carolina, established March 19, 1776, declares, that the resolutions of the late Congresses of that state, and all laws then in force there, and not thereby repealed, shall so continue until altered, or repealed, by the legislature of the state, unless where they are temporary.

The constitutions of the other states, so far as I have had an opportunity of consulting them, are silent on the subject of the adoption of the common law, or statutes of England. But I apprehend, that what I have here selected is sufficient to show, that in every state, where they have been adopted, they have the force of laws, only, *sub graviori lege*, like the civil and canon laws, in England: being modified, limited, restrained, repealed, or annulled, by the provisions contained in their several constitutions, bills of rights, legislative codes, and judicial usages, and practice; and in all cases subject to the future amendment, repeal, and control, of the legislatures of the several states, respectively. These modifications, restrictions, and limitations, being different in the different states, according to the difference of their several constitutions and laws, and the different terms of adoption, it would be altogether a hopeless attempt, to endeavor to extract from such discordant materials, an uniform system of national jurisprudence, were there any grounds in the American constitutions to warrant such an undertaking. Hitherto, I apprehend, we have met with nothing of the kind. It only remains to inquire,

4. How far that portion of the common law and statutes of England, which has been retained by the several states, respectively, has been engrafted upon, or made a part of the constitution of the United

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States.

It will he remembered, that the object of the several states in the adoption of that instrument, was not the establishment of a general consolidated government, which should swallow up the state sovereignties, and annihilate their several jurisdictions, and powers, as states; but a federal government, with powers limited to certain determinate objects; viz. their intercourse and concerns with foreign nations; and with each other, as separate and independent states; and, as members of the same confederacy: leaving the administration of their internal, and domestic concerns, to the absolute and uncontrollable jurisdiction of the states, respectively; except in one or two particular instances, specified, and enumerated in the constitution. And because this principle was supposed not to have been expressed with sufficient precision, and certainty, an amendatory article was proposed, adopted, and ratified; whereby it is expressly declared, that, "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." This article is, indeed, nothing more than an express recognition of the law of nations; for Vattel informs us, "that several sovereign, and independent states may unite themselves together by a perpetual confederacy, without each in particular ceasing to be a perfect state. They will form together a federal republic: the deliberations in common will offer no violence to the sovereignty of each member, though they may in certain respects put some constraint on the exercise of it, in virtue of voluntary engagements."[57] And with respect to the construction and interpretation of that article, the great Bacon gives us the following rule: "As exception strengthens the force of a law in cases not excepted; so enumeration weakens it, in cases not enumerated."[58] Now, the powers prohibited by the constitution to the states, respectively, are all exceptions to powers, which they before enjoyed; the powers granted to congress, are all enumerations of new powers thereby created: the prohibition on the states, operating, therefore, as an exception, strengthens their claim to all powers not excepted: on the other hand, the grant of powers to the federal government operating only by way of enumeration, weakens it's claim in all cases not enumerated.

These things being premised, I shall take a short survey of the constitution of the United States, with a view to discover, whether that instrument contains any grant of general jurisdiction in common law cases, to the federal government; or prohibits the states from the exercise of such general jurisdiction: except only, in some few cases, particularly enumerated. For without such grant the federal government cannot exercise such a jurisdiction; and without such prohibition, the states, respectively, cannot be abridged of it.

1. The powers delegated to congress, are not all legislative: Many of them have been usually supposed to belong to the executive department; such are,

The power of declaring war, granting letters of marque and reprisal, raising and supporting armies, and navies; and borrowing money; none of which contain, or can be presumed to imply, any grant of general jurisdiction in common law cases. The legislative powers of congress, are also determinate, and enumerated, being,

1. To lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense, and welfare of the United States.

2. To regulate commerce with foreign nations, and among the several states, and the Indian tribes: leaving the regulation of the internal commerce of each state, to the states, respectively.

3. To establish an uniform rule of naturalization: this being a branch of common law jurisdiction,

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particularly enumerated, leaves all others not enumerated, with the states, respectively.

4. To establish uniform laws on the subject of bankruptcies. This was no part of the common law of England, the name, as well as the wickedness of bankrupts, according to sir Edward Coke,[59] being fetched from foreign nations. The grant of special authority, upon this branch of commercial polity, and of the English statute law, shows it was not intended to vest congress with the power of legislating upon all subjects of that nature; all others not enumerated, remaining with the states, respectively.

5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures. These are, respectively, branches of the royal prerogative in England, and being specially enumerated, show that it was not intended to trust the exercise of other branches of that prerogative to the federal government; all others not enumerated, (and consistent with the nature and constitution of democratic republics) being reserved to the states, respectively.

6. To provide for the punishment of counterfeiting the securities, and current coin of the United States. Forgery, is an offense at common law; but this clause gives no power to congress over the subject of forgery, generally; but over that branch, only, which relates to counterfeiting the securities of the United States. Counterfeiting the current coin was also treason, by the common law.[60] But congress have not power to declare it to be treason in the United States:[61] the special power hereby granted, shows that it was not intended to vest congress with the power of punishing offenses of this nature, generally, but such only as are enumerated: all others not enumerated being reserved to the jurisdiction of the states, respectively.

7. To establish post-offices, and post-roads, and,

8. To promote the progress of science and useful arts, by securing to the authors and inventors, for a limited time, the exclusive right to their writings and discoveries. These determinate objects of legislation, upon subjects of general polity, may be referred to the same class as the subject of bankruptcy; and being particularly enumerated leave all others not enumerated, to the jurisdiction of the states, respectively.

9. To constitute tribunals inferior to the supreme court: another branch of the royal prerogative in England, to which we may refer what was said on the subject of coining money.

10. To define and punish piracies, and felonies, committed on the high seas; and against the law of nations: The power of defining and punishing all felonies and offenses committed upon land, in all cases not enumerated, being reserved to the states, respectively.

11. To make rules for the government and regulation of the land and naval forces: that is of the military and maritime states, employed in the service of the union; the government of the civil state, in all cases not enumerated, being reserved to the states, respectively.

12. To provide for calling forth the militia, to execute the laws of the union, suppress insurrections, and repel invasions: and to provide for organizing, arming, and disciplining them; and for governing such parts of them, as may be employed in the service of the United States. The right of appointing officers of the militia, and of training, and calling them forth, and of governing them in all other cases, not enumerated, being reserved to the states, respectively.

13. To declare the punishment of treason, under certain restrictions. The definition of treason, being contained in the constitution itself.

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14. 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 government of the United States; and to exercise like authority over all places purchased by consent of the legislature in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings. The exclusive power of legislating in all cases whatsoever, except within the precincts of the seat of government, not exceeding ten miles square; and except within the precincts of such forts, magazines, arsenals, dock-yards, and other such needful buildings, as may be erected by congress with the consent of the state, in which the same shall be, being reserved to the states, respectively.

Such are the enumerated powers, of congress; to give efficacy to them, as also to the powers expressly granted to the other departments of the federal government, there is an express declaration, of what was perhaps before implied, viz.

15. That congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other vested by the constitution in the government of the United States, or in any department or officer thereof.

This clause, I apprehend, cannot be construed to enlarge any power before specifically granted; nor to grant any new power, not before specifically enumerated; or granted in some other part of the constitution. On the contrary it seems calculated to restrain the federal government from the exercise of any power, not necessarily an appendage to, and consequence of some power particularly enumerated. Acts of congress to be binding, must be made pursuant to the constitution; otherwise they are not laws, but a mere nullity; or what is worse, acts of usurpation.[62] The people are not only not bound by them, but the several departments and officers of the governments, both federal, and state, are bound by oath to oppose them; for, being bound by oath to support the constitution, they must violate that oath, whenever they give their sanction, by obedience, or otherwise, to any unconstitutional act of any department of the government.

If the reader can discover in any of the powers before enumerated, that which contains a grant of general jurisdiction in common law cases to the federal government, our inquiry is at an end. And he will render an incomparable act of service to his country, by laying his finger upon that clause, and pointing it out to his fellow-citizens, that they may no longer puzzle themselves, or their agents, about a question of such importance. – But, if he can not do this, and is not yet convinced that no such grant is contained in the constitution, I must request him patiently to attend me, whilst we hunt for it in some other part of that instrument.

2. Then; we are to seek for this grant in that article which relates to the powers and duties of the executive department.

The president, by that article, is declared to 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 of each of the executive departments, upon any subject relating to the duties of their respective offices, and has power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. He may with advice and consent of the senate, make treaties; and may nominate, and with consent of the senate, appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers whose appointments are not otherwise provided for; he may fill up all vacancies that may happen during the recess of the senate, by temporary commissions; it is his duty to give congress information of the state of the union, and he may recommend to their consideration

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such measures as he may 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, may adjourn them; he has a qualified negative upon all the other acts, and proceedings; he is to receive ambassadors and other public ministers; he is to take care that the laws be faithfully executed; and to commission all officers of the United States.

The most dextrous political empiric would, I apprehend, be puzzled to extract from the preceding enumeration any thing, which could bear the most distant resemblance to a grant of general jurisdiction in common law cases: we are driven then, in the last resort to seek for it.

3. In that article, which relates to the constitution and powers of the judiciary department. It is therein declared,

That the judicial power shall extend to all cases in law and equity, arising under the 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; to controversies to which the United States shall be a party; to controversies between two, or more states; between citizens of different states; between citizens of the same state, claiming lands under grants from different states; and between a state and foreign states.

Such is the power of the judiciary department, as now limited by the thirteenth article of the amendments to the constitution of the United States. I shall endeavor to analyze the whole.

1. The judicial power of the federal government extends to all cases in law and equity arising under the constitution. Now, the powers granted to the federal government, or prohibited to the states, being all enumerated, the cases arising under the constitution, can only be such as arise out of some enumerated power delegated to the federal government, or prohibited to those of the several states. These general words include what is comprehended in the next clause, viz. Cases arising under the laws of the United States. But as contra-distinguished from that clause, it comprehends some cases afterwards enumerated e. g. Controversies between two or more states; between a state and foreign states; between citizens of the same state claiming lands under grants of different states; all which may arise under the constitution, and not under any law of the U. States. Many other cases might be enumerated, which would fall strictly under this clause, and no other. As, if a citizen of one state should be denied the privileges of a citizen in another; so, if a person held to service or labor in one state, should escape into another and obtain protection there, as a free man; so, if a state should coin money, and declare the same to be a legal tender in payment of debt, the validity of such a tender, if made, would fall within the meaning of this clause. So also, if a state should, without consent of congress, lay any duty upon goods imported, the question as to the validity of such an act, if disputed, would come within the meaning of this clause, and not of any other. – In all these cases equitable circumstances may arise, the cognizance of which, as well as such as were strictly legal, would belong to the federal judiciary, in virtue of this clause.

2. The judicial power of the United States extends to all cases arising under the laws of the United States; – now as the subjects upon which congress have the power to legislate, are all specially enumerated, so the judicial authority, under this clause, is limited to the same subjects as congress have power to legislate upon. Thus congress being authorized to pass uniform laws of naturalization, the question whether a person is an alien, or not, falls under this head, provided the party were an alien born. So, also, if a person be accused of counterfeiting the public securities of the United States, this question would be cognizable in the federal courts, under this clause; but if he were accused of any other forgery: of this offense the state courts, and not the federal courts, possess

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jurisdiction.

3. The power of the federal judiciary extends to cases arising under treaties; as well those already made, as to such as might be made after the adoption of the constitution. – Of the former kind were the questions concerning the validity of payments made into the state treasuries by British debtors, during the war; of the latter sort, may be such questions as may hereafter arise under the treaty of 1794, enabling British subjects, though aliens, to hold and inherit lands, within the U. States. – In neither of the preceding clauses can we find any thing like a grant of general jurisdiction in common law cases.

4. To all cases affecting ambassadors, other public ministers, and consuls; these cases, although provided for in some countries by statute, where that is not the case, belong to the law of nations, and not to the common law.

5. To all cases of admiralty and maritime jurisdiction; these were never held to be within the jurisdiction of the common law.

6. To controversies to which the United States shall be a party. The word cases used in the preceding clauses of this article comprehends, generally, I apprehend all cases, whether civil or criminal, which are capable of falling under these heads, respectively, instances of which it might be unnecessary here to repeat: I shall however add to what I have before said, that it comprehends such criminal cases as may arise within the precincts of the seat of government, not exceeding ten miles square; or within the precincts of forts, dockyards, magazines, and arsenals, purchased with the consent of the state in which they maybe; and finally, treason against the U. States; piracies and felonies committed upon the high seas; and offenses against the law of nations; and against the revenue laws of the U. S.

The word controversies, as here used, must be understood merely as relating to such as are of a civil nature. It is probably unknown in any other sense, as I do not recollect ever to have heard the expression, criminal controversy. As here applied, it seems particularly appropriated to such disputes as might arise between the U. States, and any one or more states, respecting territorial, or fiscal, matters. – Or between the U. States and their debtors, contractors, and agents. This construction is confirmed by the application of the word in the ensuing clauses, where it evidently refers to disputes of a civil nature only, such for example, as may arise between two or more states; or between citizens of different states; or between a state, and the citizens of another state; none of which can possibly be supposed to relate to such as are of a criminal nature, unless we could suppose it was meant to deprive the states of the power of punishing murder or theft, if committed by a foreigner, or the citizen of another state.

7. The judicial power extends likewise to controversies between two or more states; and between a state, and foreign states. These must be proceeded in, and determined according to the law of nations, and not according to the common law.

8. To controversies between citizens of different states; and between citizens of any state and the subjects or citizens of foreign states. – In these cases, the municipal law of the place where the cause of controversy arises, whether that be one of the United States, or Great Britain, France, Spain, Holland, Hamburg, or any other country; or the general law of merchants; or, the general law of nations according to the nature and circumstances of the case, must be the rule of decision, in whatever court the suit may be brought. Thus if a bond be given in Philadelphia, the rate of interest must be settled according to the laws of Pennsylvania. If a bill of exchange be drawn in Virginia,

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the rate of damages must be settled by the law of that state. If in England, Hamburg, or Cadiz, the custom of merchants in those places, respectively, must govern. If a ransom bill be drawn at sea, the law of nations in that case must be consulted. If the controversy relate to lands, the law of the state where the lands lie must be referred to; unless the lands be claimed under grants from different states; in which case the territorial rights of each state must be inquired into. The same must be done, in the last case which remains to be noticed; viz:

9. Controversies between citizens of the same state claiming lands under grants of different states. None of the cases enumerated in this, and the preceding paragraph can be construed to give general jurisdiction in cases at common law, or such as ordinarily arise between citizens of the same state; under which description, civil suits, in general, (with the exception of the case here supposed) are comprehended; or such as may arise between a state, and its own citizens, or subjects; under which head crimes and misdemeanors are comprehended. This being the only enumerated case, in which the federal courts can take cognizance of any civil controversy between citizens of the same state, it can not extend to such common law cases, as may arise between them; all such cases being reserved to the jurisdiction of the states, respectively. And on the other hand, as it does not extend to any case that may arise between a state and its own citizens or subjects; nor to any case between a state, and foreign citizens or subjects, or the citizens of any other state[63] – so every such case, whether civil or criminal, and whether it arise under the law of nations, the common law, or law of the state, belongs exclusively, to the jurisdiction of the states, respectively. And this, as well from the reason of the thing, as from the express declarations contained in the twelfth and thirteenth articles of the amendments to the constitution.

Having thus minutely examined all the enumerated powers, which are vested in the federal government, or any of its departments, and not finding any grant of general jurisdiction in cases at common law, we are warranted, under the twelfth article of amendments, in concluding, that no such jurisdiction has been granted; and consequently, that it remains with the states, respectively, in all cases not enumerated; so far, as their several constitutions and legislative acts, may admit the authority and obligation of the common law, or statutes of England, in each state, respectively.

But it has, I believe, been said, that if this general jurisdiction in common law cases has not been granted to the federal government in express terms, yet it is given by implication. This admits of several answers:

1. The twelfth article of the amendments was proposed, adopted and ratified, for the express purpose of rebutting, this doctrine of grant by implication: since it expressly declares, that 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. And this I hold to be a full answer to the conceit. – But,

2dly. If this were not the case, it would be absurdity in the extreme, to suppose a grant, by implication, of general power to the federal government to revive, and enforce such parts of the common law, or statutes of England, as the states by their respective constitutions had severally condemned in express terms; and rejected, repealed, and annulled as dangerous, absurd, or incompatible with that system of government which they had, respectively, established.

3dly. This is probably the first instance in which it has been supposed that sovereign and independent states can be abridged of their rights, as sovereign states, by implication, only. – For, no free nation can be bound by any law but it's own will; and where that will is manifested by any written document, as a convention, league, treaty, compact, or agreement, the nation is bound, only according as that will is expressed in the instrument by which it binds itself. And as every nation is

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bound to preserve itself, or, in other words, it's independence; so no interpretation whereby it's destruction, or that of the state, which is the same thing, may be hazarded, can be admitted in any case where it has not, in the most express terms, given it's consent to such an interpretation.[64] Now if this construction were once established, that the federal government possesses general jurisdiction over all cases at common law, what else could be the consequence, but, at one stroke, to annihilate the states altogether; and to repeal and annul their several constitutions, bills of rights, legislative codes, and political institutions in all cases whatsoever. For, what room, or occasion, could there be for a constitution, if the common law of England, be paramount thereto; or for a state legislature, if their acts are not laws, but mere nullities; or for courts, if their decisions, founded upon the constitutions and laws of the states, are for that reason null and void?

4thly. If it were admitted, that the federal government, by implication, possesses general jurisdiction over all cases at common law; this construction could not be carried into practice, without annihilating the states, and repealing, and annulling, their several constitutions, bills of rights, and legislative codes: as a few instances will demonstrate.

The constitution of Virginia declares, and the constitutions of the other states agree therewith, that the legislative, executive, and judiciary departments shall be separate and distinct: the common law unites all three in one and the same person.

The constitution of Maryland declares there shall be no forfeiture of any part of the estate of any person for any crime, except murder, or treason against the state; the laws of Virginia have abolished forfeitures in all cases: The doctrine of forfeiture, in case of conviction, or attainder for any crime, is one of the pillars of criminal jurisprudence, by the common law.

The constitution of Pennsylvania declares, that the penal laws as theretofore used in that state, shall be reformed, and punishment made less sanguinary, and more proportionate to crimes. If the common law be revived, this article is a mere nullity. South Carolina has an article in it's constitution to the same effect.

The same constitution declares, that the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of the government. It is contended by some persons in power, that the common law does not permit this freedom to any person.

The constitution of Georgia declares, that no grand-jury shall consist of fewer than eighteen persons; the common law deems sixteen a sufficient number.

The same constitution will not allow of a special verdict in any case: The practice of the common law courts in England for five hundred years past, has been to the contrary.

The constitution of North Carolina, declares, that every foreigner who comes to settle in that state, having first taken an oath of allegiance to the same, may purchase, or by other just means acquire, hold, and transfer land, or other real estate; and after one year's residence shall be deemed a free citizen. The constitution of Pennsylvania, has an article to the same effect. – The foreigner is not naturalized immediately upon taking the oath of allegiance; he continues an alien for a year; and if he departs before its expiration, remains an alien: yet he may acquire, hold, and transfer lands: by the common law, an alien can not hold lands.

The constitution of Georgia, prohibits entails; and declares that the real estate of a person dying intestate shall be divided equally among his children: that the widow shall have a child's part, or her

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dower, at her option. And if there be no children the estate shall be divided among the next of kin. The common law admits of entails; and absolutely rejects the other provisions of this article.

The constitutions and laws of all the states of the union, (except Massachusetts, where there have been judicial decisions to the contrary), admit slavery. The common, as understood for many centuries past in England, absolutely rejects slavery. – Should a question arise upon that subject in Maryland, Virginia, North Carolina, South Carolina or Georgia, it might be of serious consequence, if the common law were pronounced to be paramount to the laws of the states.

Lastly, The constitutions and laws of all the states, in which the common law and statutes of England have been expressly adopted, in a certain degree, declare that those laws are not to be construed so as to impair any of the rights and privileges contained in their respective constitutions and laws; and further subject them to be repealed, altered, or annulled, by acts of their respective legislatures: the construction contended for, would render the common law paramount to those constitutional declarations, and to all legislative acts. These cases might be multiplied without end; I shall only add one more, which may serve to illustrate the consequences likely to flow from this doctrine, were it possible it should be established.

The constitution of Pennsylvania, declare, that all men have a natural inherent right to emigrate from one state to another that will receive them, whenever they think, that thereby, they may promote their own happiness. Virginia, made a law to the same effect, in the year, 1783, which still continues to be a part of her code. The English jurists deny to the subjects of the crown of Great Britain the right of expatriation, a doctrine which they contend is derived from the common law.[65] In those states which have adopted the common law under certain limitations, but have made no declaration in their constitution, nor any legislative act upon the subject, the right of expatriation may still be questionable. But ought it to be questioned in Pennsylvania, or Virginia, (both which states have, in the most solemn and explicit manner repealed the law,) because it is still questionable in Connecticut, where the law was, perhaps, not repealed, because the right had never before been questioned. What a snare is it for the feet of the citizens of the United States, if obsolete maxims of this kind, may be revived at the discretion of a judge, and entered with severe penalties, notwithstanding they may have been expressly repealed and annulled in the most solemn manner by the authority of the states, respectively! What principle can be established, more inimical to the independence of sovereign states, or more destructive to the liberty, security, and happiness of the citizen, than, that the unwritten law of a foreign country, differing from them in the fundamental principles of government, is paramount to their own written laws, and even to those constitutions, which the people had sealed with their blood, and declared to be forever inviolable! Such, however, is the necessary, and inevitable consequence, of this constructive grant of jurisdiction in all cases at common law, to the courts of the United States, or to any department of the federal government.

But, were it possible that the consequence above mentioned would not follow, which, however, seems to be altogether inevitable, another consequence, scarcely less mischievous, must follow from the rule contended for; if, in reducing it to practice in the federal courts, it should be admitted, that the common law might be repealed in certain states, in virtue of their constitutions or legislative acts, but remain in full vigor in others. Thus, if it be admitted in the federal courts that a native citizen of Pennsylvania, or Virginia, may expatriate himself, because the constitution of the former, and the law of the latter, expressly permit him to do so; but that a native citizen of Connecticut, cannot expatriate himself, because the common law has not been repealed in that state; here the same action must, by the same judge, be decided to be lawful in one part of the United States, and unlawful in another. Consequently, a native citizen of Connecticut, may be punished, as a citizen of the United

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States, for doing that, which a native of Pennsylvania, or Virginia, may do with impunity. On the other hand, if the right of expatriation be denied, in the case of a native of Pennsylvania, or Virginia, would not such a denial amount to a declaration, that the common law of England is paramount to the law of the one, and the constitution of the other? This dilemma proves, that it could not be the intention of the several states to grant a power so unbounded in its operation, and so destructive to those principles which they deemed inseparable from their constitutions, and therefore sacred, and inviolable.

But perhaps it will be contended, that the power of establishing an uniform rule of naturalization, includes in it the power to prohibit the right of expatriation. This admits of more than one answer.

1. If it be true; (which is by no means admitted) congress alone have power to prohibit the exercise of that right; which, not having yet done, the right, until they do so, remains as before the adoption of the federal constitution.

2. The power of establishing an uniform rule of naturalization, relates to aliens; that of prohibiting expatriation to citizens: the first, to rights to be acquired; the second, to rights to be abandoned. The first relates to such persons as thereafter submit themselves to our jurisdiction; the second, to such as thenceforward renounce their connection with us, forever. – The former to political, the latter to natural, right.

5th. But to return to our subject; there are certain passages in the constitution, and the amendments thereto, not yet noticed, which perhaps may be relied on to establish this doctrine of a grant of general jurisdiction to the federal courts or government, in cases at common law, by implication: These are,

1. The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it.

2. The trial of all crimes, except in cases of impeachment, shall be by jury.

3. In suits at common law, the right of trial by jury, shall, (in general) 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 the common law.

In all these passages, we may be told, the common law is evidently referred to as the law of the land. This is not the case; it is referred to as a known law: and might in strictness have been referred to as the law of the several states, so far as their constitutions and legislative codes, respectively, have admitted or adopted it. Will any man who knows any thing of the laws of England, affirm, that the civil, or Roman Imperial law, is the general law of the land in England, because many of it's maxims, and it's course of proceedings, are generally admitted and established in the high court of chancery, which is the highest court of civil jurisdiction, except the parliament, in the kingdom? Or that the canon, or Roman ecclesiastical law, is the general law of the land, because marriages are solemnized according to it's rites; or because simony, which is an ecclesiastical offense, is also made an offense by statute?

But it will be asked, what is meant by suits at common law, the cognizance of which, from this article, appears to belong to the federal courts. The answer is easy; in many of the states, the courts are distinguished by the epithets of common law courts, and courts of equity. In the former, the rules and mode of proceeding in the English courts of common law jurisdiction, have under different modifications been adopted; the latter pursue the course of the civil law. Suits cognizable in these

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courts, respectively, are consequently denominated, suits at common law, and suits in equity, comprehending under these terms all civil suits, except such as are of a maritime nature. – The trial by jury being the usual mode of trial in all the states, except in the courts of equity, it was thought expedient to preserve the same mode of trial in the federal courts, as in the state courts. The article gives not a new jurisdiction, not before expressly granted, in the third article of the constitution; it merely prescribes a mode of trial.

We may fairly infer from all that has been said that the common law of England stands precisely upon the same footing in the federal government, and courts of the United States, as such, as the civil and ecclesiastical laws stand upon in England: That is to say, it's maxims and rules of proceeding are to be adhered to, whenever the written law is silent, in cases of a similar, or analogous nature, the cognizance whereof is by the constitution vested in the federal courts; it may govern and direct the course of proceeding, in such cases, but cannot give jurisdiction in any case, where jurisdiction is not expressly given by the constitution. The same may be said of the civil law; the rules of proceeding in which, whenever the written law is silent, are to be observed in cases of equity, and of admiralty, and maritime jurisdiction. In short, as the matters cognizable in the federal courts, belong, (as we have before shown, in reviewing the powers of the judiciary department) partly to the law of nations, partly to the common law of England; partly to the civil law; partly to the maritime law, comprehending the laws of Oleron and Rhodes; and partly to the general law and custom of merchants; and partly to the municipal laws of any foreign nation, or of any state in the union, where the cause of action may happen to arise, or where the suit may be instituted; so, the law of nations, the common law of England, the civil law, the law maritime, the law merchant, or the lex loci, or law of the foreign nation, or state, in which the cause of action may arise, or shall be decided, must in their turn be resorted to as the rule of decision, according to the nature and circumstances of each case, respectively. So that each of these laws may be regarded, so far as they apply to such cases, respectively, as the law of the land. But to infer from hence, that the common law of England is the general law of the United States, is to the full as absurd as to suppose that the laws of Russia, or Germany, are the general law of the land, because in a controversy respecting a contract made in either of those empires, it might be necessary to refer to the laws of either of them, to decide the question between the litigant parties. Nor can I find any more reason for admitting the penal code of England to be in force in the United States, (except so far as the states, respectively, may have adopted it, within their several jurisdictions) than for admitting that of the Roman empire, or of Russia, Spain, or any other nation, whatever.

One or two instances, in addition to those already mentioned, may set this matter in a clearer light. If a suit be brought in a federal court upon a bond executed in England, the bond must be actually sealed, because the common law of England requires that every bond, deed, or covenant, should be executed in that manner; and if it be not, it is not a bond, but merely a simple contract; but if the bond be executed in Virginia, where a scroll by way of seal, is by law declared to be as effectual as if the instrument were actually sealed, there the law of the state shall prevail, and turn that contract into a specialty, by which the lands of the obligor may be bound, which in England would only bind his goods and chattels, after his decease. So if a bill of exchange be drawn in Virginia, an action of debt may be maintained thereupon, in that state; but if it be drawn in any other state, or country, the action I apprehend, must be brought, even in that state upon the custom of merchants. Thus, the lex loci may operate not only so as to determine the nature of the contract, but of the remedy. And with respect to the mode of proceeding, in order to a remedy, wherever the constitution and laws of the United States are silent, there, I apprehend, the law of the state, where the suit is brought, ought to be observed as a guide: thus if a suit be brought upon a bond the plaintiff may demand bail, in

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Virginia, as of course, and an endorsement to that effect will be sufficient to compel the sheriff, who executes the writ, to take bail at his peril. But in England, the plaintiff in that case, must make an affidavit of the sum actually due upon the bond, otherwise the sheriff is not obliged to take bail. So in the same case, if the sheriff neglects to take bail where he ought to do it, the plaintiff may proceed, in Virginia, against the defendant and sheriff, at the same time, and shall have judgment for his debt against both at once, unless special ball be put in; whereas in England, he must bring a special action on the case, against the sheriff, for neglect of his duty, instead of having the remedy which the laws of Virginia furnish him with. So also, if a bond be executed in London, and a suit be brought thereupon, in the state of Virginia, the defendant cannot plead non est factum, as is the usual course of pleading in England, unless he verifies his plea by affidavit; without which it cannot be received; and the same course of proceeding, I apprehend, is to be observed in the federal, as in the state courts.

From the whole of the preceding examination, we may deduce the following conclusions:

First – That the common law of England, and every statute of that kingdom, made for the security of the life, liberty, or property of the subject, before the settlement of the British colonies, respectively, so far as the same were applicable to the nature of their situation and circumstances, respectively, were brought over to America, by the first settlers of the colonies, respectively; and remained in full force therein, until repealed, altered, or amended by the legislative authority of the colonies, respectively; or by the constitutional acts of the same, when they became sovereign and independent states.

Secondly – That neither the common law of England, nor the statutes of that kingdom, were, at any period antecedent to the revolution, the general and uniform law of the land in the British colonies, now constituting the United States.

Thirdly – That as the adoption or rejection of the common law and statutes of England, or any part thereof, in one colony, could not have any operation or effect in another colony, possessing a constitutional legislature of it's own; so neither could the adoption or rejection thereof by the constitutional, or legislative act of one sovereign and independent state, have any operation or effect in another sovereign independent state; because every such state has an exclusive right to be governed by it's own laws only.

Fourthly – Therefore the authority and obligation of the common law and statutes of England, as such in the American states, must depend solely upon the constitutional or legislative authority of each state, respectively; as contained in their several bills of rights, constitutions, and legislative declarations – which, being different in different states, and. wholly independent of each other, cannot establish any uniform law, or rule of obligation in all the states.

Fifthly – That neither the articles of confederation and perpetual union, nor, the present constitution of the United States, ever did, or do, authorize the federal government, or any department thereof, to declare the common law or statutes of England, or of any other nation, to be the law of the land in the United States, generally, as one nation; nor to legislate upon, or exercise jurisdiction in, any case of municipal law, not delegated to the United States by the constitution.

POSTSCRIPT.

SINCE the publication of the preceding tract, I have met with the case of the United States against Worral,[66] which I had not before seen.

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The defendant was charged with an attempt to bribe Tench Coxe, commissioner of the revenue; it was admitted that the offense did not come within the act of 1 Congress, 2 Session, c. 9, §. 21. and a question was asked of the attorney for the U. States, by Judge Chase, whether he meant to support his indictment solely at common law? If you do, said he, I have no difficulty upon the subject. The indictment cannot be maintained in this court, viz. The circuit court of the U. States, for the district of Pennsylvania.

The attorney for the United States, answering in the affirmative; Chase, justice, stopped the counsel for the defendant, and delivered an opinion to the following effect.

> CHASE, Justice. "This is an indictment for an offense highly injurious to morals, and deserving the severest punishment; but as it is an indictment at common law, I dismiss, at once, every thing that has been said about the constitution and laws of the United States.
>
> "In this country, every man sustains a two-fold political capacity; one in relation to the state, and another in relation to the United States: for the constitution of the union is the source of all the jurisdiction of the national government; so that the departments of the government can never assume any power that is not expressly granted by that instrument, nor exercise a power in any other manner than is there prescribed. Besides the particular cases, which the eighth section of the first article designates, there is a power granted to congress to create, define, and punish crimes and offenses, whenever they shall deem it necessary and proper by law to do so, for effectuating the objects of the government; and although bribery is not among the crimes and offenses specially mentioned, it is certainly included in this general provision. The question, however, does not arise about the power: whether the courts of the United States can punish a man for any act, before it is declared by a law of the United States, to be criminal? Now, it appears to my mind, to be as essential, that congress should define the offenses to be tried and apportion the punishment to be inflicted, as that they should erect courts to try the criminal, or to pronounce a sentence on conviction.
>
> "It is attempted, however, to supply the silence of the constitution, and statutes, of the union, by resorting to the common law, for a definition and punishment of the offense which has been committed: but, in my opinion, the United States, as a federal government, have no common law. If indeed the U. States, can be supposed for a moment, to have a common law, it must, I presume, be that of England; and yet it is impossible to trace, when, or how, the system was adopted, or introduced. With respect to the individual states, the difficulty does not occur. When the American colonies were first settled by our ancestors, it was held, as well by the settlers, as by the judges and lawyers of England, that they brought hither as a birthright and inheritance, so much of the common law, as was applicable to their situation, and change of circumstances. But each colony judged for itself, what parts of the common law were applicable to its new condition; and in various modes, by legislative acts, by judicial decisions, or by constant usage, adopted some parts, and rejected others. Hence, he who shall travel through the different states, will soon discover, that the whole of the common law of England, has been no where introduced; that some states have rejected what others have adopted; and that there is, in short, a great and essential diversity, in the subjects to which the common law is applied, as well as in the extent of the application. The common law, therefore, of one state, is not the common law of another; but the common law of England, is the law of each state, so far as each

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state has adopted it; and it results from that position, connected with the judicial act, that the common law will always apply to suits between citizen and citizen, whether they are instituted in a federal, or state court.

"But the question recurs, when and how, have the courts of the United States acquired a common law jurisdiction in criminal cases? The United States must possess the common law themselves, before they can communicate it to their judicial agents: now the United States did not bring it with them from England; the constitution does not create it; and no act of congress has assumed it. Besides, what is the common law, to which we are referred? Is it the common law entire, as it exists in England; or modified as it exists in some of the states; and of the various modifications, which are we to select; the system of Georgia, or New-Hampshire, Pennsylvania or Connecticut?

"Upon the whole, it may be a defect in our political institutions, it may be an inconvenience in the administration of justice, that the common law authority, relating to crimes and punishments, has not been conferred upon the government of the United States, which is a government in other respects also of a limited jurisdiction: but judges cannot remedy political imperfections, nor supply any legislative omission. I will not say whether the offense is at this time cognizable in a state court. But certainly congress might have provided, by law, for the present case, as they have provided for other cases of a similar nature; and yet if congress had even declared and defined the offense, without prescribing a punishment, I should still have thought it improper to exercise a discretion upon that part of the subject."

PETERS, Justice. "Whenever a government has been established, I have always supposed, that a power to preserve itself, was a necessary, and an inseparable concomitant. But the existence of the federal government would be precarious, it could no longer be called an independent government, if, for the punishment of offenses of this nature, tending to obstruct and pervert the administration of it's affairs, an appeal must be made to the state tribunals, or the offenders must escape with absolute impunity.

"The power to punish misdemeanors, is originally and strictly a common law power; of which, I think, the United States are constitutionally possessed. It might have been exercised by congress in form of a legislative act; but it may, also, in my opinion, be enforced in a course of judicial proceeding. Whenever an offense aims at the subversion of any federal institution, or at the corruption of it's public officers, it is an offense against the well-being of the United States; from it's very nature, it is cognizable under their authority; and, consequently, it is within the jurisdiction of this court, by the 11th section of the judicial act."

Here then are two opposite opinions on this great question. On the trial of Isaac Williams, in the district court of Connecticut, February 37, 1797, for accepting a commission under the French Republic, and under the authority thereof committing acts of hostility against Great-Britain, the defendant alleged, and offered to prove that he had expatriated himself from the United States, and become a French citizen before the commencement of the war between France and England. This produced a question as to the right of expatriation; when Judge Ellsworth, then chief justice of the United States, is said to have delivered an opinion nearly to the following effect.

"The common law of this country remains the same as it was before the revolution. The present question is to be decided by two great principles; one is, that all the members of

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> a civil community are bound to each other by compact; the other is, that one of the parties to this compact cannot dissolve it by his own act. The compact between our community and it's members is, that the community shall protect it's members, and on the part of the members, that they will at all times be obedient to the laws of the community, and faithful in it's defense. It necessarily results that the member cannot dissolve this compact, without the consent or default of the community. There has been no consent – no default. Express consent is not claimed; but it is argued that the consent of the community is implied, by it's policy – it's conditions – and it's acts. In countries so crowded with inhabitants, that the means of subsistence are difficult to be obtained, it is reason and policy to permit emigration; but our policy is different; for our country is but scarcely settled, and we have no inhabitants to spare.
>
> "Consent has been argued from the condition of the country, because we were in a state of peace. But though we were in peace, the war had commenced in Europe. We wished to have nothing to do with the war; but the war would have something to do with us. It has been extremely difficult for us to keep out of this war; the progress of it has threatened to involve us. It has been necessary for our government to be vigilant in restraining our own citizens from those acts which would involve us in hostilities. The most visionary writers on this subject do not contend for the principle in the unlimited extent, that a citizen may, at any, and at all times, renounce his own, and join himself to a foreign country.
>
> "Consent has been argued from the acts of our government permitting the naturalization of foreigners. When a foreigner presents himself here, we do not inquire what his relation is to his own country; we have not the means of knowing, and the inquiry would be indelicate; we leave him to judge of that. If he embarrasses himself by contracting contradictory obligations, the fault and folly are his own; but this implies no consent of the government that our own citizens should also expatriate themselves. – It is, therefore, my opinion, that these facts which the prisoner offers to prove, in his defense, are totally irrelevant," etc. The prisoner was accordingly found guilty, fined and imprisoned. See the account of his trial, National Magazine, No. 3, p. 254. I presume not to answer for the correctness of it.

As the learned judge in this opinion, refers to no express prohibitory law, except the common law, (by which I presume was meant the common law of England) we must understand his opinion, as founded upon the doctrine that the common law of England is the common law of the United States, in their federal, and national capacity and character. How far reason is on the side of that opinion, the student may form some judgement from what has been said in the foregoing essay.

And here it will be proper to subjoin an instruction from the general assembly of Virginia, to the senators from this state, in congress, January 11,1800.

> "The general assembly of Virginia would consider themselves unfaithful to the trust reposed in them, were they to remain silent, whilst a doctrine has been publicly advanced, novel in its principle, and tremendous in its consequences: That the common law of England is in force under the government of the United States. It is not at this time proposed to expose at large the monstrous pretentious resulting from the adoption of this principle. It ought never, however, to be forgotten, and can never be too often repeated, that it opens a new tribunal for the trial of crimes never contemplated by the federal compact. It opens a new code of sanguinary criminal law, both obsolete and unknown, and

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either wholly rejected or essentially modified in almost all it's parts by state institutions. It arrests, or supercedes, state jurisdictions, and innovates upon state laws. It subjects the citizens to punishment, according to the judiciary will, when he is left in ignorance of what this law enjoins as a duty, or prohibits as a crime. It assumes a range of jurisdiction for the federal courts, which defies limitation or definition. In short it is believed, that the advocates for the principle would, themselves, be lost in an attempt, to apply it to the existing institutions of federal and state courts, by separating with precision their judiciary rights, and thus preventing the constant and mischievous interference of rival jurisdictions.

“Deeply impressed with these opinions, the general assembly of Virginia, instruct the senators, and request the representatives from this state, in congress, to use their best efforts. –

“To oppose the passing of any law, founded on, or recognizing the principle lately advanced, 'that the common law of England, is in force under the government of the United States;' excepting from such opposition, such particular parts of the common law, as may have a sanction from the constitution, so far as they are necessarily comprehended in the technical phrases which express the powers delegated to the government – and excepting, also, such other parts thereof as may be adopted by congress as necessary and proper for carrying into execution the powers expressly delegated."

NOTES

1. Since this essay was transcribed for the press, I have seen an "account of the trial of Isaac Williams" in the federal district court, for the district of Connecticut: therein, the chief justice of the United States is reported to have delivered it as his opinion, that "the common law of this country remains the same, as it was before the revolution." This doctrine I apprehend, goes much farther than that which I have stated above.

2. 1 Blackstone's Com. p. 106, 107, 108.

3. Not having any history of either of those colonies to refer to, perhaps I may be mistaken as to what is said respecting the latter.

4. Spavin's Pufendorf Vol. II. p. 342.

5. Grotius de Jure Belli et pacis, lib. 1. c. 3, Sec. 12.

6. Grotius de Jure Belli et pacis, lib. 2, c. 9, Sec. 10.

7. Stith's History of Virginia, p. 4, 8.

8. According to Governor Hutchinson, all the colonies before the restoration of Charles the Second, except Maryland, settled a model of government for themselves. History of Massachusetts, Vol. I, 92. A different policy was adopted after the restoration. Ibid.

9. Minot's History of Massachusetts, page 20.

10. See Blackstone's Commentaries, Vol. I. p. 65, 66, 67.

11. 1 Blackstone's Commentaries, 74.

12. Hutch. Hist. of Mass. Vol. I. p 393, 394.

13. Finch. 85. Blacks. Com. 239.

14. Queen Elizabeth's patent to Sir Walter Raleigh, bore date March 25, 1584. That of George the Second, for the settlement of Georgia, bears date June 9, 1732, a period of one hundred and fifty-two years.

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15. Jefferson's Notes on Virginia, 240.

16. Laws of Virginia, 1661, c. 1 Edi. 1769.

17. Jefferson's Notes, 197.

18. Laws of Virginia, Ed. 1769. p. 3.

19. Purvis's collection of the Laws of Virginia, p. 6.

20. Ibid p. 115, 116.

21. Hume's History of England, Vol. IV. 334. Hutch. Hist. of Massachusetts, Vol. I. p 11, 12. Minot's Hist. of Mass. Vol. I. p. 14. Belkn. Hist. of New-Hampshire, Vol. I. p. 67. Peters' Hist. of Connecticut, p. 7.

22. Laws of Virginia, Ed. 1733, p. 163, 156, 259, 260, 359, 360, 361, 363, 364, 385, 446, 448. Ed. 1769, p. 160, &c.

23. Hutch. Hist. of Mass. Vol. 1. preface.

24. Hutch. Hist. of Mass. Vol. I. preface, p. 11, 12.

25. Ibid. 19, 20. Minot's Hist. of Mass. 14. Belknap's Hist. of New-Hampshire, Vol. I. 67.

26. Hutchinson, Vol. I. p. 384.

27. Ibid. 385, 386.

28. Hutchinson, Vol. II. p. 10, 11.

29. Ibid. Vol. I. p. 387.

30. Ibid. Vol. II. p. 12.

31. In 1678, when complaints were made against the colony, in England, it was made capital. Ibid Vol. I. p. 390.

32. Ibid. Vol. I. p. 390.

33. Hutchinson's History of Mass. Vol. I. p. 388, to 392.

34. Hutchinson's History Mass. Vol. I. p. 392, to 397.

35. Ibid. 369.

36. Ibid. 370, 371.

37. Ibid. 374.

38. Ibid. 379.

39. Ibid. 380.

40. Hutch. Hist. Mass. Vol. II. p. 11, 12.

41. Ibid, 17.

42. Ibid. 20, 21.

43. Hutch. h. Mass. Vol. II. p. 63.

44. Ibid. 66.

45. Minots h. Mass, p. 23.

46. Hutch. h. Mass. Vol. I. 395.

47. Belknap's Hist. New-Hampshire, Vol. I. p. 69, 75, 179. Peters's Hist. of Con. p. 63, 82. He tells us it is a ruled case there, that no law, or statute of England is in force there, till formally passed by the general assembly. Ibid, 83.

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48. Hutch. Vol. I. 75. Belknap, Vol. I. 84. Peters, 64, 65, 67.

49. Castration was mayhem at the common law, and by that law might have been punished as felony, 3. Inst. 62. It would seem that the court neither considered the common law nor the statute of Mayhem, as in force in Connecticut.

50. History of Connecticut, 83.

51. Swift's System of the Laws of Connecticut, Vol. I. 40 to 47.

52. *Sine scripto jus venit, quod usus approbavit; nam diuturni mores consensu utentium comprobati, legem imitantur*. Just. Inst. Lib. 1, Fit. 2, 8, 9. The unwritten law is that, which usage has approved: for all customs, which are established by the consent of those who use them, obtain the force of a law. Harris's Justinian, 10.

53. Established, March, 1780.

54. Vattel, p. 9.

55. They were not finally agreed upon and ratified till the first day of March 1781.

56. Vattel, p. 18.

57. Vattel, B. 1, C. 1, Sec. 10.

58. Bacon, of the advancement of learning, fo. 440.

59. 4. Inst. 277.

60. 1. Hale's Hist. P. C. 222.

61. C. U. S. Art. 3. §. 3.

62. See the Federalist, No. 33. and No. 44.

63. Amendments to C. U. S. Art. 11, now ratified, and declared to be a part of the constitution, Swift's Edi. of L. U. S. Vol. 3. p. 131.

64. See Vattel, Book the first.

65. In F. N. B. p. 85. It is expressly said, "that by the common law every man may go out of the realm, to merchandise, or on pilgrimage, or for what other cause he pleases, without the king's leave, and he shall not be punished for so doing." The Stat. 3 Ja. 1, c. 4. for the better discovering and repressing popish recusants, first prohibited any person from going out of the realm to serve any foreign prince, without having first taken the oath of allegiance before his departure: the reason of which statute, surely, can not now apply to American citizens. – Mr. Locke, with his usual discernment, examines and refutes the doctrine, that all men are bound to continue in subjection to that government under which they may happen to be born. A doctrine, which having been practically denied by the whole people of America seems to sanction the right of every individual to do the like, even if they had not expressly recognized it, by constitutional, and legislative declarations. See Locke on Civil Government, Sec. 113, &c.

66. 2 Vol. Dallas's Reports, 384.

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NOTE F

Of the *Lex Scripta,* or Written Law, of Virginia

THE LEX SCRIPTA, or Written Law of the commonwealth of Virginia, may be arranged under six different heads. 1st. The constitution of the United States; 2d. Laws of the United States made in pursuance thereof; 3d. Treaties made, or which hereafter may be made, under the authority of the United States; 4th. The constitution of the commonwealth of Virginia; 5th. Acts of the general assembly of the colony of Virginia, antecedent to the revolution, and of the commonwealth, since that period; 6th. Certain acts of the parliament of England, antecedent to the settlement and establishment of the colony of Virginia.

1, 2, and 3. The constitution of the United States, 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, are by that constitution declared to 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. And the senators and representatives of the United States, 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 the constitution.[1]

4. The fourth part of the lex scripta, or written law of this commonwealth, and formerly the first in point of obligation, and pre-eminence, is the constitution of the commonwealth: concerning which, as well as the three preceding heads, sufficient has been said in the foregoing tracts.

5. The acts of the colonial and state legislature, successively, form a fifth part of the written law of the commonwealth.

This body, like the congress of the United States, consists of two distinct branches, differently chosen, and organized, in some respects, but equally the immediate representatives of the people; being both chosen by the same persons (though in larger districts) and with the same qualifications; except in respect to age; though the senators are chosen by a larger portion of the community, and serve for a longer period than the delegates,

The constitution requires that these two bodies should meet once, or oftener, every year, in general assembly, for the purpose of making such laws as shall be necessary for the common good; and the acts made by them, if neither repugnant to the constitution of the United States, nor to any law, or treaty made under the authority thereof, nor to the constitution of the commonwealth, are binding upon every other branch of the government, as well as upon all orders and descriptions of persons within the commonwealth.

To form a complete digest of statute law, as was observed in another place, seems to have been a favorite object with the legislature of Virginia; and repeated and frequent attempts have been made to effectuate that purpose; but unfortunately the disposition to change has been such, that laws have not unfrequently been altered, suspended, or wholly repealed, even before they have obtained a place in the new code. – There have been five compilations made under legislative authority within about sixty years; neither of which could be regarded as complete, the number of omitted laws, being probably more than ten-fold the number of those that are preserved.[2] A thousand inconveniences and perplexities daily arise from this circumstance, and are likely daily to increase. The compilations now to be met with (though most of them very rarely) are Purvis', printed in 1684, but whether by authority or not, does not appear. Park's, printed in 1733. Hunter's, in 1753. Rind and Purdie's, in l769. Nicolson and Prentis' in 1785; and Davis' in 1794. The sessions acts are usually sent out in

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sheets, and are rarely preserved, even till a succeeding session, without mutilation. Hence arises one of the greatest difficulties attending the study of the law in Virginia. – A proposal was laid before the legislature in 1796, to direct a new publication of all the laws of the state – but no attention seems to have been paid to it, though made from a quarter[3] which, it was supposed, would procure it that respect.

The manner of making these laws will be better considered hereafter, when we are to examine the constitution of the congress, and of the general assembly of the state. – For the different kinds of acts, or statutes, as they may be properly termed, with the general rules of construction, I shall refer the student to 1 Blacks. Com. p. 85, 91.

The constitution of the United States imposes certain restrictions upon the states, which in their operation must be considered as restraining the power of the legislature particularly.

First, 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. All acts of the state, therefore, on any of these subjects, whether entered into or passed by the legislature, or any other department of the state government, are absolutely null and void, ab initio.

Secondly, no state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing it's 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 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.

On the subject of both these prohibitory clauses of the constitution of the United States, we have offered some remarks at large, in the tract upon the constitution of the United States. They are repeated here, for the sake of regularity, only.

6th. The sixth and last branch of the written law of the commonwealth, are certain acts of the parliament of Great-Britain.

In the preceding note,[4] we endeavored to show, that our forefathers migrating to this new country, brought with them all the laws of the parent state, which were applicable to their new condition and circumstances; and this extended not only to the common and unwritten law, but also to the written laws of the kingdom from whence they emigrated. But this principle extends only to the existing laws of the parent state, at the time of the colony being settled, and not to such as should be thereafter made. Upon these grounds it was always held, during the regal government, that all statutes of the kingdom of Great Britain made prior to the fourth year of the reign of James the first, which were applicable to the circumstances of a remote and infant colony, were actually in force in Virginia: the colonial legislature, therefore, held it to be generally unnecessary, by any special acts, to re-enact them so as to form a part of the colonial code.[5] Hence, at the revolution, the same convention which established the constitution, judged it expedient to pass an ordinance, declaring that "all statutes or acts of parliament made in aid of the common law, prior to the fourth year of James the first, and which are of a general nature, not local to that kingdom, so far as the same may

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consist with the several ordinances, declarations, and resolutions of the general convention, shall be considered as in full force until the same be altered by the legislative power of the colony."[6]

The change of principle which had taken place in the government, very soon manifested the necessity of revising a code formed upon monarchical principles, and not unfrequently under the auspices of despots, who dictated to their complying parliaments, whatsoever might contribute to strengthen and confirm the power which they had by continual usurpations obtained. – A special committee was therefore appointed in October 1776, to prepare such a code of law, as should be adapted to the republican spirit of the newly established constitution. A judicious selection of the British statutes was made by this committee, in 1785, and 1786, the general assembly acted upon their report, and passed a considerable number of the acts which they had prepared, in consequence of which a very considerable part of the British statute book, was either repealed, or enacted in the form of Virginia laws. But the whole report was not acted upon – the system was thereby rendered incomplete. In 1786, another act was passed for "completing the revision,"[7] which directed that a committee of three should be appointed to take into consideration the bills reported by the former committee, which had not been enacted into laws, to examine what alterations should be made therein, and report thereupon to the next assembly as they should judge proper: they were likewise authorized to take into consideration all acts passed subsequent to the revisal being prepared, with full power to revise, alter, amend, repeal, or introduce all or any of them, and to prepare bills on the subject, and report them to the general assembly, with a proviso that they should have no force or effect, until enacted by the general assembly. What was done in consequence of this act I have never been informed, but I believe that no step whatsoever was taken in pursuance of it. In 1789, several other salutary British statutes were introduced into the state code, by the general assembly. In the same session another committee was appointed to prepare a new edition of the laws, a part of whose duty it was to report, "what English statutes, if any there be, are suited to this commonwealth, and shall not have been enacted in the form of Virginia laws."[8] Nineteen statutes were reported by that committee as proper to be re-enacted.

The assembly at the same session passed an act,[9] repealing so much of the ordinance of convention above mentioned as relates to any British statute, and declaring that after the first day of January, 1791, no such statute should have any force or authority within this commonwealth. This act was at the succeeding session suspended,[10] until the general assembly should have acted upon the report of another committee, thereby appointed for the purpose of carrying the former act concerning a new edition of the laws into effect, a part of whose duty was assigned by the act, "to prepare bills on the subject of such British statutes, if any there be, which are suited to this commonwealth, and have not been enacted in the form of Virginia laws." In pursuance of the directions of this act, the committee reported drafts of bills to the general assembly on the subject of all such remaining statutes as had not already been enacted by the legislature, and as it was conceived proper to adopt in our code, which were accordingly passed, at the succeeding session in 1792. At the same session the assembly passed an act repealing, under certain restrictions, all statutes or acts of the parliament of Great Britain heretofore in force within this commonwealth, with a proviso, "That all rights arising under any such statute or act, and all crimes and offenses committed against the same, at any time before the commencement of this act, shall remain in the same condition in all respects, as if this act had never been made." "Saving moreover to this commonwealth, and to all and every person and persons, bodies politic and corporate, and each and every of them, the right and benefit of all and every writ and writs, remedial and judicial, which might have been legally obtained from, or sued out of any court or jurisdiction of this commonwealth, or the office of the clerk of any such court or jurisdiction, before the commencement of this act, in like manner, with the like proceedings

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thereupon to be had, as fully and amply to all intents, constructions and purposes, as if this act had never been made; any thing herein contained, to the contrary or seeming to the contrary notwithstanding."[11]

NOTES

1. C. U. S. Art. 6.

2. In the editions of 1733 and 1753, the titles of the omitted acts are retained in the order of time in which they were passed; but this necessary circumstance was altogether disregarded in the edition of 1769. The edition of 1785 retains the titles of all omitted acts passed between the years 1769 and 1784. But the edition of 1794 omits the titles, as well as the acts.

3. Mr. Jefferson, Mr. Wythe, Mr. Marshall, and some others.

4. Some few acts of parliament prior to that period, were re-enacted in Virginia.

5. Note E.

6. 1776, c. 5. See also, Vol, 2, p. 259, note 2

7. Acts of 1786 c. 113.

8. Acts of 1789, c. 9.

9. Ibid. c. 17.

10. Acts of 1790, c. 20.

11. V. L. Edition of 1794, c. 147.

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APPENDIX
to Vol. 2

NOTE G

Of the Right of Conscience; and of the Freedom of Speech and of the Press

1 Blackstone's Commentaries, 134.

THE right of personal security in the United States comprehends, likewise, the uninterrupted enjoyment of a person's conscience in all matters respecting religion; and of his opinions in all matters of a civil nature.

The right of personal opinion is one of those absolute rights which man has received from the immediate gift of his Creator, but which the policy of all governments, from the first institution of society to the foundation of the American republics, has endeavored to restrain, in some mode or other. The mind being created free by the author of our nature, in vain have the arts of man endeavored to shackle it: it may indeed be imprisoned a while by ignorance, or restrained from a due exertion of it's powers by tyranny and oppression; but let the rays of science, or the dawn of freedom, penetrate the dungeon, its faculties are instantly rarified and burst their prison. This right of personal opinion, comprehends first, liberty of conscience in all matters relative to religion; and, secondly, liberty of speech and of discussion in all speculative matters, whether religious, philosophical, or political.

1. Liberty of conscience in matters of religion consists in the absolute and unrestrained exercise of our religious opinions, and duties, in that mode which our own reason and conviction dictate, without the control or intervention of any human power or authority whatsoever. This liberty though made a part of our constitution, and interwoven in the nature of man by his Creator, so far as the arts of fraud and terrors of violence have been capable of abridging it, has been the subject of coercion by human laws in all ages and in all countries as far as the annals of mankind extend. The infallibility of the rulers of nations, in matters of religion, has been a doctrine practically enforced from the earliest periods of history to the present moment among jews, pagans, Mahomedans, and Christians, alike. The altars of Moloch and of Jehovah have been equally stained with the blood of victims, whose conscience did not receive conviction from the polluted doctrines of blood thirsty priests and tyrants. Even in countries where the crucifix, the rack, and the flames have ceased to be the engines of proselytism, civil incapacities have been invariably attached to a dissent from the national religion: the ceasing to persecute by more violent means, has in such nations obtained the name of toleration.[1] In liberty of conscience says the elegant Dr. Price, I include much more than toleration. Jesus Christ has established a perfect equality among his followers. His command is, that they shall assume no jurisdiction over one another, and acknowledge no master besides himself. It is, therefore, presumption in any of them to claim a right to any superiority or pre-eminence over their brethren. Such a claim is implied, whenever any of them pretend to tolerate the rest. Not only all Christians, but all men of all religions, ought to be considered by a state as equally entitled to it's protection, as far as they demean themselves honestly and peaceably. Toleration can take place only where there is a civil establishment of a particular mode of religion; that is, where a predominant sect enjoys exclusive advantages, and makes the encouragement of it's own mode of faith and worship a part of the constitution of the state; but at the same time thinks fit to suffer the exercise of other modes of faith and worship. Thanks be to God, the new American states are at present strangers to such establishments. In this respect, as well as many others, they have shown in framing their constitutions, a degree of wisdom and liberality which is above all praise.

Civil establishments of formularies of faith and worship, are inconsistent with the rights of private

judgment. They engender strife – they turn religion into a trade – they shore up error – they produce hypocrisy and prevarication – they lay an undue bias on the human mind in its inquiries, and obstruct the progress of truth – genuine religion is a concern that lies entirely between God and our own souls. It is incapable of receiving any aid from human laws. It is contaminated as soon as worldly motives and sanctions mix their influence with it. Statesmen should countenance it only by exhibiting, in their own example, a conscientious regard to it in those forms which are most agreeable to their own judgments, and by encouraging their fellow citizens in doing the same. They cannot, as public men, give it any other assistance. All, besides, that has been called a public leading in religion, has done it an essential injury, and produced some of the worst consequences.

If also we view this matter in a temporal sense, we shall see the ill effects it has had on the prosperity of nations. The union of church and state has impoverished Spain. The revoking the edict of Nantz drove the silk manufacture from France into England; and church and state are now driving the cotton manufacture from England to America and France. It was by observing the ill effects of it in England, that America has been warned against it; and it is by experiencing them in France, that the national assembly have abolished it; and, like America, have established universal right of conscience, and universal right of citizenship.

The church establishment in England is one of the mildest sort. But even there what a snare has it been to integrity? And what a check to free inquiry? What dispositions favorable to despotism has it fostered? What a turn to pride and narrowness and domination has it given the clerical character? What struggles has it produced in its members to accommodate their opinions to the subscriptions and tests which it imposes? What a perversion of learning has it occasioned to defend obsolete creeds and absurdities? What a burden is it on the consciences of some of its best clergy, who, in consequence of being bound down to a system they do not approve, and having no support except that which they derive from conforming to it, find themselves under the hard necessity of either prevaricating or starving? No one doubts but that the English clergy in general could with more truth declare that they do not, than that they do give their unfeigned assent to all and every thing contained in the thirty-nine articles, and the book of common prayer: and, yet, with a solemn declaration to this purpose, are they obliged to enter upon an office which above all offices requires those who exercise it to be examples of simplicity and sincerity. – Who can help execrating the cause of such an evil?

But what I wish most to urge is the tendency of religious establishments to impede the improvement of the world. They are boundaries prescribed by human folly to human investigation; and enclosures, which intercept the light, and confine the exertions of reason. Let any one imagine to himself what effects similar establishments would have in philosophy, navigation, metaphysics, medicine, or mathematics. Something like this, took place in logic and philosophy, while the ipse dixit of Aristotle, and the nonsense of the schools, maintained, an authority like that of the creeds of churchmen; and the effect was a longer continuance of the world in the ignorance and barbarity of the dark ages. But civil establishments of religion are more pernicious. So apt are mankind to misrepresent the character of the Deity, and to connect his favor with particular modes of faith, that it must be expected that a religion so settled will be what it has hitherto been – a gloomy and cruel superstition, bearing the name of religion.

It has been long a subject of dispute, which is worse in it's effects on society, such a religion or speculative atheism. For my own part, I could almost give the preference to the latter. – Atheism is so repugnant to every principle of common sense, that it is not possible it should ever gain much ground, or become very prevalent. On the contrary, there is a particular proneness in the human

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mind to superstition, and nothing is more likely to become prevalent. – Atheism leaves us to the full influence of most of our natural feelings and social principles; and these are so strong in their operation, that, in general, they are a sufficient guard to the order of society. But superstition counteracts these principles, by holding forth men to one another as objects of divine hatred; and by putting them on harassing, silencing, imprisoning and burning one another, in order to do God service. – Atheism is a sanctuary for vice, by taking away the motives to virtue arising from the will of God, and the fear of future judgment. But superstition is more a sanctuary for vice, by teaching men ways of pleasing God, without moral virtue; and by leading them even to compound for wickedness, by ritual services, by bodily penances and mortifications; by adoring shrines, going pilgrimages, saying many prayers, receiving absolution from the priests, exterminating heretics, etc. – Atheism destroys the sacredness and obligation of an oath. But is there not also a religion (so called) which does this, by teaching, that there is a power which can dispense with the obligation of oaths; that pious frauds are right, and that faith is not to be kept with heretics.

It is Indeed only a rational and liberal religion; a religion founded on just notions of the Deity, as a Being who regards equally every sincere worshiper, and by whom all are alike favored as far as they act up to the light they enjoy: a religion which consists in the imitation of the moral perfections of an Almighty but Benevolent Governor of Nature, who directs for the best, all events, in confidence in the care of his providence, in resignation to his will, and in the faithful discharge of every duty of piety and morality from a regard to his authority, and the apprehension of a future righteous retribution. It is only this religion (the inspiring principle of every thing fair and worthy, and joyful, and which, in truth is nothing but the love of God to man, and virtue warming the heart and directing the conduct). It is only this kind of religion that can bless the world, or be an advantage to society. This is the religion that every enlightened friend to mankind will be zealous to support. But it is a religion that the powers of the world know little of, and which will always be best promoted by being left free and open.[2] The following passage from the same author, deserves too much attention to be pretermitted: "Let no such monster be known there, [in the United States] as human authority in matters of religion. Let every honest and peaceable man, whatever is his faith, be protected there; and find an effectual defense against the attacks of bigotry and intolerance. In the United States may religion flourish! They cannot be very great and happy if it does not. But let it be a better religion than most of those which have been hitherto professed in the world. Let it be a religion which enforces moral obligations; not a religion which relaxes and evades them. – A tolerant and catholic religion; not a rage for proselytism. – A religion of peace and charity; not a religion that persecutes curses and damns. In a word, let it be the genuine gospel of peace, lifting above the world, warming the heart with the love of God and his creatures, and sustaining the fortitude of good men, by the assured hope of a future deliverance from death, and an infinite reward in the everlasting kingdom of our Lord and Savior."[3]

This inestimable and imprescriptible right is guaranteed to the citizens of the United States, as such, by the constitution of the United States, which declares,[4] that no religious test shall ever be required as a qualification to any office or public trust under the United States; and by that amendment to the constitution of the United States,[5] which prohibits congress from making any law respecting the establishment of religion, or prohibiting the free exercise thereof; and to the citizens of Virginia by the bill of rights,[6] which declares, "that religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience: and that it is the mutual duty of all to practice Christian forbearance, love, and charity, towards each other." And further, by the act for establishing religious freedom, by which

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it is also declared, "that no man shall be compelled to frequent or support any religious worship, place, or ministry, whatsoever, nor shall be enforced, restrained, molested or burdened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument maintain their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities."[7]

2. Liberty of speech and of discussion in all speculative matters, consists in the absolute and uncontrollable right of speaking, writing, and publishing, our opinions concerning any subject, whether religious, philosophical, or political; and of inquiring into and, examining the nature of truth, whether moral or metaphysical; the expediency or inexpediency of all public measures, with their tendency and probable effect; the conduct of public men, and generally every other subject, without restraint, except as to the injury of any other individual, in his person, property, or good name. Thought and speech are equally the immediate gifts of the Creator, the one being intended as the vehicle of the other: they ought, therefore, to have been wholly exempt from the coercion of human laws in all speculative and doctrinal points whatsoever: liberty of speech in political matters, has been equally proscribed in almost all the governments of the world, as liberty of conscience in those of religion. A complete tyranny over the human mind could never have been exercised whilst the organ by which our sentiments are conveyed to others, was free: when the introduction of letters among men afforded a new mode of disclosing, and that of the press, a more expeditious method of diffusing their sentiments, writing and printing also became subjects of legal coersion;[8] even the expression of sentiments by pictures and hieroglyphics[9] attracted the attention of the Argus-government, so far as to render such expressions punishable by law. The common place arguments in support of these restraints are, that they tend to preserve peace and good order in government; that there are some doctrines both in religion and politics, so sacred, and others of so bad a tendency, that no public discussion of them ought to be suffered. To these the elegant writer before referred to, gives this answer: "were this a right opinion, all the persecution that has ever been practiced, would be justified. For if it is a part of the duty of civil magistrates, to prevent the discussion of such doctrines, they must, in doing this, act on their own judgments of the nature and tendency of doctrines; and consequently, they must have a right to prevent the discussion of all doctrines which they think to be too sacred for discussion, or too dangerous in their tendency; and this right they must exercise in the only way in which civil power is capable of exercising it, by inflicting penalties on all who oppose sacred doctrines, or who maintain pernicious opinions."[10]

In England during the existence of the court of star chamber, and after it's abolition, from the time of the long parliament to the year 1694, the liberty of the press, and the right of vending books, was restrained to very narrow limits, by various ordinances and acts of parliament; all books printed were previously licensed by some of the great offices of state, or the two universities, and all foreign books were exposed to a similar scrutiny before they were vended. No shopkeeper could buy a book to sell again, or sell any book, unless he were a licensed bookseller. By these and other restrictions the communication of knowledge was utterly subjected to the control of those whose interest led them rather to promote ignorance than the knowledge of truth. In 1694, the parliament refused to continue these prohibitions any longer, and thereby, according to De Lolme,[11] established the freedom of the press in England.

But although this negative establishment may satisfy the subjects of England, the people of America have not thought proper to suffer the freedom of speech, and of the press to rest upon such an uncertain foundation, as the will and pleasure of the government. Accordingly, when it was discovered that the constitution of the United States had not provided any barrier against the possible

encroachments of the government thereby to be established, great complaints were made of the omission, and most of the states instructed their representatives to obtain an amendment in that respect; and so sensible was the first congress of the general prevalence of this sentiment throughout America, that in their first session they proposed an amendment since adopted by all the states and made a part of the constitution; "that congress shall make no law abridging the freedom of speech, or of the press."[12] And our state bill of rights declares, "that the freedom of the press is one of the great bulwarks of liberty, and cannot be restrained, but by despotic governments."[13] And so tenacious of this right, was the convention of Virginia, by which the constitution of the United States was ratified, that they further declared, as an article of the bill of rights then agreed to, "that the people have a right to the freedom of speech, and of writing and publishing their sentiments; that the freedom of the press is one of the greatest bulwarks of liberty, and ought not to be violated."[14] Nay, so reasonably jealous were they of the possibility of this declaration being disregarded, as not forming a part of the constitution, at that time, that the following declaration is inserted in, and forms a part of, the instrument of ratification, viz. "That the powers granted under the constitution, being derived from the people of the United States, may be resumed by them, whensoever the same shall be perverted to their injury or oppression; and that, every power not granted thereby, remains with them, and at their will: that, therefore no right; of any denomination, can be cancelled, abridged, restrained, or modified by the congress, by the senate, or house of representatives, acting in any capacity, by the president, or any department, or officer of the United States, except in those instances where power is given by the constitution for those purposes: that among other essential rights, the liberty of conscience, and of the press, cannot be cancelled, abridged, restrained, or modified, by any authority of the United States."[15]

As this latter declaration forms a part of the instrument by which the constitution of the United States became obligatory upon the state, and citizens of Virginia; and as the act of ratification has been accepted in that form; no principle is more clear, than that the state of Virginia is no otherwise bound thereby, than according to the very tenor of the instrument, by which she has bound herself. For as no free state can be bound to another, or to a number of others, but by it's own voluntary consent and act, so not only the evidence of that consent, but the nature and terms of it, can be ascertained only by recurrence to the very instrument, by which it was first given. And as the foregoing declaration not only constitutes a part of that instrument, but contains a preliminary protest against any extension of the enumerated powers thereby granted to the federal government, it could scarcely have been imagined, that any violation of a principle so strenuously asserted, and made, as it were, the sole ground of the pragmatic sanction, would ever have been attempted by the federal government.

But however reasonable such an expectation might have been, a very few years evinced a determination on the part of those who then ruled the public councils of the United States, to set at nought all such restraints. An act accordingly was passed by the congress,[16] on the fourteenth of July 1798, whereby it was enacted, that "if any person shall write, print, utter or publish any false and malicious writing against the government of the United States, or either house of congress, or the president, with intent to defame them, or either of them, or to bring them or either of them into contempt, or disrepute; or to excite against them or either of them, the hatred of the good people of the United States, then such person, being thereof convicted before any court of the United States having jurisdiction thereof shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years." The act was limited in it's duration to the third day of March, 1801, the very day on which the period for which the then president was elected, was to expire; and, previous to which the event of the next presidential election must be known.

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The consequences of this act, as might have been foreseen, were a general astonishment, and dissatisfaction, among all those who considered the government of the United States, as a limited system of government; in it's nature altogether federal, and essentially different from all others which might lay claim to unlimited powers; or even to national, instead of federal authority. The constitutionality of the act was accordingly very generally denied, or questioned, by them. They alleged, that it is to, the freedom of the press, and of speech, that the American nation is indebted for its liberty, it's happiness, it's enlightened state, nay more, for it's existence. That in these states the people are the only sovereign: that the government established by themselves, is for their benefit; that those who administer the government, whether it be that of the state, or of the federal union, are the agents and servants of the people, not their rulers or tyrants. – That these agents must be, and are, from the nature and principles of our governments, responsible to the people, for their conduct. That to enforce this responsibility, it is indispensably necessary that the people should inquire into the conduct of their agents; that in this inquiry, they must, or ought to scrutinize their motives, sift their intentions, and penetrate their designs; and that it was therefore, an unimpeachable right in them to censure as well as to applaud; to condemn or to acquit; and to reject, or to employ them again, as the most severe scrutiny might advise. That as no man can be forced into the service of the people against his own will and consent; so if any man employed by them in any office, should find the tenure of it too severe, because responsibility is inseparably annexed to it, he might retire: if he can not bear scrutiny, he might resign: if his motives, or designs, will not bear sifting; or if censure be too galling to his feelings, he might avoid it in the shades of domestic privacy.

That if flattery be the only music to his ear, or the only balm to his heart; if he sickened when it is withheld, or turned pale when denied him; or if power, like the dagger of Macbeth, should invite his willing imagination to grasp it, the indignation of the people ought immediately to mark him; and hurl him from their councils, and their confidence forever. That if this absolute freedom of inquiry may be, in any manner, abridged, or impaired by those who administer the government, the nature of it will be instantly changed from a federal union of representative democracies, in which the people of the several states are the sovereign, and the administrators of the government their agents, to a consolidated oligarchy, aristocracy, or monarchy, according to the prevailing caprice of the constituted authorities, or of those who may usurp them. That where absolute freedom of discussion is prohibited, or restrained, responsibility vanishes. That any attempt to prohibit, or restrain that freedom, may well be construed to proceed from conscious guilt. That the people of America have always manifested a most jealous sensibility, on the subject of this inestimable right, and have ever regarded it as a fundamental principle in their government, and carefully engrafted in the constitution. That this sentiment was generated in the American mind, by an abhorrence of the maxims and principles of that government which they had shaken off, and a detestation of the abominable persecutions, and extrajudicial dogmas, of the still odious court of star-chamber; whose tyrannical proceedings and persecutions, among other motives of the like nature, prompted and impelled our ancestors to fly from the pestilential government of their native country, to seek an asylum here; where they might enjoy, and their posterity establish, and transmit to all future generations, freedom, unshackled, unlimited, undefined. That in our time we have vindicated, fought for, and established that freedom by our arms, and made it the solid, and immovable basis and foundation both of the state, and federal government. That nothing could more clearly evince the inestimable value that the American people have set upon the liberty of the press, than their uniting it in the same sentence, and even in the same member of a sentence, with the rights of conscience, and the freedom of speech.

And since congress are equally prohibited from making any law abridging the freedom of speech,

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or of the press, they boldly challenged their adversaries to point out the constitutional distinction, between those two modes of discussion, or inquiry. If the unrestrained freedom of the press, said they, be not guaranteed, by the constitution, neither is that of speech. If on the contrary the unrestrained freedom of speech is guaranteed, so also, is that of the press. If then the genius of our federal constitution has vested the people of the United States, not only with a censorial power, but even with the sovereignty itself; if magistrates are, indeed, their agents: if they are responsible for their acts of agency; if the people may not only censure whom they disapprove, but reject whom they may find unworthy; if approbation or censure, election or rejection, ought to be the result of inquiry, scrutiny, and mature deliberation; why, said they, is the exercise of this censorial power, this sovereign right, this necessary inquiry, and scrutiny to be confined to the freedom of speech? Is it because this mode of discussion better answers the purposes of the censorial power? Surely not. The best speech can not be heard, by any great number of persons. The best speech may be misunderstood, misrepresented, and imperfectly remembered by those who are present. To all the rest of mankind, it is, as if it had never been. The best speech must also be short for the investigation of any subject of an intricate nature, or even a plain one, if it be of more than ordinary length. The best speech then must be altogether inadequate to the due exercise of the censorial power, by the people. The only adequate supplementary aid for these defects, is the absolute freedom of the press. A freedom unlimited as the human mind; viewing all things, penetrating the recesses of the human heart, unfolding the motives of human actions, and estimating all things by one invaluable standard, truth; applauding those who deserve well; censuring the undeserving; and condemning the unworthy, according to the measure of their demerits.

In vindication of the act, the promoters and supporters of it, said,[17] that a law to punish false, scandalous, and malicious writings against the government, with intent to stir up sedition, is a law necessary for carrying into effect the power vested by the constitution in the government of the United States, and consequently such a law as congress may pass. To which it was answered, that even were the premises true, it would not authorize congress to pass an act to punish writings calculated to bring congress, or the president into contempt or disrepute. Inasmuch as such contempt or disrepute may be entertained for them, or either of them, without incurring the guilt of sedition, against the government, and without the most remote design of opposing, or resisting any law, or any act of the president done in pursuance of any law: one or the other of which would seem necessary to constitute the offense, which this argument defends the right of congress to punish, or prevent.

It was further urged in vindication of the act, that the liberty of the press consists not in a license for every man to publish what he pleases, without being liable to punishment for any abuse of that license; but in a permission to publish without previous restraint; and, therefore, that a law to restrain the licentiousness of the press, cannot be considered as an abridgment of its liberty.[18] To which it was answered that this exposition of the liberty of the press, was only to be found in the theoretical writings of the commentators on the English government, where the liberty of the press rests upon no other ground, than that there is now no law which imposes any actual previous restraint upon the press, as was formerly the case: which is very different from the footing upon which it stands in the United States, where it is made a fundamental article of the constitutions, both of the federal and state governments, that no such restraint shall be imposed by the authority of either. – That if the sense of the state governments be wanting on the occasion, nothing can be more explicit than the meaning and intention of the state of Virginia, at the moment of adopting the constitution of the United States; by which it will clearly appear that it never was the intention of that state (and probably of no other in the union) to permit congress to distinguish between the liberty and

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licentiousness of the press; or, in any manner to "cancel, abridge, restrain, or modify" that inestimable right.

Thirdly it was alleged, that the act could not be unconstitutional because it made nothing penal, which was not penal before, being merely declaratory of the common law,[19] viz. of England.

To this it was, among other arguments, answered. That the United States as a federal government have no common law. That although the common law of England, is, under different modifications, admitted to be the common law of the states respectively, yet the whole of the common law of England has been no where introduced: that there is a great and essential difference, in this respect, in the several states, not only in the subjects to which it is applied, but in the extent of its application. That the common law of one state, therefore, is not the common law of another. That the constitution of the United States has neither created it, nor conferred it upon the federal government. And, therefore, that government has no power or authority to assume the right of punishing any action, merely because it is punishable in England, or may be punishable in any, or all the states, by the common law.

The essential difference between the British government and the American constitutions was moreover insisted on, as placing this subject in the clearest light. In the former, the danger of encroachments on the rights of the people, was understood to be confined to the executive magistrate. The representatives of the people in the legislature are not only exempt themselves, from distrust, but are considered as sufficient guardians of the rights of their constituents against the danger from the executive. Hence it is a principle, that the parliament is unlimited in it's power, or, in their own language, is omnipotent. Hence too, all the ramparts for protecting the rights of the people, such as their magna charta, their bill of rights, etc. are not reared against the parliament, but against the royal prerogative. They are mere legislative precautions against executive usurpations. Under such a government as that, an exemption of the press from previous restraints, by licensors from the king, is all the freedom that can be secured to it, there: but, that in the United States the case is altogether different. The people, not the government, possess the absolute sovereignty. The legislature, no less than the executive, is under limitations of power. Encroachments are regarded as possible from the one, as well as from the other. Hence in the United States, the great and essential rights of the people, are secured against legislative, as well as against executive ambition. They are secured, not by laws paramount to prerogative; but by constitutions paramount to laws.

This security of the freedom of the press requires, that it should be exempt, not only from previous restraint by the executive, as in Great Britain; but from legislative restraint also; and this exemption, to be effectual, must be an exemption, not only from the previous inspection of licensors, but from the subsequent penalty of laws. – A further difference between the two governments was also insisted on. In Great Britain, it is a maxim, that the king, an hereditary, not a responsible magistrate, tan do no wrong; and that the legislature, which in two thirds of it's composition, is also hereditary, not responsible, can do what it pleases. In the United States, the executive magistrates are not held to be infallible, nor the legislatures to be omnipotent; and both being elective, are both responsible. That the latter may well be supposed to require a greater degree of freedom of animadversion than might be tolerated by the genius of the former. That even in England, notwithstanding the general doctrine of the common law, the ministry, who are responsible to impeachment, are at all times animadverted on, by the press, with peculiar freedom. That the practice in America must be entitled to much more respect: being in most instances founded upon the express declarations contained in the respective constitutions, or bill of rights of the confederated states.[20] That even in those states where no such guarantee could be found, the press had always exerted a freedom in canvassing the

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merits, and measures of public men of every description, not confined to the limits of the common law. That on this footing the press has stood even in those states, at least, from the period of the revolution.

The advocates and supporters of the act alleged, fourthly; That had the constitution intended to prohibit congress from legislating at all, on the subject of the press, it would have used the same expressions as in that part of the clause, which relates to religion, and religious tests; whereas, said they, there is a manifest difference; it being evident that the constitution intended to prohibit congress from legislating at all, on the subject of religious establishments, and the prohibition is made in the most express terms. Had the same intention prevailed respecting the press, the same expression would have been used, viz. "Congress shall make no law respecting the press." They are not, however, prohibited, added they, from legislating at all, on the subject, but merely from abridging the liberty of the press. It is evident, therefore, said they, that congress may legislate respecting the press: may pass laws for it's regulation, and to punish those who pervert it into an engine of mischief, provided those laws do not abridge it's liberty. A law to impose previous restraints upon the press, and not one to inflict punishment on wicked and malicious publications, would be a law to abridge the liberty of the press.[21]

To this it was answered, that laws to regulate, must, according to the true interpretation of that word, impose rules, or regulations, not before imposed; that to impose rules is to restrain; that to restrain must necessarily imply an abridgment of some former existing rights, or power: consequently, when the constitution prohibits congress from making any law abridging the freedom of speech, or of the press, it forbids them to make any law respecting either of these subjects. That this conclusion was an inevitable consequence of the injunction contained in the amendment, unless it could be shown, that the existing restraints upon the freedom of the press in the United States, were such as to require a remedy, by a law regulating (but not abridging) the manner in which it might be exercised with greater freedom and security. A supposition, which it was believed no person would maintain. That the necessary consequence of these things is, that the amendment was meant as a positive denial to congress, of any power whatever, on the subject.

As an evidence on this subject, which must be deemed absolutely conclusive, it was observed, That the proposition of amendments made by congress, is introduced in the following terms: "The conventions of a number of states, having, at the time of their adopting the constitution, expressed a desire, in order to prevent misconstruction, or abuse of its powers, that further declaratory and restrictive clauses should be added; and, as extending the ground of public confidence in the government, will best ensure the beneficent ends of it's institution:" which affords the most satisfactory and authentic proof, that the several amendments proposed, were to be considered as either declaratory, or restrictive; and whether the one or the other, as corresponding with the desire expressed by a number of states, and as extending the ground of public confidence in the government. That under any other construction of the amendment relating to the press, than that it declared the press to be wholly exempt from the power of congress – the amendment could neither be said to correspond with the desire expressed by a number of the states, nor be calculated to extend the ground of public confidence in the government. Nay more; that the construction employed to justify the "Sedition Act," would exhibit a phenomenon without a parallel in the political world. It would exhibit a number of respectable states, as denying first that any power over the press was delegated by the constitution; as proposing next, that an amendment to it should explicitly declare, that no such power was delegated; and finally as concurring in an amendment actually recognizing, or delegating such a power.

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But, the part of the constitution which seems to have been most recurred to, and even relied on, in defense of the act of congress, is the last clause of the eighth section of the first article, empowering congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the constitution in the government of the United States, or in any department or officer thereof."[22]

To this it was answered, that the plain import of that clause is, that congress shall have all the incidental, or instrumental powers, necessary and proper for carrying into execution all the express powers; whether they be vested in the government of the United States, more collectively, or in the several departments, or officers thereof. That it is not a grant of new powers to congress, but merely a declaration, for the removal of all uncertainty, that the means of carrying into execution, those otherwise granted, are included in the grant. Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is, whether the power be expressed in the constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be, whether it is properly incidental to an express power, and necessary to its execution. If it be, it may be exercised by congress. If it be not, congress cannot exercise it. – That, if the sedition law be brought to this kind of test, it is not even pretended by the framers of that act, that the power over the press, which is exercised thereby, can be found among the powers expressly vested in congress. That if it be asked, whether there is any express power, for executing which, that act is a necessary and a proper power: the answer is, that the express power which has been selected, as least remote from that exercised by the act, is the power of "suppressing insurrections;" which is said to imply a power to prevent insurrections, by punishing whatever may lead, or tend to them. But it surely cannot, with the least plausibility, be said, that a regulation of the press, and the punishment of libels, are exercises of a power to suppress insurrections. That if it be asked, whether the federal government has no power to prevent, as well as punish, resistance to the laws; the proper answer is, that they have the power, which the constitution deemed most proper in their hands for the purpose. That congress has power, before it happens, to pass laws for punishing such resistance; and the executive and judiciary have a power to enforce those laws, whenever it does actually happen. That it must be recollected by many, and could be shown to the satisfaction of all, that this construction of the terms "necessary and proper," is precisely the construction which prevailed during the discussions and ratifications of the constitution: and that it is a construction absolutely necessary to maintain their consistency with the peculiar character of the government, as possessed of particular and defined powers only; not of the general and indefinite powers vested in ordinary governments. That if this construction be rejected, it must be wholly immaterial, whether unlimited powers be exercised under the name of unlimited powers, or be exercised under the name of unlimited means of carrying into execution limited powers.

To those who asked, if the federal government be destitute of every authority for restraining the licentiousness of the press, and for shielding itself against the libelous attacks which may be made on those who administer it; the reply given was, that the constitution alone can answer the question: that no such power being expressly given; and such a power not being both necessary and proper to carry into execution any express power; but, above all, such a power being expressly forbidden by a declaratory amendment to the constitution, the answer must be, that the federal government is destitute of all such authority.[23]

This very imperfect sketch may be sufficient to afford the student some idea of the magnitude and importance of a question, which agitated every part of the United Slates, almost to a degree of convulsion: the controversy not being confined to the closets of speculative politicians, or to the

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ordinary channels of discussion through the medium of the press; but engrossing the attention, and calling forth the talents and exertions of the legislatures of several of the states in the union, on the one hand, and of the federal government, and all its branches, legislative, executive, and judiciary, on the other. For no sooner had the act passed, than prosecutions were commenced against individuals in several of the states: they were conducted, in some cases, with a rigor, which seemed to betray a determination to convert into a scourge that, which it had been pretended was meant only to serve as a shield.

The state of Kentucky was the first which took the act under consideration, and by a resolution passed with two dissenting voices only, declared the act of congress not law, but altogether void, and of no force. The state of Virginia, though posterior to her younger sister in point of time, was not behind her in energy. The general assembly at their first session after the passage of the act, did

> "explicitly and peremptorily declare, that it views the powers of the federal government, as resulting from the compact, to which the states are parties; as limited by the plain sense and intention of the instrument constituting that compact; as no further valid than they are authorized by the grants contained in that compact; and that in case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the states who are parties thereto have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits the authorities, rights, and liberties appertaining to them." –
>
> "That a spirit has, in sundry instances, been manifested by the federal government, to enlarge its powers, by forced constructions of the constitutional charter which defines them; and to expound certain general phrases (copied from the very limited grant of powers in the former articles of confederation, and therefore less liable to be misconstrued) so as to destroy the meaning and effect of the particular enumeration, which necessarily explains and limits the general phrases; so as to consolidate the states, by degrees, into one sovereignty." That the "general assembly does, particularly protest against the palpable and alarming infractions of the constitution, in the two cases of the alien and sedition acts, passed at the last session of congress; the first of which exercises a power no where delegated to the federal government; and the other exercises, in like manner, a power not delegated by the constitution; but, on the contrary, expressly and positively forbidden by one of the amendments thereto; a power which, more than any other, ought to produce universal alarm; because it is leveled against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right."
>
> "That this state having by its convention, which ratified the federal constitution, expressly declared, that among other essential rights, "the liberty of conscience, and of the press cannot be canceled, abridged, restrained, or modified, by any authority of the United States," and from its extreme anxiety to guard these rights from every possible attack of sophistry, or ambition, having, with other states, recommended an amendment for that purpose, which amendment was, in due time, annexed to the constitution; it would mark a reproachful inconsistency and criminal degeneracy, if an indifference were now shown, to the most palpable violation of the rights, thus declared and secured; and to the establishment of a precedent, which may be fatal to the other."

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> "That feeling the most sincere affection for their sister states; the truest anxiety for establishing and perpetuating the union; and the most scrupulous fidelity to the constitution which is the pledge of mutual friendship; and solemnly appealing "to the like dispositions of the other states, in confidence that they will concur with this commonwealth in declaring, (as it does hereby declare,) that the acts aforesaid are unconstitutional; and that the necessary and proper measures will be taken by each, for co-operating with this stale, in maintaining the authorities, rights and liberties, reserved to the states respectively, or to the people."[24]

Answers were received from the legislatures of seven states, disapproving of the resolutions of Virginia and Kentucky, which had also been transmitted with a similar proposition. The general assembly of Massachusetts, alone, condescended to reason with her sister states; the others scarcely paid them the common respect that is held to be due from individuals, to each other. The assembly of Virginia at their next session, entered into a critical review and examination of their former resolutions, and supported them by a train of arguments, and of powerful, convincing, and unsophisticated reasoning, to which, probably, the equal cannot be produced in any public document, in any country.[25] They concluded this examination and review (which occupied more than eighty pages) with resolving, "That having carefully and respectfully attended to the proceedings of a number of the states, in answer to their former resolutions, and having accurately and fully re-examined and re-considered the latter, they found it to be their indispensable duty to adhere to the same, as founded in truth, as consonant with the constitution, and as conducive to its preservation; and more especially to be their duty, to renew, as they do hereby renew their protest against the alien and sedition acts, as palpable and alarming infractions of the constitution."

Mean time, petitions had been presented to congress for the repeal of those obnoxious acts: on the 25th of February 1799, congress agreed to the report of a committee advising them, that it would be inexpedient to repeal them. A majority of four members, only, prevailed on this occasion. During the session which succeeded, strenuous exertions were made for the continuance of the act commonly called the sedition act, (the other concerning aliens, having expired: After a severe struggle, the attempt failed, and the act was permitted to expire, at the same moment that put a period to the political importance of those, for whose benefit, alone, it seems to have been intended.

We may now, I trust, say with our former envoys to the republic of France: "The genius of the constitution can not be overruled by those who administer the government. Among those principles deemed sacred in America; among those sacred rights, considered as forming the bulwark of their liberty, which the government should contemplate with awful reverence, and approach only with the most cautious circumspection, there is none of which the importance is more deeply impressed on the public mind, than the liberty of the press."[26]

It may be asked, perhaps: is there no remedy in the United States for injuries done to the good fame and reputation of a man; injuries, which to a man of sensibility, and of conscious integrity, are the most grievous that can be inflicted; injuries, which when offered through the medium of the press, may be diffused throughout the globe, and transmitted to latest posterity; may render him odious, and detestable in the eyes of the world, his country, his neighbors, his friends, and even his own family; may seclude him from society as a monster of depravity, and iniquity; and even may deprive him of sustenance, by destroying all confidence in him, and discouraging that commerce, or intercourse with him, which may be necessary to obtain the means?

Heaven forbid, that in a country which boasts of rational freedom, and of affording perfect security

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to the citizen for the complete enjoyment of all his rights, the most valuable of all should be exposed without remedy, or redress, to the vile arts of detraction and slander! Every individual, certainly, has a right to speak, or publish, his sentiments on the measures of government: to do this without restraint, control, or fear of punishment for so doing, is that which constitutes the genuine freedom of the press. The danger justly apprehended by those states which insisted that the federal government should possess no power, directly or indirectly, over the subject, was, that those who were entrusted with the administration might be forward in considering every thing as a crime against the government, which might operate to their own personal disadvantage; it was therefore made a fundamental ankle of the federal compact, that no such power should be exercised, or claimed by the federal government; leaving it to the state governments to exercise such jurisdiction and control over the subject, as their several constitutions and laws permit. In contending therefore for the absolute freedom of the press, and its total exemption from all restraint, control, or jurisdiction of the federal government, the writer of these sheets most explicitly disavows the most distant approbation of its licentiousness. A free press, conducted with ability, firmness, decorum, and impartiality, may be regarded as the chaste nurse of genuine liberty; but a press stained with falsehood, imposture, detraction, and personal slander, resembles a contaminated prostitute, whose touch is pollution, and whose offspring bears the foul marks of the parent's ignominy.

Whoever makes use of the press as the vehicle of his sentiments on any subject, ought to do it in such language as to show he has a deference for the sentiments of others; that while he asserts the right of expressing and vindicating his own judgment, he acknowledges the obligation to submit to the judgment of those whose authority he cannot legally, or constitutionally dispute. In his statement of facts he is bound to adhere strictly to the truth; for any deviation from the truth is both an imposition upon the public, and an injury to the individual whom it may respect. In his restrictures on the conduct of men, in public stations, he is bound to do justice to their characters, and not to criminate them without substantial reason. The right of character is a sacred and invaluable right, and is not forfeited by accepting a public employment. Whoever knowingly departs from any of these maxims is guilty of a crime against the community, as well as against the person injured; and though both the letter and the spirit of our federal constitution wisely prohibit the congress of the United States from making any law, by which the freedom of speech, or of the press, may be exposed to restraint or persecution under the authority of the federal government, yet for injuries done the reputation of any person, as an individual, the state-courts are always open, and may afford ample, and competent redress, as the records of the courts of this commonwealth abundantly testify.

NOTES

1. There is something so truly original in the following observations of the celebrated author of Common Sense, on the subject of toleration, that I shall give it at full length. –

> "Toleration is not the opposite of intolerance, but is the counterfeit of it. Both are despotisms. The one assumes to itself the right of withholding liberty of conscience, and the other of granting it. The one is the pope armed with fire and faggot, and the other is the pope selling, or granting indulgences. The former is church and state; and the latter is church and traffic. But toleration may be viewed in a much stronger light. Man worships not himself, but his Maker; and the liberty of conscience which he claims, is not for the service of himself, but of his God. In this case, therefore, we must necessarily have the associated idea of two beings; the mortal who renders the worship, and the immortal being who is worshiped. – Toleration, therefore, places itself, not between man and man, nor between church and church, nor between one denomination of religion and another, but between God and man; between the being who worships, and the being who is worshiped; and by the same act of assumed authority by which it tolerates man to pay his worship, it presumptuously and blasphemously sets itself up to tolerate the Almighty to receive it.
>
> "Were a bill brought into any parliament, entitled, "An act to tolerate or grant liberty to the Almighty to receive

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the worship of a Jew or a Turk," or "to prohibit the Almighty from receiving it:" all men would startle, and call it blasphemy. There would be an uproar. The presumption of toleration in religious matters would then present itself unmasked: but the presumption is not the less because the name of "man" only appears to those laws, for the associated idea of the worshiper and worshiped cannot be separated. Who, then, art thou, vain dust and ashes! by whatever name thou art called, whether a king, a bishop, a church or a state, a parliament or any thing else, that obtrudest thine insignificance between the soul of man and it's Maker? Mind thine own concerns. If he believes not as thou believest, it is a proof that thou believest not as he believeth, and there is no earthly power can determine between you.

"With respect to what are called denominations of religion, if every one is left to judge of it's own religion, there is no such thing as a religion that is wrong; but if they are to judge of each other's religion, there is no such thing as a religion that is right; and, therefore, all the world is right, or all the world is wrong. But with respect to religion itself, without regard to names, and as directing itself from the universal family of mankind to the divine object of all adoration, it is man bringing to his Maker the fruits of his heart; and though those fruits may differ from each other like the fruits of the earth, the grateful tribute of every one is accepted.

"A bishop of Durham or a bishop of Winchester, or the archbishop who leads the dukes, will not refuse a tithe-sheaf of wheat, because it is not a cock of hay; nor a cock of hay, because it is not a sheaf of wheat; nor a pig because it is neither one nor the other; but these same persons, under the figure of an established church, will not permit their maker to receive the varied tithes of man's devotion.

"One of the continual choruses of Mr. Burke's book is "church and state": he does not mean some one particular church, or someone particular state, but any church and state; and he uses the term as a general figure, to hold forth the political doctrine of always uniting the church with the state in every country; and he censures the national assembly for not having done this in France. Let us bestow a few thoughts on this subject.

"All religions are in their nature, kind and benign, and united with principles of morality. They could not have made proselytes at first, by professing any thing that was vicious, cruel, persecuting, or immoral. Like every thing else they had their beginning; and they proceeded by persuasion, exhortation, and example. How is it then that they lose their native mildness, and become morose and intolerant? It proceeds from the connection which Mr. Burke recommends. By engendering the church with the state, a sort of mule animal, capable only of destroying, and not of breeding up, is produced, called the church established by law. It is a stranger, even from it's birth, to any parent mother on which it is begotten, and whom in time it kicks out and destroys.

"The inquisition in Spain does not proceed from the religion originally professed, but from this mule animal, engendered between the church and state. The burnings in Smithfield proceeded from the same heterogeneous production; and it was the regeneration of this strange animal in England afterwards, that renewed the rancor and irreligion among the inhabitants; and that drove the people called Quakers and dissenters to America. Persecution is not an original feature in any religion; but it is always the strongly marked feature of all law religions, or religions established by law. Take away the law-establishment, and every religion re-assumes it's original benignity. In America, a catholic priest is a good citizen, a good character, and a good neighbor; an episcopalian minister is of the same description: and this proceeds independently of the men, from there being no law-establishment in America.

Paine's Rights of Man, part 1, p. 58, &c. Albany, 1794.

2. Price's observations on the American revolution. p. 28 to 34.

3. Ibid. p. 39.

4. Art. 6.

5. Art. 3.

6. Art. 16. Revised code. Edi. of 1794, p. 4.

7. Art. 16. Revised code. Edi. of 1794, c. 20.

8. Stat. 13 and 14, Car 2.

9. 4 Blacks. Com. p. 150.

10. Price's Observations on the American Revolution, p. 19.

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11. Page 215.

12. Amendments to C. U. S. Art. 3.

13. State Bill of Rights. Art. 12.

14. Bill of Rights agreed to by the convention of Virginia, by which the C. U. S. was adopted Art. 16.

15. C U. S. as ratified by the convention of Virginia.

16. L. U. S. 5 Cong c. 91.

17. See the report of a committee of congress, respecting the alien and sedition laws, Feb. 25, 1799.

18. See the report of a committee of congress, respecting the alien and sedition laws, February 25, 1799.

19. See the report of a committee of congress, respecting the alien and sedition laws, February 25, 1799.

20. See the Virginia bill of rights. Art. 12. Massachusetts, Art. 16. Pennsylvania, Art, 12. Delaware, Art. 23. Maryland, Art. 38. North Carolina, Art. 15. South Carolina, Art. 43. Georgia, Art. 61. The constitution of Pennsylvania, Art. 35, declares, "That the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature or any part of the government." And the bill of rights of Vermont, Art. 15, is to the same effect.

21. See the report of a committee of congress, respecting the alien and sedition laws, February 25, 1799.

22. See the report of a committee of congress, Feb. 25, 1799; and the answer of the senate and house of representatives of Massachusetts, (Feb. 9th. and 13th, 1799), to the communications from the state of Virginia, on the subject of the alien and sedition laws.

23. In the preceding sketch of the arguments used to demonstrate the unconstitutionality of the act of congress, I have extracted a few of those contained in the report of the committee of the house of delegates of Virginia, agreed to by the house, Jan. 11, 1800, and afterwards concurred in by the senate. This most valuable document is very long, and is incapable of being abridged, without manifest injury.

24. See the sessions acts of 1798, *ad finem*.

25. See the report of the committee, on this subject, agreed to in the home of delegates, Jan. 11, 1800.

26. See the letters from Messrs Marshall, Pinckney, and Gerry, to Mons. Talleyrand, minister of foreign affairs in France, 1798.

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NOTE H

On the State of Slavery in Virginia

IN the preceding inquiry into the absolute rights of the citizens of united America, we must not be understood as if those rights were equally and universally the privilege of all the inhabitants of the United States, or even of all those, who may challenge this land of freedom as their native country. Among the blessings which the Almighty has showered down on these states, there is a large portion of the bitterest draft that ever flowed from the cup of affliction. Whilst America has been the land of promise to Europeans, and their descendants, it has been the vale of death to millions of the wretched sons of Africa. The genial light of liberty, which has here shone with unrivaled luster on the former, has yielded no comfort to the latter, but to them has proved a pillar of darkness, whilst it has conducted the former to the most enviable state of human existence. Whilst we were offering up vows at the shrine of liberty, and sacrificing hecatombs upon her altars; whilst we swore irreconcilable hostility to her enemies, and hurled defiance in their faces; whilst we adjured the God of Hosts to witness our resolution to live free, or die, and imprecated curses on their heads who refused to unite with us in establishing the empire of freedom; we were imposing upon our fellow men, who differ in complection from us, a slavery, ten thousand times more cruel than the utmost extremity of those grievances and oppressions, of which we complained.

Such are the inconsistencies of human nature; such the blindness of those who pluck not the beam out of their own eyes, whilst they can espy a moat, in the eyes of their brother; such that partial system of morality which confines rights and injuries, to particular complections; such the effect of that self-love which justifies, or condemns, not according to principle, but to the agent. Had we turned our eyes inwardly when we supplicated the Father of Mercies to aid the injured and oppressed; when we invoked the Author of Righteousness to attest the purity of our motives, and the justice of our cause;[1] and implored the God of Battles to aid our exertions in it's defense, should we not have stood more self convicted than the contrite publican! Should we not have left our gift upon the altar, that we might be first reconciled to our brethren whom we held in bondage? should we not have loosed their chains, and broken their fetters? Or if the difficulties and dangers of such an experiment prohibited the attempt during the convulsions of a revolution, is it not our duty to embrace the first moment of constitutional health and vigor, to effectuate so desirable an object, and to remove from us a stigma, with which our enemies will never fail to upbraid us, nor our consciences to reproach us? To form a just estimate of this obligation, to demonstrate the incompatibility of a state of slavery with the principles of our government, and of that revolution upon which it is founded, and to elucidate the practicability of it's total, though gradual abolition, it will he proper to consider the nature of slavery, its properties, attendants, and consequences in general; it's rise, progress, and present state, not only in this commonwealth, but in such of our sister states as have either perfected, or commenced the great work of it's extirpation; with the means they have adopted to effect it, and those which the circumstances and situation of our country may render it most expedient for us to pursue, for the attainment of the same noble and important end.[2]

According to Justinian,[3] the first general division of persons, in respect to their rights, is into freemen and slaves. It is equally the glory and the happiness of that country from which the citizens of the United States derive their origin, that the traces of slavery, such as at present exists in several of the United States, are there utterly extinguished. It is not my design to enter into a minute inquiry whether it ever had existence there, nor to compare the situation of villeins, during the existence of pure villenage, with that of modern domestic slaves. The records of those times, at least such as have reached this quarter of the globe, are too few to throw a satisfactory light on the subject. Suffice it

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that our ancestors migrating hither brought not with them any prototype of that slavery which has been established among us. The first introduction of it into Virginia was by the arrival of a Dutch ship from the coast of Africa, having twenty negroes on board, who were sold here in the year 1620.[4] In the year 1638 we find them in Massachusetts.[5] They were introduced into Connecticut soon after the settlement of that colony; that is to say, about the same period.[6] Thus early had our forefathers sown the seeds of an evil, which, like a leprosy has descended upon their posterity with accumulated rancor, visiting the sins of the fathers upon succeeding generations. – The climate of the northern states less favorable to the constitution of the natives of Africa,[7] than the southern, proved alike unfavorable to their propagation, and to the increase of their numbers by importations. – As the southern colonies advanced in population, not only importations increased there, but nature herself, under a climate more congenial to the African constitution, assisted in multiplying the blacks in those parts, no less than in diminishing their numbers in the more rigorous climates of the north; this influence of climate moreover contributed extremely to increase or diminish the value of the slave to the purchasers, in the different colonies.

White laborers, whose constitutions were better adapted to the severe winters of the New England colonies, were there found to be preferable to the negroes,[8] who, accustomed to the influence of an ardent sun, became almost torpid in those countries, not less adapted to give vigor to their laborious exercises, than unfavorable to the multiplication of their species: in those colonies, where the winters were not only milder, and of shorter duration, but succeeded by an intense summer heat, as invigorating to the African, as debilitating to the European constitution, the negroes were not barely more capable of performing labor than the Europeans, or their descendants, but the multiplication of the species were at least equal; and, where they met with humane treatment, perhaps greater than among the whites. The purchaser, therefore, calculated not upon the value of the labor of his slave only, but, if a female, he regarded her as "the fruitful mother of an hundred more:" and many of these unfortunate people have there been in this state, whose descendants even in the compass of two or three generations have gone near to realize the calculation. – The great increase of slavery in the southern, in proportion to the northern states in the union, is, therefore, not attributable, solely, to the effect of sentiment, but to natural causes; as well as those considerations of profit, which have, perhaps, an equal influence over the conduct of mankind in general, in whatever country, or under whatever climate their destiny has placed them. What else but considerations of this nature could have Influenced the merchants of the freest nation, at that time, in the world, to embark in so nefarious a traffic, as that of the human race, attended, as the African slave trade has been, with the most atrocious aggravations of cruelty, perfidy, and intrigues, the objects of which have been the perpetual fomentation of predatory and intestine wars? What, but similar considerations, could prevail on the government of the same country, even in these days, to patronize a commerce so diametrically opposite to the generally received maxims of that government. It is to the operation of these considerations in the parent country, not less than to their influence in the colonies, that the rise, increase, and continuance of slavery in those British colonies which now constitute united America, are to be attributed, as I shall endeavor to show in the course of the present inquiry. It is now time to inquire into the nature of slavery, in general, and take a view of it's consequences, and attendants in this commonwealth, in particular.

Slavery, says a well informed writer[9] on the subject, has been attended with circumstances so various in different countries, as to render it difficult to give a general definition of it. – Justinian calls it a constitution of the law of nations, by which one man is made subject to another, contrary to nature.[10] Grotius describes it to be an obligation to serve another for life, in consideration of diet, and other common necessaries.[11] Dr. Rutherforth, rejecting this definition, informs us, that perfect

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slavery is an obligation to be directed by another in all one's actions.[12] Baron Montesquieu defines it to be the establishment of a right, which gives one man such a power over another, as renders him absolute master over his life and fortune.[13] These definitions appear not to embrace the subject fully, since they respect the condition of the slave, in regard to his master, only, and not in regard to the state, as well as the master. The author last mentioned, observes, that the constitution of a state may be free, and the subject not so. The subject free, and not the constitution of the state.[14] Pursuing this idea, instead of attempting a general definition of slavery; I shall, by considering it under a threefold aspect, endeavor to give a just idea of it's nature.

I. When a nation is, from any external cause, deprived of the right of being governed by it's own laws, only, such a nation may be considered as in a state of political slavery. Such is the state of conquered countries, and, generally, of colonies, and other dependant governments. Such was the state of united America before the revolution. In this case the personal rights of the subject may be so far secured by wholesome laws, as that the individual may be esteemed free, whilst the state is subject to a higher power: this subjection of one nation, or people, to the will of another, constitutes the first species of slavery, which, in order to distinguish it from the other two, I have called political; inasmuch as it exists only in respect to the governments, and not to the individuals of the two countries. Of this it is not our business to speak, at present.

II. Civil liberty, according to judge Blackstone, being no other than natural liberty so far restrained by human laws, and no farther, as is necessary and expedient for the general advantage of the public,[15] whenever that liberty is, by the laws of the state, further restrained than is necessary and expedient for the general advantage, a state of civil slavery commences immediately: this may affect the whole society, and every description of persons in it, and yet the constitution of the state be perfectly free. And this happens whenever the laws of a state respect the form, or energy of the government, more than the happiness of the citizen; as in Venice, where the most oppressive species of civil slavery exists, extending to every individual in the state, from the poorest gondolier to the members of the senate, and the doge himself.

This species of slavery also exists whenever there is an inequality of rights, or privileges, between the subjects or citizens of the same state, except such as necessarily results from the exercise of a public office, for the pre-eminence of one class of men must be founded and erected upon the depression of another; and the measure of exaltation in the former, is that of the slavery of the latter. In all governments, however constituted, or by what description soever denominated, wherever the distinction of rank prevails, or is admitted by the constitution, this species of slavery exists. It existed in every nation, and in every government in Europe before the French revolution. It existed in the American colonies before they became independent states; and notwithstanding the maxims of equality which have been adopted in their several constitutions, it exists in most, if not all, of them, at this day, in the persons of our free negroes and mulattoes; whose civil incapacities are almost as numerous as the civil rights of our free citizens. A brief enumeration of them, may not be improper before we proceed to the third head.

Free negroes and mulattoes are by our constitution excluded from the right of suffrage,[16] and by consequence, I apprehend, from office too: they were formerly incapable of serving in the militia, except as drummers or pioneers, but of late years I presume they were enrolled in the lists of those that bear arms,[17] though formerly punishable for presuming to appear at a muster-field.[18] During the revolutionary war many of them were enlisted as soldiers in the regular army. Even slaves were not rejected from military service at that period, and such as served faithfully during the period of their enlistment, were emancipated by an act passed after the conclusion of the war.[19] An act of justice

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to which they were entitled upon every principle. All but housekeepers, and persons residing upon the frontiers, are prohibited from keeping, or carrying any gun, powder, shot, club, or other weapon offensive or defensive:[20] Resistance to a white person, in any case, was, formerly, and now, in any case, except a wanton assault on the negro or mulatto, is punishable by whipping.[21] No negro or mulatto can be a witness in any prosecution, or civil suit in which a white person is a party.[22] Free negroes, together with slaves, were formerly denied the benefit of clergy in cases where it was allowed to white persons; but they are now upon an equal footing as to the allowance of clergy.[23] Emancipated negroes may be sold to pay the debts of their former master contracted before their emancipation; and they may be hired out to satisfy their taxes where no sufficient distress can be had. Their children are to be bound out apprentices by the overseers of the poor. Free negroes have all the advantages in capital cases, which white men are entitled to, except a trial by a jury of their own complection: and a slave suing for his freedom shall have the same privilege. Free negroes residing, or employed to labor in any town, must be registered; the same thing is required of such as go at large in any county. The penalty in both cases is a fine upon the person employing, or harboring them, and imprisonment of the negro.[24] The migration of free negroes or mulattoes to this state is also prohibited; and those who do migrate hither may be sent back to the place from whence they came.[25] Any person, not being a negro, having one-fourth or more negro blood in him, is deemed a mulatto. The law formerly made no other distinction between negroes and mulattoes, whether slaves or freemen. But now the act of 1796, c. 2, which abolishes the punishment of death, except in case of murder, in all cases where any free person may be convicted, creates a most important distinction in their favor; slaves not being entitled to the same benefit. These incapacities and disabilities are evidently the fruit of the third species of slavery, of which it remains to speak; or, rather, they are scions from the same common stock: which is,

III. That condition in which one man is subject to be directed by another in all his actions, and this constitutes a state of domestic slavery; to which state all the incapacities and disabilities of civil slavery are incident, with the weight of other numerous calamities superadded thereto. And here it may be proper to make a short inquiry into the origin and foundation of domestic slavery in other countries, previous to it's fatal introduction into this.

Slaves, says Justinian, are either born such or become so.[26] They are born slaves when they are children of bond women; and they become slaves, either by the law of nations, that is, by captivity; for it is the practice of our generals to sell their captives, being accustomed to preserve, and not to destroy them: or by the civil law, which happens when a free person, above the age of twenty, suffers himself to be sold for the sake of sharing the price given for him. The author of the Commentaries on the Laws of England thus combats the reasonableness of all these grounds:[27] "The conqueror," says he, "according to the civilians, had a right to the life of his captive; and having spared that, has a right to deal with him as he pleases. But it is an untrue position, when taken generally, that by the law of nature or nations, a man may kill his enemy: he has a right to kill him only in particular cases; in cases of absolute necessity for self-defense; and it is plain that this absolute necessity did not subsist, since the victor did not actually kill him, but made him prisoner. War itself is justifiable only on principles of self-preservation; and therefore it gives no other right over prisoners but merely to disable them from doing harm to us, by confining their persons; much less can it give a right to kill, torture, abuse, plunder, or even to enslave, an enemy, when the war is over. Since, therefore, the right of making slaves by captivity, depends on a supposed right of slaughter, that foundation failing, the consequence drawn from it must fail likewise. But, secondly, it is said slavery may begin *jure civili*; when one man sells himself to another. This, if only meant of contracts to serve, or work for, another, is very just: but when applied to strict slavery, in the

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sense of the laws of old Rome or modern Barbary, is also impossible. Every sale implies a price, a quid pro quo, an equivalent given to the seller, in lieu of what he transfers to the buyer; but what equivalent can be given for life and liberty, both of which, in absolute slavery, are held to be in the master's disposal? His property, also, the very price he seems to receive, devolves, ipso facto, to his master, the instant he becomes a slave. In this case, therefore, the buyer gives nothing, and the seller receives nothing: of what validity then can a sale be, which destroys the very principles upon which all sales are founded? Lastly we are told, that besides these two ways by which slaves are acquired, they may also be hereditary; "*servi nascuntur*;" the children of acquired slaves are, "*jure naturae*," by a negative kind of birthright, slaves also. – But this, being built on the two former rights, must fall together with them. If neither captivity, nor the sale of one's self, can by the law of nature and reason reduce the parent to slavery, much less can they reduce the offspring." Thus by the most clear, manly, and convincing reasoning does this excellent author refute every claim, upon which the practice of slavery is founded, or by which it has been supposed to be justified, at least, in modern times.[28] But were we even to admit, that a captive taken in a just war, might by his conqueror be reduced to a state of slavery, this could not justify the claim of Europeans to reduce the natives of Africa to that state: it is a melancholy, though well-known fact, that in order to furnish supplies of these unhappy people for the purposes of the slave trade, the Europeans have constantly, by the most insidious (I had almost said infernal) arts, fomented a kind of perpetual warfare among the ignorant and miserable people of Africa; and instances have not been wanting, where, by the most shameful breach of faith, they have trespassed and made slaves of the sellers as well as the sold.[29] That such horrid practices have been sanctioned by a civilized nation; that a nation ardent in the cause of liberty, and enjoying it's blessings in the fullest extent, can continue to vindicate a right established upon such a foundation; that a people who have declared, "That all men are by nature equally[30] free and independent," and have made this declaration the first article in the foundation of their government, should in defiance of so sacred a truth, recognized by themselves in so solemn a manner, and on so important an occasion, tolerate a practice incompatible therewith, is such an evidence of the weakness and inconsistency of human nature, as every man who has a spark of patriotic fire in his bosom must wish to see removed from his own country. If ever there was a cause, if ever an occasion, in which all hearts should be united, every nerve strained, and every power exerted, surely the restoration of human nature to it's unalienable right, is such. Whatever obstacles, therefore, may hitherto have retarded the attempt, he that can appreciate the honor and happiness of his country, will think it time that we should attempt to surmount them.

But how loudly soever reason, justice, and (may I not add) religion,[31] condemn the practice of slavery, it is acknowledged to have been very ancient, and almost universal. The Greeks, the Romans, and the ancient Germans also practiced it, as well as the more ancient Jews and Egyptians. By the Germans it was transmitted to the various kingdoms which arose in Europe out of the ruins of the Roman empire. In England it subsisted for some ages under the name of villeinage.[32] In Asia it seems to have been general, and in Africa universal, and so remains to this day: In Europe it has long since declined; it's first declension there, is said to have been in Spain, so early as the eighth century; and it is alleged to have been general about the middle of the fourteenth, and was near expiring in the sixteenth, when the discovery of the American continent, and the eastern and western coasts of Africa gave rise to the introduction of a new species of slavery. It took it's origin from the Portuguese, who, in order to supply the Spaniards with persons able to sustain the fatigue of cultivating their new possessions in America, particularly the islands, opened a trade between Africa and America for the sale of negroes, about the year 1508. The expedient of having slaves for labor was not long peculiar to the Spaniards, being afterwards adopted by other European colonies:[33] and

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though some attempts have been made to stop its progress in most of the United States, and several of them have the fairest prospects of success in attempting the extirpation of it, yet in others, it has taken such deep root, as to require the most strenuous exertions to eradicate it.

The first introduction of negroes into Virginia happened, as we have already mentioned, in the year 1620; from that period to the year 1662 there is no compilation of our laws, in print, now to be met with. In the revision made in that year, we find an act declaring that no Englishman, trader, or other, who shall bring in any Indians as servants and assign them over to any other, shall sell them for slaves, nor for any other time than English of like age should serve by act of assembly.[34] The succeeding session all children born in this country were declared to be bond, or free, according to the condition of the mother.[35] In 1667 it was declared, "That the conferring of baptism does not alter the condition of the person baptized, as to his bondage or freedom."[36] This was done, "that divers masters, freed from this doubt, may more carefully endeavor the propagating of Christianity, by permitting their slaves to be baptized." It would have been happy for this unfortunate race of men if the same tender regard for their bodies, had always manifested itself in our laws, as is shown for their souls in this act. But this was not the case; for two years after, we meet with an act, declaring, "That if any slave resist his master, or others, by his master's orders correcting him, and by the extremity of the correction should chance to die, such death should not be accounted felony: but the master or other person appointed by his master to punish him, be acquit from molestation: since it could not be presumed that prepensive malice, which alone makes murder felony, should induce any man to destroy his own estate."[37] This cruel and tyrannical act, was, at three different periods,[38] re-enacted, with very little alteration; and was not finally repealed till the year 1788[39] – above a century after it had first disgraced our code. In 1668 we meet with the first traces of emancipation, in an act which subjects negro women set free to the tax on titheables.[40] Two years after,[41] an act passed prohibiting Indians or negroes, manumitted, or otherwise set free, though baptized, from purchasing Christian servants.[42] From this act it is evident that Indians had before that time been made slaves, as well as negroes, though we have no traces of the original act by which they were reduced to that condition. An act of the same session recites that disputes had arisen whether Indians taken in war by any other nation, and by that nation sold to the English, are servants for life, or for a term of years; and declaring that all servants, not being Christians, imported into this country by shipping, shall be slaves for their life-time; but that what shall come by land, shall serve, if boys and girls, until thirty years of age; if men and women twelve years, and no longer. On a rupture with the Indians in the year 1679, it was, for the better encouragement of soldiers, declared that what Indian prisoners should be taken in war should be free purchase to the soldier taking them.[43] Three years after it was declared that all servants brought into this country by sea or land, not being Christians, whether negroes, Moors, mulattoes or Indians, except Turks and Moors in amity with Great Britain, and all Indians which should thereafter be sold by neighboring Indians, or any others trafficking with us, as slaves, should be slaves to all intents and purposes.[44] This act was re-enacted in the year 1705, and afterwards in 1753,[45] nearly in the same terms. In 1705 an act was made, authorizing a free and open trade for all persons, at all times, and at all places, with all Indians whatsoever.[46] On the authority of this act, the general court in April term 1787, decided that no Indians brought into Virginia since the passing thereof, nor their descendants, can be slaves in this commonwealth.[47] In October 1778, the general assembly passed the first act which occurs in our code for prohibiting the importation of slaves;[48] thereby declaring that no slave should thereafter be brought into this commonwealth by land, or by water; and that every slave imported contrary thereto, should upon such importation be free: with an exception as to such as might belong to persons migrating from the other states, or be claimed by descent, devise, or marriage, or be at that time the actual property

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of any citizen of this commonwealth, residing in any other of the United States, or belonging to travelers making a transient stay, and carrying their slaves away with them. – In 1785 this act unfortunately underwent some alteration, by declaring that slaves thereafter brought into this commonwealth, and kept therein, one whole year together, or so long at different times as shall amount to a year, shall be free. By this means the difficulty of proving the right to freedom will be not a little augmented: for the fact of the first importation, where the right to. freedom immediately ensued, might have been always proved without difficulty; but where a slave is subject to removal from place to place, and his right to freedom is postponed for so long a time as a whole year, or perhaps several years, the provisions in favor of liberty may be too easily evaded. The same act declares that no persons shall thenceforth be slaves in this commonwealth, except such as were so on the first day of that session (Oct. 17th, 1785,) and the descendants of the females of them. This act was re-enacted in the revisal made in 1792.[49] In 1793 an additional act passed, authorizing and requiring any justice of the peace having notice of the importation of any slaves, directly or indirectly, from any part of Africa or the West Indies, to cause such slave to be immediately apprehended and transported out of the commonwealth.[50] Such is the rise, progress, and present foundation of slavery in Virginia, so far as I have been able to trace it. The present number of slaves in Virginia, is immense, as appears by the census taken in 1791, amounting to no less than 292,427 souls: nearly two-fifths of the whole population of the commonwealth.[51] We may console ourselves with the hope that this proportion will not increase, the further importation of slaves being prohibited, whilst the free migrations of white people hither is encouraged. But this hope affords no other relief from the evil of slavery, than a diminution of those apprehensions which are naturally excited by the detention of so large a number of oppressed individuals among us, and the possibility that they may one day be roused to an attempt to shake off their chains.

Whatever inclination the first inhabitants of Virginia might have to encourage slavery, a disposition to check its progress, and increase, manifested itself in the legislature even before the close of the last century. So long ago as the year 1699 we find the title of an act,[52] laying an imposition upon servants and slaves, imported into this country; which was either continued, revived, or increased, by a variety of temporary acts, passed between that period and the revolution in 1776.[53] – One of these acts passed in 1723, by a marginal note appears to have been repealed by proclamation, Oct. 24, 1724. In 1732 a duty of five per cent. was laid on slaves imported, to be paid by the buyers; a measure calculated to render it as little obnoxious as possible to the English merchants trading to Africa, and not improbably suggested by them, to the privy council in England. The preamble to this act is in these remarkable words, "We your majesty's most dutiful and loyal subjects, etc. taking into our serious consideration the exigencies of your government here, and that the duty laid upon liquors will not be sufficient to defray the necessary expenses thereof, do humbly represent to your majesty, that no other duty can be laid upon our import or export, without oppressing your subjects, than a duty upon slaves imported, to be paid by the buyers, agreeable to your majesty's instructions to your lieutenant governor." This act was only for the short period of four years, but seems to have been continued from time to time till the year 1751, when the duty expired, but was revived the next year. In the year 1740 an additional duty of five per cent. was imposed for four years, for the purpose of an expedition against the Spaniards, etc. to be likewise paid by the buyers; and in 1743 the whole duty was continued till July 1, 1747. – The act of 1752, by which these duties were revived and continued (as well as several former acts,) takes notice that the duty had been found no ways burdensome to the traders in slaves. In 1754 an additional duty of five per cent. was imposed for the term of three years, by an act for encouraging and protecting the settlers on the Mississippi: this duty, like all the former, was to be paid by the buyers. In 1759 a duty of 20 per cent. was imposed

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upon all slaves Imported into Virginia from Maryland, North Carolina, or other places in America, to continue for seven years. In 1769 the same duty was further continued. In the same session the duty of five per cent. was continued for three years, and an additional duty of ten per cent. to be likewise paid by the buyers, was imposed for seven years; and a further duty of five per cent. was, by a separate act of the same session, imposed for the better support of the contingent charges of government, to be paid by the buyers. In 1772 all these duties were further continued for the term of five years from the expiration of the acts then in force: the assembly at the same time petitioned the throne,[54] to remove all those restraints which inhibited his majesty's governors assenting to such laws as might check so very pernicious a commerce, as that of slavery.

In the course of this inquiry it is easy to trace the desire of the legislature to put a stop to the further importation of slaves: and had not this desire been uniformly opposed on the part of the crown, it is highly probable that event would have taken effect at a much earlier period than it did. A duty of five per cent. to be paid by the buyers, at first, with difficulty, obtained the royal assent. Requisitions from the crown for aids, on particular occasions, afforded a pretext, from time to time, for increasing the duty from five, to ten, and finally to twenty per cent. with which the buyer was uniformly made chargeable. The wishes of the people of this colony, were not sufficient to counterbalance the interest of the English merchants, trading to Africa, and it is probable, that however disposed to put a atop to so infamous a traffic by law, we should never have been able to effect it, so long as we might have continued dependant on the British government: an object sufficient of itself to justify a revolution. That the legislature of Virginia were sincerely disposed to put a stop to it, cannot be doubted; for even during the tumult and confusion of the revolution, we have seen that they availed themselves of the earliest opportunity, to crush forever so pernicious and infamous a commerce, by an act passed in October 1778, the penalties of which, though apparently lessened by the act of 1792, are still equal to the value of the slave; being two hundred dollars upon the importer, and one hundred dollars upon every person buying or selling an imported slave.[55]

A system uniformly persisted in for nearly a whole century, and finally carried into effect, so soon as the legislature was unrestrained by "the inhuman exercise of the royal negative," evinces the sincerity of that disposition which the legislature had shown during so long a period, to put a check to the growing evil. From the time that the duty was raised above five per cent. it is probable that the importation of slaves into this colony decreased. The demand for them in the more southern colonies probably contributed also to lessen the numbers imported into this: for some years immediately preceding the revolution, the importation of slaves into Virginia might almost be considered as at an end; and probably would have been entirely so, if the ingenuity of the merchant had not found out the means of evading the heavy duty, by pretended sales, at which the slaves were bought in by some friend, at a quarter of their real value.

Tedious and unentertaining as this detail may appear to all others, a citizen of Virginia will feel some satisfaction in reading a vindication of his country, from the opprobrium, but too lavishly bestowed upon her of fostering slavery in her bosom, whilst she boasts a sacred regard to the liberty of her citizens, and of mankind in general. The acrimony of such censures must abate, at least in the breasts of the candid, upon an impartial review of the subject here brought before them; and if in addition to what we have already advanced, they consider the difficulties attendant on any plan for the abolition of slavery, in a country where so large a proportion of the inhabitants are slaves; and where a still larger proportion of the cultivators of the earth are of that description of men, they will probably feel emotions of sympathy and compassion, both for the slave and for his master, succeeded to those hasty prejudices, which even the best dispositions are not exempt from

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contracting, upon subjects where there is a deficiency of information.

We are next to consider the condition of slaves, in Virginia, or the legal consequences attendant on a state of slavery in this commonwealth; and here it is not my intention to notice those laws, which consider slaves, merely as property, and have, from time to time been enacted to regulate the disposition of them, as such: for these will be more properly considered, elsewhere: my intention, at present is, therefore, to take a view of such laws, only, as regard slaves, as a distinct class of persons, whose rights (if indeed they possess any), are reduced to a much narrower compass, than those, of which we have been speaking before.

Civil, or rather social rights, we may remember, are reducible to three primary heads; the right of personal security; the right of personal liberty; and the right of private property. In a state of slavery the two last are wholly abolished, the person of the slave being at the absolute disposal of his master; and property, what he is incapable, in that state, either of acquiring, or holding, to his own use. Hence it will appear how perfectly irreconcilable a state of slavery is to the principles of a democracy, which, form the basis and foundation of our government. For our bill of rights, declares, "that all men are, by nature equally free, and independent, and have certain rights of which they cannot deprive or divest their posterity – namely, the enjoyment of life and liberty, with the means of acquiring and possessing property." This is, indeed, no more than a recognition of the first principles of the law of nature, which teaches us this equality, and enjoins every man, whatever advantages he may possess over another, as to the various qualities or endowments of body or mind, to practice the precepts of the law of nature to those who are in these respects his inferiors, no less than it enjoins his inferiors to practice them towards him. Since he has no more right to insult them, than they have to injure him. Nor does the bare unkindness of nature, or of fortune condemn a man to a worse condition than others, as to the enjoyment of common privileges.[56] It would be hard to reconcile reducing the negroes to a state of slavery to these principles, unless we first degrade them below the rank of human beings, not only politically, but also physically and morally. – The Roman lawyers look upon those only properly as persons, who are free, putting slaves into the rank of goods and chattels; and the policy of our legislature, as well as the practice of slave-holders in America in general, seems conformable to that idea: but surely it is time we should admit the evidence of moral truth, and learn to regard them as our fellow men, and equals, except in those particulars where accident, or possibly nature, may have given us some advantage; a recompense, for which they, perhaps, enjoy in other respects.

Slavery, says Hargrave, always imports an obligation of perpetual service, which only the consent of the master can dissolve: it also generally gives to the master an arbitrary power of administering every sort of correction, however inhuman, not immediately affecting life or limb, and even these in some countries, as formerly in Rome, and at this day among the Asiatics and Africans, are left exposed to the arbitrary will of a master, or protected only by fines or other slight punishments. The property of the slave, also, is absolutely the property of his master, the slave, himself, being the subject of property, and as such saleable, or transmissible at the will of his master. – A slavery, so malignant as that here described, does not leave to it's wretched victims the least vestige of any civil right, and even divests them of all their natural rights. It does not, however, appear, that the rigors of slavery in this country, were ever as great, as those above described: yet it must be confessed, that, at times, they have fallen very little short of them.

The first severe law respecting slaves, now to be met with in our code, is that of 1669, already mentioned, which declared that the death of a slave resisting his master, or other person correcting him by his order, happening by the extremity of the correction, should not be accounted felony. The

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alterations, which this law underwent in three successive acts,[57] were by no means calculated effectually to mitigate its severity; it seems rather to have been augmented by the act of 1723, which declared that a person indicted for the murder of a slave, and found guilty of manslaughter, should not incur any punishment for the same.[58]

All these acts, were at length repealed in 1788.[59] So that homicide of a slave stands now upon the same footing, as in the case of any other person. In 1672 it was declared lawful for any person pursuing any runaway negro, mulatto, Indian slave, or servant for life, by virtue of an hue and cry, to kill them in case of resistance, without being questioned for the same.[60] A few years afterwards, this act was extended to persons employed to apprehend runaways.[61] In 1705, these acts underwent some small alterations; two justices being authorized by proclamation to outlaw runaways, who might, thereafter be killed and destroyed by any person, whatsoever, by such ways and means as he may think fit, without accusation or impeachment of any crime, for so doing.[62] And if any such slave were apprehended, he might be punished at the discretion of the county court, either by dismembering, or in any other manner not touching life. The inhuman rigor of this act was afterwards[63] extended to the venial offense of going abroad by night, if the slave was notoriously guilty of it. – Such are the cruelties to which a state of slavery gives birth; such the horrors to which the human mind is capable of being reconciled, by it's adoption. The dawn of humanity at length appeared in the year 1769, when the power of dismembering, even under the authority of a county court, was restricted to the single offense of attempting to ravish a white woman,[64] in which case, perhaps, the punishment is not more than commensurate to the crime. In 1772, some restraints were laid upon the practice of outlawing slaves, requiring that it should appear to the satisfaction of the justices that the slaves were out-lying and doing mischief.[65] The loose expressions of the act, left too much in the discretion of men, not much addicted to weighing their import. – In 1792, every thing relative to the outlawry of slaves was expunged from our code,[66] and I trust, will never again find a place in it. By the act of 1680, a negro, mulatto, or Indian bond or free, presuming to lift his hand in opposition to any Christian, should receive thirty lashes on his bare back for every offense.[67] The same act prohibited slaves from carrying any club, staff, gun, sword, or other weapon, offensive or defensive. This was afterwards extended to all negroes, mulattoes, and Indians, whatsoever, with a few exceptions in favor of housekeepers, residents on a frontier plantation, and such as were enlisted in the militia.[68] Slaves, by these and other acts,[69] are prohibited from going abroad without leave, in writing from their masters, and if they do, they may be whipped: any person suffering a slave to remain on his plantation for four hours together, or dealing with him without leave in writing from his master, is subject to a fine. A runaway slave may be apprehended and committed to jail and if not claimed within three months (being first advertised) he shall be hired out, having an iron collar first put about his neck: and if not claimed within a year, shall be sold.[70] – These provisions were, in general, re-enacted in 1792,[71] but the punishment to be inflicted on a negro or mulatto, for lifting his hand against a white person, is restricted to those cases, where the former is not wantonly assaulted. In this act the word Indian appears to have been designedly omitted: the small number of these people, or their descendants remaining among us, concurring with a more liberal way of thinking, probably gave occasion to this circumstance. The act of 1748, c. 31, made it felony without benefit of clergy for a slave to prepare, exhibit, or administer any medicine whatever, without the order or consent of the master: but allowed clergy, if it appeared that the medicine was not administered with an ill intent; the act of 1792, with more justice, directs that in such case he shall be acquitted.[72] – To consult, advise, or conspire, to rebel, or to plot, or conspire the death of any person whatsoever, is still felony without benefit of clergy in a slave.[73] – Riots, routs, unlawful assemblies, trespasses and seditious speeches by slaves, are punishable with stripes,

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at the discretion of a justice of the peace.[74] – The master of a slave permitting him to go at large and trade as a freeman, is subject to a fine;[75] and if he suffers the slave to hire himself out, the latter may be sold, and twenty-five percent. of the price be applied to the use of the county. – Negroes and mulattoes, whether slaves or not, are incapable of being witnesses, but against or between negroes and mulattoes; they are not permitted to intermarry with any white person; yet no punishment is annexed to the offense in the slave; nor is the marriage void; but the white person contracting the marriage, and the clergyman by whom it is celebrated are liable to fine and imprisonment; and this is probably the only instance in which our laws will be found more favorable to a negro than a white person. These provisions though introduced into our code at different periods, were all re-enacted in 1792.[76]

From this melancholy review it will appear that not only the right of property, and the right of personal liberty, but even the right of personal security, has been, at times either wholly annihilated, or reduced to a shadow: and even in these days, the protection of the latter seems to be confined to very few cases. Many actions, indifferent in themselves, being permitted by the law of nature to all mankind, and by the laws of society to all free persons, are either rendered highly criminal in a slave, or subject him to some kind of punishment or restraint. Nor is it in this respect only, that his condition is rendered thus deplorable by law. The measure of punishment for the same offense, is often, and the manner of trial and conviction is always different in the case of a slave, and a free-man. If the latter be accused of any crime, he is entitled to an examination before the court of the county where the offense is alleged to have been committed; whose decision, if in his favor, is held to be a legal and final acquittal, but it is not final if against him; for after this, both a grand jury and a petit jury of the country, must successively pronounce him guilty; the former by the concurrent voices of twelve at least, of their body, and the latter, by their unanimous verdict upon oath. He may take exception to the proceedings against him, by a motion in arrest of judgment; and in this case, or, if there be a special verdict, the same unanimity between his judges as between his jurors, is necessary to his condemnation. The title of an act occurs, which passed in the year 1705[77] for the speedy and easy prosecution of slaves committing capital crimes. In 1723[78] the governor was authorized, whenever any slave was committed for any capital offense, to issue a special commission of *oyer* and *terminer*, to such persons as he should think fit, the number being left to his discretion, who should thereupon proceed to the trial of such slave, taking for evidence the confession of the defendant, the oath of one or more credible witnesses, or such testimony of negroes, mulattoes, or Indians, tend or free, with pregnant circumstances, as to them should seem convincing, without the solemnity of a jury. No exception, formerly, could be taken to the proceedings, on the trial of a slave,[79] but that proviso is omitted in the act of 1792, and the justices moreover seem bound to allow him counsel for his defense, whose fee shall be paid by his master.[80] In case of conviction, execution of the sentence was probably very speedily performed, since the act of 1748, provides that, thereafter, it should not be per. formed in less than ten days, except in case of insurrection or rebellion; and further, that if the court be divided in opinion the accused should be acquitted. In 1764, an act passed, authorizing general, instead of special commissioners of *oyer* and *terminer*, constituting all the justices of any county, judges for the trial of slaves, committing capital offenses, within their respective counties; any four of whom, one being of the quorum, should constitute a court for that purpose. In 1772, one step further was made in favor of humanity, by an act declaring that no slave should thereafter be condemned to die unless four of the court should concur in opinion of his guilt.[81] The act of 1786, c. 58, confirmed by that of 1792, constitutes the justices of every county and corporation justices of *oyer* and *terminer* for the trial of slaves;[82] requires five justices, at least, to constitute a court, and unanimity in the court for his condemnation; allows him counsel

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for his defense, to be paid by his owner, and, I apprehend, admits him to object to the proceedings against him; and finally enlarges the time of execution to thirty days, instead of ten (except in cases of conspiracy, insurrection, or rebellion), and extends the benefit of clergy to him in all cases, where any other person should have the benefit thereof, except in the cases before mentioned.

To an attentive observer these gradual, and almost imperceptible amendments in our jurisprudence respecting slaves, will be found, upon the whole, of infinite importance to that unhappy race. The mode of trial in criminal cases especially, is rendered infinitely more beneficial to them, than formerly, though perhaps still liable to exception for want of the aid of a jury: the solemnity of an oath administered the moment the trial commences, may be considered as operating more forcibly on the mind, than a general oath of office, taken, perhaps, twenty years before. Unanimity may also be more readily expected to take place among five men, than among twelve. These objections to the want of a jury are not without weight: on the other band it may be deserved, that if the number of triers be not equal to a full jury, they may yet be considered as more select; a circumstance of infinitely greater importance to the slave. The unanimity requisite in the court in order to conviction, is a more happy acquisition to the accused, than may at first appear; the opinions of the court must be delivered openly, immediately, and seriatim, beginning with the youngest judge. A single voice in favor of the accused, is an acquittal; for unanimity is not necessary, as with a jury, to acquit, as well as to condemn: there is less danger in this mode of trial, where the suffrages are to be openly delivered, that a few will be brought over to the opinion of the majority, as may too often happen among jurors, whose deliberations are in private, and whose impatience of confinement may go further than real conviction, to produce the requisite unanimity. That this happens not unfrequently in civil cases, there is too much reason to believe; that it may also happen in criminal cases, especially where the party accused is not one of their equals, might, not unreasonably, be apprehended. In New York, before the revolution, a slave accused of a capital crime, should have been tried by a jury if his master required it. This is, perhaps, still the law of that state. Such a provision might not be amiss, in this; but considering the ordinary run of juries in the county-courts, I should presume the privilege would be rarely insisted upon.

Slaves, we have seen, are now entitled to the benefit of clergy in all cases where it was allowed to any other offenders, except in cases of consulting, advising, or conspiring to rebel, or make insurrection; or plotting, or conspiring to murder any person: or preparing, exhibiting, or administering medicine with an ill intent. The same lenity was not extended to them formerly. The act of 1748, c. 31, denied it to a slave in case of manslaughter; or the felonious breaking and entering any house in the night time: or breaking and entering any house in the day time, and taking therefrom goods to the value of twenty shillings. The act of 1764, c. 9, extended the benefit of clergy, to a slave convicted of the manslaughter of a slave: and the act of 1772, c. 9, extended it further, to a slave convicted of house. breaking in the night time, unless such breaking be burglary; in the latter case, other offenders would be equally deprived of it. But wherever the benefit of clergy is allowed to a slave, the court, besides burning him in the hand (the usual punishment inflicted on free persons) may inflict such further corporal punishment as they may think fit;[83] this also seems to have been the law in the case of free negroes and mulattoes.

By the act of 1723, c. 4, it was enacted, that when any negro or mulatto shall be found, upon due proof made, or pregnant circumstances, to have given false testimony, every such offender shall, without further trial, have his ears successively nailed to the pillory for the space of an hour, and then cut off, and moreover receive thirty-nine lashes on his bare back, or such other punishment as the court shall think proper, not extending to life or limb. This act, with the exception of the words

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pregnant circumstances, was re-enacted in 1792. The punishment of perjury, in a white person, is only a fine and imprisonment. A slave convicted of hog-stealing, shall, for the first offense, receive thirty-nine lashes: any other person twenty-five: but the latter is also subject to a fine of thirty dollars, besides paying eight dollars to the owner of the hog. The punishment for the second and third offense, of this kind, is the same in the case of a free person, as of a slave, namely, by the pillory and loss of ears, for the second offense; the third is declared felony, to which clergy is, however, allowed. The preceding were, until lately, the only positive distinctions which remained between the punishment of a slave, and a white person, in those cases, where the latter is liable to a determinate corporal punishment.[84]

But we must not forget, that many actions, which are either not punishable at all, when perpetrated by a white person, or at most, by fine and imprisonment, only, are liable to severe corporal punishment, when done by a slave; nay, even to death itself, in some cases. To go abroad without a written permission; to keep or carry a gun, or other weapon; to utter any seditious speech; to be present at any unlawful assembly of slaves; to lift the hand in opposition to a white person, unless wantonly assaulted, are all offenses punishable by whipping.[85] To attempt the chastity of a white woman, forcibly, is punishable by dismemberment: such an attempt would be a high misdemeanor in a white free man, but the punishment would be far short of that of a slave.[86] To administer medicine without the order and consent of the master, unless it appear not to have been done with an ill intent, to consult, advise, or conspire, to rebel or make insurrection; or to conspire, or plot to murder any person, we have seen, are all capital offenses, from which the benefit of clergy is utterly excluded. But a bare intention to commit a felony, is not punishable in the case of a free white man; and even the attempt, if not attended with an actual breach of the peace, or prevented by such circumstances, only, as do not tend to lessen the guilt of the offender, is at most a misdemeanor by the common law: and in statutable offenses in general, to consult, advise, and even to procure any person to commit a felony, does not constitute the crime of felony in the adviser or procurer, unless the felony be actually perpetrated.

From this view of our jurisprudence respecting slaves, we are unavoidably led to remark, how frequently the laws of nature have been set aside in favor of institutions, the pure result of prejudice, usurpation, and tyranny. We have found actions, innocent, or indifferent, punishable with a rigor scarcely due to any, but the most atrocious, offenses against civil society; justice distributed by an unequal measure to the master and the slave; and even the hand of mercy arrested, where mercy might have been extended to the wretched culprit, had his complection been the same with that of his judges; for, the short period of fen days, between his condemnation and execution, was often insufficient to obtain a pardon for a slave, convicted in a remote part of the country, whilst a free man, condemned at the seat of government, and tried before the governor himself, in whom the power of pardoning was vested, had a respite of thirty days to implore the clemency of the executive authority. It may be urged, and I believe with truth, that these rigors do not proceed from a sanguinary temper in the people of Virginia, but from those political considerations indispensably necessary, where slavery prevails to any great extent: I am moreover happy to observe that our police respecting this unhappy class of people, is not only less rigorous than formerly, but perhaps milder than in other countries[87] where there are so many slaves, or so large a proportion of them, in respect to the free inhabitants: it is also, I trust, unjust to censure the present generation for the existence of slavery in Virginia: for I think it unquestionably true, that a very large proportion of our fellow-citizens lament that as a misfortune, which is imputed to them as a reproach; it being evident from what has been already shown upon the subject, that, antecedent to the revolution, no exertion to abolish, or even to check the progress of slavery in Virginia, could have received the smallest

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countenance from the crown, without whose assent the united wishes and exertions of every individual here, would have been wholly fruitless and ineffectual: it is, perhaps, also demonstrable, that at no period since the revolution, could the abolition of slavery in this state have been safely undertaken, until the foundations of our newly established governments had been found capable of supporting the fabric itself, under any shock, which so arduous an attempt might have produced. But these obstacles being now happily removed, considerations of policy, as well as justice and humanity, must evince the necessity of eradicating the evil, before it becomes impossible to do it, without tearing up the roots of civil society with it.

Having, in the preceding part of this inquiry, shown the origin and foundation of slavery, or the manner in which men have become slaves, as also who are liable to be retained in slavery, in Virginia, at present, with the legal consequences attendant upon their condition; it only remains to consider the mode by which slaves have been, or may be, emancipated; and the legal consequences thereof, in this state. – Manumission, among the Israelites, if the bondman were an Hebrew, was enjoined after six year's service, by the Mosaical law, unless the servant chose to, continue with his master, in which case the master carried him before the Judges, and took an awl, and thrust it through his ear into the door,[88] and from thenceforth he became a servant for ever: but if he sent him away free, he was bound to furnish him liberally out of his flock, and out of his floor, and out of his wine-press.[89] Among the Romans, in the time of the commonwealth, liberty could be conferred only three ways. By testament, by the census, and by the *vindicta*, or lictor's rod. A man was said to be free by the census, "*liber censu*," when his name was inserted in the censor's roll, with the approbation of his master. When he was freed by the vindicta, the master placing his hand upon the head of the slave, said in the presence of the praetor, it is my desire that this man may be free, "*hunc hominem liberum esse volo*;" to which the praetor replied, pronounce him free after the manner of the Romans, "*dico cum liberum esse more quiritum*." – Then the lictor, receiving the vindicta, struck the new freed man several blows with it upon the head, face, and back, after which his name was registered in the roll of freed-men, and his head being close shaved, a cap was given him as a token of liberty.[90]

Under the imperial constitutions liberty might have been conferred by several other methods, as in the face of the church, in the presence of friends, or by letter, or by testament.[91] – But it was not in the power of every master to manumit at will; for if it were done with an intent to defraud creditors, the act was void: that is, if the master were insolvent at the time of manumission, or became insolvent by manumission, and intentionally manumitted his slave for the purpose of defrauding his creditors. A minor, under the age of twenty years, could not manumit his slave but for a just cause assigned, which must have been approved by a council, consisting of the praetor, five senator's, and five knights.[92] – In England, the mode of enfranchising villeins is said to have been thus prescribed by a law of William the Conqueror. "If any person is willing to enfranchise his slave, let him, with his right hand, deliver the slave to the sheriff in a full county, proclaim him exempt from the bond of servitude by manumission, show him open gates and ways, and deliver him free arms, to wit, a lance and a sword; thereupon he is a free man."[93] – But after that period freedom was more generally conferred by deed, of which Mr. Harris, in his notes upon Justinian, has furnished a precedent.

In what manner manumission was performed in this country during the first century after the introduction of slavery does not appear: the act of 1668, before mentioned,[94] shows it to have been practiced before that period. In 1723, an act passed, prohibiting the manumission of slaves, upon any pretense whatsoever, except for meritorious services, to be adjudged, and allowed by the governor and council.[95] This clause was re-enacted in 1748, and continued to be the law, until after the

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revolution was accomplished. The number of manumissions under such restrictions must necessarily have been very few. In May, 1782 an act passed, authorizing, generally, the manumission of slaves, but requiring such as might be set free, not being of sound mind or body, or being above the age of forty-five years, or males under twenty-one, or females under eighteen, to be supported by the person liberating them, or out of his estate.[96]

The act of manumission may be performed either by will, or by deed, under the hand and seal of the party, acknowledged by him, or proved by two witnesses in the court of the county where he resides. There is reason to believe that great numbers have been emancipated since the passing of this act. By the census of 1791, it appears, that the number of free negroes, mulattoes, and Indians, in Virginia, was then 12,866. It would be a large allowance, to suppose that there were 2800 free negroes and mulattoes, in Virginia, when the act took effect; so that upwards of ten thousand must have been indebted to it for their freedom.[97] The number of Indians and their descendants in Virginia, at present, is too small to require particular notice. The progress of emancipation in Virginia, is at this time continual, but not rapid. The act passed in 1792, accords, in some degree with the Justinian code,[98] by providing that slaves emancipated may be taken in execution to satisfy any debt contracted by the person emancipating them, before such emancipation is made.[99]

Among the Romans, the *libertini*, or freedmen, were formerly distinguished by a threefold division.[100] They, sometimes obtained what was called the greater liberty, thereby becoming Roman citizens. To this privilege, those who were enfranchised by testament, by the census, or by the vindicta, appear to have been alone admitted: sometimes they obtained the lesser liberty only, and became Latins; whose condition is thus described by Justinian: "They never enjoyed the right of succession [to estates]. – For although they led the lives of free men, yet, with their last breath they lost both their lives and liberties; for their possessions, like the goods of slaves, were detained by the *manumittor*."[101] Sometimes they obtained only the inferior liberty, being called *dedititii*: such were slaves who had been condemned as criminals, and afterwards obtained manumission, through the indulgence of their masters: their condition was equaled with that of conquered revolters, whom the Romans called, in reproach, *dedititii, quia se suaque omnia dediderunt*: but all these distinctions were abolished by Justinian,[102] by whom all freed men in general, were made citizens of Rome, without regard to the form of manumission.

In England, the presenting the villein with free arms, seems to have been the symbol of his restoration to ail the rights which a feudatory was entitled to. With us, we have seen that emancipation does not confer the rights of citizenship on the person emancipated; on the contrary, both he, and his posterity, of the same complection with himself, must always labor under many civil incapacities. If he is absolved from personal restraint, or corporal punishment, by a master, yet the laws impose a restraint upon his actions in many instances, where there is none upon a free white man. If he can maintain a suit, he cannot be a witness, a juror, or a judge in any controversy between one of his own complection and a white person. If he can acquire property in lands, he cannot exercise the right of suffrage, which such a property would confer on his former master; much less can he assist in making those laws by which he is bound. Yet, even under these disabilities, his present condition bears an enviable pre-eminence over his former state. Possessing the liberty of loco-motion, which was formerly denied him, it is in his choice to submit to that civil inferiority, inseparably attached to his condition in this country, or seek some more favorable climate, where all distinctions between men are either totally abolished, or less regarded than in this.

The extirpation of slavery from the United States, is a task equally arduous and momentous. To restore the blessings of liberty to near a million[103] of oppressed individuals, who have groaned under

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the yoke of bondage, and to their descendants, is an object, which those who trust in Providence, will be convinced would not be unaided by the Divine Author of our being, should we invoke his blessing upon our endeavors. Yet human prudence forbids that we should precipitately engage in a work of such hazard as a general and simultaneous emancipation. The mind of a man must in some measure be formed for his future condition. The early impressions of obedience and submission, which slaves have received among us, and the no less habitual arrogance and assumption of superiority, among the whites, contribute, equally, to unfit the former for freedom, and the latter for equality.[104] To expel them all at once from the United States, would, in fact, be to devote them only to a lingering death by famine by disease, and other accumulated miseries: "We have in history but one picture of a similar enterprise, and there we see it was necessary not only to open the sea by a miracle, for them to pass, but more necessary to close it again to prevent their return."[105]

To retain them among us, would be nothing more than to throw so many of the human race upon the earth without the means of subsistence: they would soon become idle, profligate, and miserable. Unfit for their new condition, and unwilling to return to their former laborious course, they would become the caterpillars of the earth, and the tigers of the human race. The recent history of the French West Indies exhibits the melancholy picture of the probable consequences of a general, and momentary emancipation in any of the states, where slavery has made considerable progress. In Massachusetts the abolition of it was effected by a single stroke; a clause in their constitution:[106] but the whites at that time were as sixty-five to one, in proportion to the blacks. The whole number of free persons in the United States, south of Delaware state, are 1,233,829, and there are 648,439 slaves; the proportion being less than two to one. Of the cultivators of the earth in the same district, it is probable that there are four slaves for one free white man. – To discharge the former from their present condition, would be attended with an immediate general famine, in those parts of the United States, from which, not all the productions of the other states, could deliver them; similar evils might reasonably be apprehended from the adoption of the measure by any one of the southern states: for in all of them the proportion of slaves is too great, not to be attended with calamitous effects, if they were immediately set free.[107] –

These are serious, I had almost said unsurmountable obstacles, to a general, simultaneous emancipation. There are other considerations not to be disregarded. A great part of the property of individuals consists in slaves. The laws have sanctioned this species of property. Can the laws take away the property of an individual without his own consent, or without a just compensation? Will those who do not hold slaves agree to be taxed to make this compensation? Creditors also, who have trusted their debtors upon the faith of this visible property, will be defrauded, If justice demands the emancipation of the slave, she also, under these circumstances, seems to plead for the owner, and for his creditor. The claims of nature, it will be said are stronger than those which arise from social institutions, only. I admit it, but nature also dictates to us to provide for our own safety, and authorizes all necessary measures for that purpose. And we have shown that our own security, nay, our very existence, might be endangered by the hasty adoption of any measure for the immediate relief of the whole of this unhappy race. Must we then quit the subject, in despair of the success of any project for the amendment of their, as well as our own, condition? I think not. – Strenuously as I feel my mind opposed to a simultaneous emancipation, for the reasons already mentioned, the abolition of slavery in the United States, and especially in that state, to which I am attached by every tie that nature and society form, is now my first, and will probably be my last, expiring wish.

But here let me avoid the imputation of inconsistency, by observing, that the abolition of slavery may be effected without the emancipation of a single slave; without depriving any man of the

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property which he possesses, and without defrauding a creditor who has trusted him on the faith of that property. The experiment in that mode has already been begun in some of our sister states. Pennsylvania, under the auspices of the immortal Franklin,[108] begun the work of gradual abolition of slavery in the year 1780, by enlisting nature herself, on the side of humanity. Connecticut followed the example four years after.[109] New York very lately made an essay which miscarried, by a very inconsiderable majority. Mr. Jefferson informs us, that the committee of revisors, of which he was a member, had prepared a bill for the emancipation of all slaves born after the passing that act. This is conformable to the Pennsylvania and Connecticut laws. – Why the measure was not brought forward in the general assembly I have never heard. Possibly because objections were foreseen to that part of the bill which relates to the disposal of the blacks, after they had attained a certain age.[110] It certainly seems liable to many, both as to the policy and the practicability of it.

To establish such a colony in the territory of the United States, would probably lay the foundation of intestine wars, which would terminate only in their extirpation, or final expulsion. To attempt it in any other quarter of the globe would be attended with the utmost cruelty to the colonists, themselves, and the destruction of their whole race. If the plan were at this moment in operation, it would require the annual exportation of 12,000 persons. This requisite number must, for a series of years be considerably increased, in order to keep pace with the increasing population of those people. In twenty years it would amount to upwards of twenty thousand persons; which is near half the number which are now supposed to be annually exported from Africa. – Where would a fund to support this expense be found? Five times the present revenue of the state would barely defray the charge of their passage. Where provisions for their support after their arrival? Where those necessaries which must preserve them from perishing? – Where a territory sufficient to support them? – Or where could they be received as friends, and not as invaders?

To colonize them in the United States might seem less difficult. If the territory to be assigned them were beyond the settlements of the whites, would they not be put upon a forlorn hope against the Indians;[111] would not the expense of transporting them thither, and supporting them, at least for the first and second years, be also far beyond the revenues and abilities of the state? The expense attending a small army in that country has been found enormous. To transport as many colonists, annually, as we have shown, were necessary to eradicate the evil, would probably require five times as much money as the support of such an army. But the expense would not stop there: they must be assisted and supported at least for another year after their arrival in their new settlements. Suppose them arrived, illiterate and ignorant as they are, is it probable that they would be capable of instituting such a government, in their new colony, as would be necessary for their own internal happiness, or to secure them from destruction from without? European emigrants, from whatever country they arrive, have been accustomed to the restraint of laws, and to respect for government. These people, accustomed to be ruled with a rod of iron, will not easily submit to milder restraints. They would become hordes of vagabonds, robbers and murderers. Without the aids of an enlightened policy, morality, or religion, what else could be expected from their still savage state, and debased condition? –

"But why not retain and "incorporate the blacks into the state?" This question has been well answered by Mr. Jefferson,[112] and who is there so free from prejudices among us, as candidly to declare that he has none against such a measure? The recent scenes transacted in the French colonies in the West Indies are enough to make one shudder with the apprehension of realizing similar calamities in this country. Such probably would be the event of an attempt to smother those prejudices which have been cherished for a period of almost two centuries. Many persons who regret

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domestic slavery, contend that in abolishing it, we must also abolish that scion from it, which I have denominated civil slavery. That there must be no distinction of rights; that the descendants of Africans, as men, have an equal claim to all civil rights, as the descendants of Europeans; and upon being delivered from the yoke of bondage have a right to be admitted to all the privileges of a citizen. – But have not men when they enter into a state of society, a right to admit, or exclude any description of persons, as they think proper? If it be true, as Mr. Jefferson seems to suppose, that the Africans are really an inferior race of mankind,[113] will not sound policy advise their exclusion from a society in which they have not yet been admitted to participate in civil rights; and even to guard against such admission, at any future period, since it may eventually depreciate the whole national character?

And if prejudices have taken such deep root in our minds, as to render it impossible to eradicate this opinion, ought not so general an error, if it be one, to be respected? Shall we not relieve the necessities of the naked diseased beggar, unless we will invite him to a seat at our table; nor afford him shelter from the inclemencies of the night air, unless we admit him also to share our bed! To deny that we ought to abolish slavery, without incorporating the Negroes into the state, and admitting them to a full participation of all our civil and social rights, appears to me to rest upon a similar foundation. The experiment so far as it has been already made among us, proves that the emancipated blacks are not ambitious of civil rights. To prevent the generation of such an ambition, appears to comport with sound policy; for if it should ever rear its head, its partisans, as well as its opponents, will be enlisted by nature herself, and always ranged in formidable array against each other.[114] We must therefore endeavor to find some middle course, between the tyrannical and iniquitous policy which holds so many human creatures in a state of grievous bondage, and that which would turn loose a numerous, starving, and enraged *banditti*, upon the innocent descendants of their former oppressors. Nature, time and sound policy must co-operate with each other to produce, such a change: if either be neglected, the work will be incomplete, dangerous, and not improbably destructive.

The plan therefore which I would presume to propose for the consideration of my countrymen is such, as the number of slaves, the difference of their nature, and habits, and the state of agriculture, among us, might render it expedient, rather than desirable to adopt: and would partake partly of that proposed by Mr. Jefferson, and adopted in other states; and partly of such cautionary restrictions, as a due regard to situation and circumstances, and even to general prejudices, might recommend to those, who engage in so arduous, and perhaps unprecedented an undertaking.

1. Let every female born after the adoption of the plan, be free, and transmit freedom to all the descendants, both male and female.

2. As a compensation to those persons, in whose families such females, or their descendants may be born, for the expense and trouble of their maintenance during infancy, let them serve such persons until the age of twenty-eight years: let them then receive twenty dollars in money, two suits of clothes, suited to the season, a hat, a pair of shoes, and two blankets. If these things be not voluntarily done, let the county courts enforce the performance, upon complaint.

3. Let all negro children be registered with the clerk of the county or corporation court, where born, within one month after their birth: let the person in whose family they are born, take a copy of the register, and deliver it to the mother, or if she die, to the child, before it is of the age of twenty-one years. Let any negro claiming to be free, and above the age of puberty, be considered as of the age of twenty-eight years, if he or she be not registered as required.

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4. Let all the negro servants be put on the same footing as white servants and apprentices now are, in respect to food, raiment, correction, and the assignment of their service from one to another.

5. Let the children of negroes and mulattoes, born in the families of their parents, be bound to service by the overseers of the poor, until they shall attain the age of twenty-one years. Let all above that age, who are not house-keepers, nor have voluntarily bound themselves to service for a year before the first day of February annually, be then bound for the remainder of the year by the overseers of the poor. To stimulate the overseers of the poor to perform their duty, let them receive fifteen per cent. of their wages, from the person hiring them, as a compensation for their trouble, and ten per cent. per annum out of the wages of such as they may bind apprentices.

6. If at the age of twenty-seven years, the master of a negro or mulatto servant be unwilling to pay his freedom dues, above mentioned, at the expiration of the succeeding year, let him bring him into the county court, clad and furnished with necessaries as before directed, and pay into court five dollars, for the servant, and thereupon let the court direct him to be hired by the overseers of the poor for the succeeding year, in the manner before directed.

7. Let no negro or mulatto be capable of taking, holding, or exercising, any public office, freehold, franchise, or privilege,[115] or any estate in lands or tenements, other than a lease not exceeding twenty-one years. – Nor of keeping, or bearing arms,[116] unless authorized so to do by some act of the general assembly, whose duration shall be limited to three years. Nor of contracting matrimony with any other than a negro or mulatto; nor be an attorney; nor be a juror; nor a witness in any court of judicature, except against, or between negroes. and mulattoes. Nor be an executor or administrator; nor capable of making any will or testament; nor maintain any real action; nor be a trustee of lands or tenements himself, nor any other person to be a trustee to him or to his use.

8. Let all persons born after the passing of the act, be considered as entitled to the same mode of trial in criminal cases, as free negroes and mulattoes are now entitled to.

The restrictions in this plan may appear to savor strongly of prejudice: whoever proposes any plan for the abolition of slavery must either encounter, or accommodate himself, to prejudice. – I have preferred the latter; not that I pretend to be wholly exempt from it, but that I might avoid as many obstacles as possible to the completion of so desirable a work, as the abolition of slavery.[117] Though I am opposed to the banishment of the negroes, I wish not to encourage their future residence among us. By denying them the most valuable privileges which civil government affords, I wish to render it their inclination and their interest to seek those privileges in some other climate. There is an immense unsettled territory on this continent[118] more congenial to their natural constitutions than ours, where they may perhaps be received upon more favorable terms than we can permit them to remain with us. Emigrating in small numbers, they will be able to effect settlements more easily than in large numbers; and without the expense or danger of numerous colonies. By releasing them from the yoke of bondage, and enabling them to seek happiness wherever they can hope to find it, we surely confer a benefit, which no one can sufficiently appreciate, who has not tasted of the bitter curse of compulsory servitude. By excluding them from offices, we may hope that the seeds of ambition would be buried too deep, ever to germinate: by disarming them, we may calm our apprehensions of their resentments arising from past sufferings; by incapacitating them from holding lands, we should add one inducement more to emigration, and effectually remove the foundation of ambition, and party-struggles. Their personal rights, and their property, though limited, would, whilst they remain among us, be under the protection of the laws; and their condition not at all inferior to that of the laboring poor in most other countries. Under such an arrangement we might

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reasonably hope, that time would either remove from us a race of men, whom we wish not to incorporate with us, or obliterate those prejudices, which now form an obstacle to such incorporation.

To such as apprehend danger to our agricultural interest, and the depriving the families of those whose principal reliance is upon their slaves, of support, it will be proper to submit a view of the gradual operation, and effects of this plan. They will, no doubt, be surprised to hear, that, whenever it is adopted, the number of slaves will not be diminished for forty years after it takes place; that it will even increase for thirty years; that at the distance of sixty years, there will be one-third of the number at it's first commencement: that it will require above a century to complete it; and that the number of blacks under twenty-eight and consequently bound to service, in the families they are born in, will always be at least as great, as the present number of slaves. These circumstances, I trust, will remove many objections, and that they are truly stated will appear upon inquiry.[119] It will be the case in every well ordered society, and where the numbers of persons without property increase, there the coercion of the laws becomes more immediately requisite. The proposed plan would necessarily have this effect, and, therefore, ought to be accompanied with such a regulation. Though the rigors of our police in respect to this unhappy race ought to be softened, yet, its regularity, and punctual administration should be increased, rather than relaxed. If we doubt the propriety of such measures, what must we think of the situation of our country, when instead of 300,000, we shall have more than two millions of SLAVES among us? This must happen within a CENTURY, if we do not set about the abolition of slavery. Will not our posterity curse the days of their nativity with all the anguish of Job? Will they not execrate the memory of those ancestors, who, having it in their power to avert evil, have, like their first parents, entailed a curse upon all future generations? We know that the rigor of the laws respecting slaves unavoidably must increase with their numbers: What a blood-stained code must that be which is calculated for the restraint of millions held in bondage! Such must our unhappy country exhibit within a century, unless we are both wise and just enough to avert from posterity the calamity and reproach, which are otherwise unavoidable.[120]

I am not vain enough to presume the plan I have suggested, entirely free from objection: nor that, in offering my own ideas on the subject, I have been more fortunate than others: but from the communication of sentiment between those who lament the evil, it is possible that an effectual remedy may at length be discovered. Whenever that happens the golden age of our country will begin. Till then,

– – *Non hospes ab hospite tutus, Non Herus a Famulis: fratrum quoque gratia rara.*

NOTES

1. The American standard, at the commencement of those hostilities which terminated in the revolution, had these words upon it. – AN APPEAL TO HEAVEN!

2. The Editor here takes the liberty of making his acknowledgments to the reverend Jeremiah Belknap, D. D. of Boston, and to Zephaniah Swift, Esq. representative in Congress from Connecticut, for their obliging communications; he has occasionally made use of them in several parts of this Lecture, where he may have omitted referring to them.

3. Lib. 1. Tit. 2.

4. Stith 182.

5. Dr. Belknap's Answers to St. G. T.'s queries

6. Letter from Zephaniah Swift to St. G. T.

7. Dr. Belknap, Zephan. Swift

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8. Ibid.

9. Hargrave's case of negro Somerset.

10. Lib. 1, Tit. 3. Sec. 3.

11. Lib. 2. c. 5, Sec. 27.

12. Lib. 1. c. 20. p. 474.

13. Lib. 15, c. 1.

14. Lib. 12. c. 1.

15. Blacks. Com. 125. I should rather incline to think this definition of civil liberty more applicable to social liberty, for reasons mentioned in a note, page 145, Vol. I. of Blackstone's Commentaries.

16. The constitution of Virginia, Art. 7, declares, that the right of suffrage shall remain as then exercised: the act of 1723, c. 4, (Edi. 1733,) Sec. 23, declared, that no negro, mulatto, or Indian, shall have any vote at the election of burgesses, or any other election whatsoever. This act, it is presumed, was in force at the adoption of the constitution. The act of 1785, c. 55, (Edi. of 1794, c. 17,) also expressly excludes them from the right of suffrage.

17. This was the case under the laws of the state; but the act of 2 Cong. c. 33, for establishing an uniform militia throughout the United States, seems to have excluded all but free white men from bearing arms in the militia.

18. 1723, c. 2.

19. Oct. 1783, c. 3.

20. 1748, c. 31. Edi. 1794.

21. Ibid. c. 103.

22. 1794, c. 141.

23. 1794, c. 103.

24. 1794, c. 163.

25. 1794, c. 164.

26. Inst. lib. 1. tit. 1.

27. 1 b. c. 423.

28. These arguments are, in fact, borrowed from the Spirit of Laws. Lib. xv. c. 2.

29. "About the same time (the reign of queen Elizabeth) a traffic in the human species, called negroes, was introduced into England, which is one of the most odious and unnatural branches of trade the sordid and avaricious mind of mortals ever invented. – It had been carried on before this period by Genoese traders, who bought a patent from Charles the fifth, containing an exclusive right of carrying negroes from the Portuguese settlements in Africa, to America and the West-Indies; but the English nation had not yet engaged in the iniquitous traffic. – One William Hawkins, an expert English seaman, having made several voyages to the coast of Guinea, and from thence to Brazil and the West-Indies, had acquired considerable knowledge of these countries. At his death he left his journals with his son, John Hawkins, in which he described the lands of America and the West-Indies as exceedingly rich and fertile, but utterly neglected for want of hands to improve them. He represented the natives of Europe as unequal to the task in such a scorching climate; but those of Africa as well adapted to undergo the labors requisite. Upon which John Hawkins immediately formed a design of transporting Africans into the western world; and having drawn a plan for the execution of it, he laid it before some of his opulent neighbors for encouragement and approbation. To them it appeared promising and advantageous. A subscription was opened and speedily filled up, by Sir Lionel Ducket, Sir Thomas Lodge, Sir William Winter, and others, who plainly perceived the vast profits that would result from such a trade. Accordingly three ships were fitted out, and manned by an hundred select sailors, whom Hawkins encouraged to go with him by promises of good treatment and great pay. In the year 1562 he set sail for Africa, and in a few weeks arrived at the country called Sierra Leona, where he began his commerce with the negroes. While he

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> trafficked with them, he found the means of giving them a charming description of the country to which he was bound; the unsuspicious Africans listened to him with apparent joy and satisfaction, and seemed remarkably fond of his European trinkets, food, and clothes. He pointed out to them the barrenness of the country, and their naked and wretched condition, and promised if any of them were weary of their miserable circumstances, and would go along with him, he would carry them to a plentiful land, where they should live happy, and receive an abundant recompense for their labors. He told them the country was inhabited by such men as himself and his jovial companions, and assured them of kind usage and great friendship, In short, the negroes were overcome by his nattering promises, and three hundred stout fellows accepted his offer, and consented to embark along with him. Every thing being settled on the most amicable terms between them, Hawkins made preparations for his voyage. But in the night before his departure his negroes were attacked by a large body from a different quarter; Hawkins, being alarmed with the shrieks and cries of dying persons, ordered his men to the assistance of his slaves, and having surrounded the assailants, carried a number of them on board as prisoners of war. The next day he set sail for Hispaniola with his cargo of human creatures; but during the passage, he treated the prisoners of war in a different manner from his volunteers. Upon his arrival, he disposed of his cargo to great advantage; and endeavored to inculcate on the Spaniards who bought the negroes the same distinction to be observed: but they having purchased, all at the same rate, considered them as slaves of the same condition, and consequently treated all alike."

Hawkins having returned to England, soon after made preparations for a second voyage.

> "In his passage he fell in with the Minion man of war, which accompanied him to the coast of Africa. After his arrival he began as formerly to traffic with the negroes, endeavoring by persuasions and prospects of reward, to induce them to go along with him – but now they were more reserved and jealous of his designs, and as none of their neighbors had returned, they were apprehensive he had killed and eat them. The crew of the man of war observing the Africans backward and suspicious, began to laugh at his gentle and dilatory methods of proceeding, and proposed having immediate recourse to force and compulsion – but Hawkins considered it as cruel and unjust, and tried by persuasions, promises and threats, to prevail on them to desist from a purpose so unwarrantable and barbarous. In vain did he urge his authority and instructions from the queen: the bold and headstrong sailors would hear of no restraints. Drunkenness and avarice are deaf to the voice of humanity. They pursue their violent design, and, after several unsuccessful attacks, in which many of them lost their lives, the cargo was at length completed by barbarity and force.
>
> "Hence arose that horrid and inhuman practice of dragging Africans into slavery, which has since been so pursued, in defiance of every principle of justice and religion. Had negroes been brought from the flames, to which in some countries they were devoted on their falling prisoners of war, and in others, sacrificed at the funeral obsequies of the great and powerful among themselves; in short, had they by this traffic been delivered from torture or death, European merchants might have some excuse to plead in it's vindication. But according to the common mode in which it has been conducted, we must confess it a difficult matter to conceive a single argument in it's defense. And though policy has given countenance and sanction to the trade, yet every candid and impartial man must confess, that it is atrocious and unjustifiable in every light in which it can be viewed, and turns merchants into a band of robbers, and trade into atrocious acts of fraud and violence."

Historical Account of South Carolina and Georgia. Anonymous. London printed in 1779 – page 20, etc.

"The number of negro slaves bartered for in one year, (viz. 1768), on the coast of Africa from Cape Blanco, to Rio Congo, amounted to 104,000 souls, whereof more than half (viz. 53,000) were shipped on account of British merchants, and 6,300 on the account of British Americans." The Law of Retribution, by Granville Sharpe, Esq. page 147. note.

30. Bill of Rights, Article 1.

31. See the various tracts on this subject, by Granville Sharpe, Esq. of London.

32. The condition of a villein had most of the incidents I have before described in giving the idea of slavery, in general. His services were uncertain and indeterminate such as his lord thought fit to require; or as some of our ancient writers express it, he knew not in the evening what he was to do in the morning, he was bound to do whatever he was commanded. He was liable to beating, imprisonment, and every other chastisement his lord could devise, except killing and maiming. He was incapable of acquiring property for his own benefit; he was himself the subject of property; as such saleable and transmissible. If he was a villein regardant he passed with the land to which he was annexed, but might be severed at the will of his lord; if he was a villein in gross, he was an hereditament, or a chattel real, according to his lord's interest; being descendible to the heir, where the lord was absolute owner, and transmissible to the executor where the lord had only a term of years in him. Lastly, the slavery extended to the issue, if the father was a villein, our law deriving the condition of the child from that of

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the father, contrary to the Roman law, in which the rule was *partus sequitur ventrem*. – Harg. Case of negro Somerset, p. 26 and 27.

The same writer refers the origin of vassalage in England, principally to the wars between the British, Saxon, Danish, and Norman nations, contending for the sovereignty of that country, in opposition to the opinion of judge Fitzherbert, who supposes villeinage to have commenced at the conquest. Ib. 27, 28. And this he proves from Spelman and other antiquaries. Ib. The writ *de nativo habendo*, by which the lord was enabled to recover his villein that had absconded from him, creates a presumption that all the natives of England were at some period reduced to a state of villeinage, the word *nativus*, which signified a villein, most clearly designated the person meant thereby to be a native: this etymon is obvious, as well from the import of the word nativus, as from the history of the more remote ages of Britain. Sir Edward Coke's Etymology, "*quia plerumque nascuntur servi*," is one of those puerile conceits, which so frequently occur in his works, and are unworthy of so great a man.

Barrington in his observations upon magna carta, c. 4, observes, that the villeins who held by servile tenures were considered as so many negroes on a sugar plantation; the words "*liber homo*", in magna carta, c. 14, with all deference to Sir Edward Coke, who says they mean a free-holder, I understand as meaning a free man (1) as contradistinguished from a villein; for in the very next sentence the words "*et villanus alterius quam noster*," occur. Villeins must certainly have been numerous at that day, to have obtained a place in the Great Charter (2). It is no less an evidence that their condition was in a state of melioration.

In Poland, at this day, the peasants seem to be in an absolute state of slavery, or at least of villeinage, to the nobility, who are the land-holders.

(1) Liber homo, &c. the title of freeman was formerly confined to the nobility and gentry who were descended of free ancestors. Burgh's Political Disquisitions, vol. iii. p. 400, who cites Spelman's. Glossary, voc. Liber homo.

(2) In the time of the Saxons, the slaves, or villeins were by much the most numerous class of the community in England. Russel's Modern Europe, vol. I. 54. Philadelphia edition.

33. Hargrave, ibid.

34. 1662, c. 136.

35. 1662. Sess. d. c. 12.

36. 1667, c. 2.

37. Among the Israelites, according to the Mosaical law, "If a man smote his servant, or his maid, with a rod, and he died under his hand, he should surely be punished – notwithstanding if he continue a day or two, he should not be punished (1): for, saith the text, he is his money. Our legislators appear to have adopted the reason of the latter clause, without the humanity of the former part of the law. (1) Exod. c. 21.

38. 1705, c. 49. 1723, c. 4. 1748. c. 31.

39. 1788, c. 23.

40. 1668, c. 7.

41. 1670, c. 5.

42. 1670, c. 12.

43. 1679, c. 3.

44. 1662, c. 1.

45. 1705, c. 49. 1753, c. 2.

46. 1705, c. 52.

47. Hannah and other Indians, against Davis. Since this adjudication, I have met with a manuscript act of assembly made in 1691, c. 9, entitled, "An Act for a free trade with Indians," the enacting clause of which is in the very words of the act of 1705, c. 52. A similar title to an act of that session occurs in the edition of 1733, p. 94, and the chapter is numbered as in the manuscript. If this manuscript be authentic (which there is some reason to presume, it being copied in some blank leaves at

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the and of Purvis's edition, and apparently written about the time of the passage of the act), it would seem that no Indians brought into Virginia for more than a century, nor any of their descendants, can be retained in slavery in this commonwealth.

48. 1778, c. 1.

49. See ads of 1794, c. 103.

50. Edi. of 1794, c. 164.

51. Although it be true that the number of slaves in the whole state bears the proportion of 292,427, to 747,610, the whole number of souls in the state, that is, nearly as two to five; yet this proportion is by no means uniform throughout the state. In the forty-four counties lying upon the Bay, and the great rivers of the state, and comprehended by a line including Brunswick, Cumberland, Goochland, Hanover, Spottsylvania, Stafford, Prince William and Fairfax, and the counties eastward thereof, the number of slaves is 196,542, and the number of free persons, including free negroes and mulattoes, 198,371 only. So that the blacks in that populous and extensive district of country are more numerous than the whites. In the second class, comprehending nineteen counties, and extending from the last mentioned line to the Blue Ridge, and including the populous counties of Frederick and Berkeley, beyond the Blue Ridge, there are 82,286 slaves, and 136,351 free persons; the number of free persons in that class not being two to one, to the slaves. In the third class the proportion is considerably increased; the eleven counties of which it consists contain only 11,218 slaves, and 76,281 free persons. This class reaches to the Allegheny ridge of mountains: the fourth and last class, comprehending fourteen counties westward of the third class, contains only 2,381 slaves, and 42,288 free persons. – It is obvious from this statement that almost all the dangers and inconveniences which may be apprehended from a state of slavery on the one hand, or an attempt to abolish it, on the other, will be confined to the people eastward of the blue ridge of mountains.

52. Edi. of 1733. c. 12.

53. The following is a list of the acts, or titles of acts, imposing duties on slaves imported, which occur in the various compilations of our laws, or in the Sessions Acts, or Journals.

1699, c. 12. title only retained. Edit. of 1733, p. -------- 113 1701, c. 5. the same, -------- 116

1704, c. 4. the same, -------- 122

1705, c. 1. the same, -------- 126

1710, c. 1. the same, -------- 239

1712, c. 3. the same, -------- 282

1723, c. 1. repealed by proclamation, -------- 333

1727, c. 1. enacted with a suspending clause, and the royal assent refused, -------- 376

1732, c. 3. printed at large, -------- 469

1734, c. 3. printed at large in Sessions Acts. 1736, c. 1. the same. 1738, c. 6. the same. 1740, c. 2, the same. 1742, c. 2, the same.

From this period I have not been able to refer to the Sessions Acts.

1752, c. 1. printed at large in the Edit. of 1769, -------- 281

1754, c. 1. the same, -------- 319

1755, c. 2. Sessions Acts. Ten per cent. in addition to all former duties.

1759, c. 1. printed at large, edition of 1769, -------- 369 1763, c. 1. Journals of that session,

1766, c. 3, 4. printed at large, Edit. of 1769, -------- 461, 462 -------- c. 15. additional duty, the title only is printed, being repealed by the crown, Ib. -------- 473 1769, c. 7, 8, and 12, title only printed, edition of 1785, -------- 6, 7 1772, c. 15, title only printed, -------- Ibidem, 24

54. The following extract from a petition to the throne, presented from the house of burgesses of Virginia, April 1, 1772, will shew the sense of the people of Virginia, on the subject of slavery at that period.

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> "The many instances of your majesty's benevolent intentions, and most gracious disposition to promote the prosperity and happiness of your subjects in the colonies, encourages us to look up to the throne, and implore your majesty's paternal assistance in averting a calamity of a most alarming nature."
>
> "The importation of slaves into the colonies from the coast of Africa, has long been considered as a trade of great inhumanity, and under it's present encouragement, we have too much reason to fear will endanger the very existence of your majesty's American dominions."
>
> "We are sensible that some of your majesty's subjects of Great Britain may reap emoluments from this sort of traffic, but when we consider that it greatly retards the settlement of the colonies, with more useful inhabitants, and may, in time, have the most destructive influence, we presume to hope, that the interest of a few will be disregarded when placed in competition with the security and happiness of such numbers of your majesty's dutiful and loyal subjects."
>
> "Deeply impressed with these sentiments, we most humbly beseech your majesty to remove all those restraints on your majesty's governors of this colony, which inhibit their assenting to such laws as might check so very pernicious a commerce." Journals of the house of burgesses, page 131.

This petition produced no effect, as appears from the first clause of our CONSTITUTION, where among other acts of misrule, "the inhuman use of the royal negative," in refusing us permission to exclude slaves from us by law, is enumerated, among the reasons for separating from Great Britain,

I have lately been favored with the perusal of a manuscript copy of a letter from Granville Sharpe, esquire, of London, to a friend of the prime minister, dated March 25, 1794, in which he speaks of this petition thus: "I myself was desired, by a letter from America, to inquire for an answer to this extraordinary Virginia petition. I waited on the secretary of state, and was informed by himself that the petition was received, but that (he apprehended) no answer would be given.

55. It may not be improper here to note, that the first congress of the U. States, at their 3d session, Dec. 1793, passed an act to prohibit the carrying on the slave trade from the United States to any foreign place or country; the provisions of which seem well calculated to restrain the citizens of united America from embarking in so infamous a traffic.

56. Spavan's Puff. Vol. I, c. 17.

57. 1705, c. 49. 1723, c. 4. 1748, c. 31.

58. In December term 1788, one John Huston was tried in the general court for the murder of a slave; the jury found him guilty of manslaughter, and the court, upon a motion in arrest of judgment, discharged him without any punishment. The general assembly being then sitting, some of the members of the court mentioned the case to some leading characters in the legislature, and the act was, at the same session repealed.

59. 1788, c. 23.

60. 1672, c. 8.

61. 1680, c. 10.

62. 1705, c. 49.

63. 1723, c. 4. 1748, c. 31.

64. 1769, c. 19.

65. 1772, c. 9?.

66. 1680, c. 10. 1705.

67. 1705, c. 49. 1723, c. 4.

68. 1753, c. 2.

69. Edi. 1794, c. 103.

70. 1723, c. 4. 1748. c. 31. 1753, c. 2. 1785, c. 77.

71. Edi. of 1794, c. 103, 181.

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72. Edi. 1794, c. 103

73. 1748, c. 31. 1794, c. 103.

74. 1785, c. 77. 1794, c. 103.

75. 1769, c. 19. May 1783, c. 32. 1794, Ibid.

76. Edi. of 1794, c. 103.

77. 1705, c. 11.

78. 1748, c. 31. 1764, c. 9.

79. 1723, c. 4.

80. Edi. 1794, c. 103.

81. 1772, c. 9.

82. Edit. 1794, c. 103.

83. 1794, c. 103.

84. But herein the law is now altered by the act of 1796, c. 2, which does not extend to slaves. See note, ante p. 22.

85. 1794, c. 103.

86. Ibidem.

87. See Jefferson's Notes, 259. The marquis de Chattelleux's travels, I have not noted the page; the Law of Retribution, by Granville Sharpe, p. 151, 238, notes. The Just Limitation of Slavery, by the same author, pa. 15, note, Ibidem, pa. 33, 50. Ib. Append. No. 2, Encyclopedie. Tit. Esclave. Laws of Barbadoes, etc.

88. Exod c. 21 Deut. c 15.

89. Ibid.

90. Harris's Just. in notes.

91. Just. Inst lib. 1 tit. 5 Ib. lib. 1. tit. 6.

92. Ib Harris's Just. in notes.

93. Ibid.

94. Ante, p. 36.

95. May 1782, c. 21.

96. 1723, c. 4.

97. There are more free negroes and mulattoes in Virginia alone, than are to be found in the four New England states, and Vermont in addition to them. The progress of emancipation in this state is therefore much greater than our Eastern brethren may at first suppose. There are only 1087 free negroes and mulattoes in the states of New York, New Jersey, and Pennsylvania, more, than in Virginia. Those who take a subject in the gross, have little idea of the result of an exact scrutiny. Out of 20,348 inhabitants on the Eastern Shore of Virginia, 1185, were free negroes and mulattoes when the census was taken. The number is since much augmented.

98. 1794, c. 103.

99. The act of 1795, c. 11, enacts, that any person held in slavery may make complaint to a magistrate, or to the court of the district county or corporation wherein he resides and not elsewhere. The magistrate, if the complaint be made to him, shall issue his warrant to summon the owner before him, and compel him to give bond and security to suffer the complainant to appear at the next court to be admitted to sue *in forma pauperis*. If the owner refuse, the magistrate shall order the complainant into the custody of the officer serving the warrant, at the expense of the master, who shall keep him until the sitting of the

court, and then produce him before it. Upon the petition to the court, if the court be satisfied as to the material facts, they shall assign the complainant council, who shall state the facts with his opinion thereon to the court; and unless from the circumstances so stated, and the opinion thereon given, the court shall sue manifest reason to deny their interference, they shall order the clerk to issue process against the owner, and the complainant shall remain in the custody of the sheriff until the owner shall give bond and security to have him forthcoming to answer the judgment of the court. And by the general law in case of pauper's suits, the complainants shall have writs of subpoena gratis, and by the practice of the courts, he is permitted to attend the taking the depositions of witnesses, and go and come freely to and from court, for the prosecution of his suit.

100. Jus. Inst. lib. 1, tit. 5.

101. Harris's Inst. lib. 3, tit. 8.

102. Inst. lib. 1, tit. 5, s. 3.

103. The number of slaves in the United States at the time of the late census, was about 900,000.

104. Mr. Jefferson most forcibly paints the unhappy influence on the manners of the people, produced by the existence of slavery among us. "The whole commerce between master and slave, says he, is a perpetual exercise of the most boisterous passions, the most unremitting despotism on the one part, and degrading submissions on the other. Our children see this, and learn to imitate it; for man is an imitative animal. This quality is the germ of education in him. From his cradle to his grave he is learning what he sees others do. If a parent had no other motive either in his own philanthropy or his self-love, for restraining the intemperance of passion towards his slave, it should always be a sufficient one that his child is present. But generally it is not sufficient. The parent storms, the child looks on, catches the lineaments of wrath, puts on the same airs in the circle of smaller slaves, gives a loose to his worst of passions; and thus nursed, educated, and daily exercised in tyranny, cannot but be stamped by it with odious peculiarities. – The man must be a prodigy who can retain his manners and morals undepraved by such circumstances. And with what execrations would the statesman be loaded, who permitting one half the citizens thus to trample on the rights of the other, transforms them into despots, and these into enemies, destroys the morals of the one part, and the *amor patriae* of the other. For if a slave can have a country in this world, it must be any other in preference to that in which he is born to live and labor for another: in which he must lock up the faculties of his nature, contribute as far as depends on his individual endeavors to the evanishment of the human race, or entail his own miserable condition on the endless generations proceeding from him. With the morals of the people, their industry also, is destroyed. For in a warm climate, no man will labor for himself that can make another labor for him. This is so true, that of the proprietors of slaves a very small proportion indeed are ever seen to labor. – And can the liberties of a nation be ever thought secure when we have removed their only firm basis, a conviction in the minds of the people, that these liberties are of the gift of God? That they are not to be violated but with his wrath? Indeed, I tremble for my country when I reflect that God is just: that his justice cannot sleep for ever: that considering numbers, nature, and natural means only, a revolution of the wheel of fortune, an exchange of situation is among possible events: that it may become probable by supernatural interference! The Almighty has no attribute which can take side with us in such a contest – but it is impossible to be temperate and to pursue this subject through the various considerations of policy, of morals, of history, natural and civil. We must be contented to hope they will force their way into every one's mind. I think a change already perceptible, since the origin of the present revolution. the spirit of the master is abating, that of the slave rising from the dust; his condition mollifying; the way, I hope, preparing, under the auspices of Heaven, for a total emancipation, and that this is disposed in the order of events, to be with the consent of their masters, rather than by their extirpation." Notes on Virginia, 298.

105. Letter from Jas. Sullivan, Esq. to Dr. Belknap.

106. Dr. Belknap.

107. What is here advanced is not to be understood as implying an opinion that the labor of slaves is more productive than that of freemen. – The author of the Treatise on the Wealth of Nations, informs us, "That it appears from the experience of all ages and nations, that the work done by freemen comes cheaper in the end than that done by slaves. That it is found to do so, even in Boston, New York, and Philadelphia, where the wages of common labor are very high." Vol. 1. p. 123. Lond. edit. oct. Admitting this conclusion, it would not remove the objection that emancipated slaves would, not willingly labor.

108. Doctor Franklin, it is said, drew the bill for the gradual abolition of slavery in Pennsylvania.

109. It is probable that similar laws have been passed in some other states; but I have not been able to procure a note of them.

110. The object of the amendment proposed to be offered to the legislature, was to emancipate all slaves born after a certain period; and further directing that they should continue with their parents to a certain age, then be brought up, at the public expense, to tillage, arts, or sciences, according to their geniuses, till the females should be eighteen, and the males twenty-one

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years of age, when they should be colonized to such a place as the circumstances of the time should render most proper; sending them out with arms, implements of household and of the handicraft arts, seeds, pairs of the useful domestic animals, etc. to declare them a free and independent people, and extend to them our alliance and protection, till they shall have acquired strength; and to send vessels at the same time to other parts of the world for an equal number of white inhabitants; to induce whom to migrate hither, proper encouragements should be proposed. Notes on Virginia, 251.

111. Or, perhaps, by incorporating with them, become a formidable accession of strength to those hostile savages?

112. "It will probably be asked, why not retain the blacks among us, and incorporate them into the state? Deep rooted prejudices entertained by the whites; ten thousand recollections by the blacks, of the injuries they have sustained; new provocations; the real distinctions which nature has made; and many other circumstances will divide us into parties and produce convulsions, which will probably never end but in the extermination of one or the other race. To these objections, which are political, may be added others which are physical and moral. The first difference which strikes us is that of color – etc. The circumstance of superior beauty is thought worthy of attention in the propagation of our horses, dogs, and other domestic animals; why not in that of man? etc. In general their existence appears to participate more of sensation than reflection. Comparing them by their faculties of memory, reason and imagination, it appears to me that in memory they are equal to the whites; in reason much inferior; that in imagination they are dull, tasteless and anomalous, etc. the improvement of the blacks in body and mind, in the first instance of their mixture with the whites, has been observed by every one, and proves that their inferiority is not the effect merely of their condition of life. We know that among the Romans about the Augustan age, especially, the condition of their slaves was much more deplorable, than that of the blacks on the continent of America. Yet among the Romans their slaves were often their rarest artists. They excelled too in science, insomuch as to be usually employed as tutors to their master's children. Epictetus, Terence, and Phœdrus were slaves. But they were of the race of whites. It is not their condition then, but nature which has produced the distinction. The opinion that they are inferior in the faculties of reason and imagination, must be hazarded with great diffidence. To justify a general conclusion requires many observations, etc. – I advance it, therefore, as a suspicion only, that the blacks, whether originally a distinct race, or made distinct by time and circumstances, are inferior to the whites both in the endowments of body and mind, etc. This unfortunate difference of color, and perhaps of faculty, is a powerful obstacle to the emancipation of these people. Among the Romans emancipation required but one effort. The slave, when made free, might mix with, without staining the blood of his master. But with us a second is necessary, unknown to history." – See the passage at length, Notes on Virginia, page, 252 to 265.

"In the present case, it is not only the slave who is beneath his master, it is the negro who is beneath the white man. No act of enfranchisement can efface this unfortunate distinction." Chattelleux's Travels in America.

113. The celebrated David Hume, in his Essay on National Character, advances the same opinion; Doctor Beattie, in his Essay on Truth, controverts it with many powerful arguments. Early prejudices, had we more satisfactory information than we can possibly possess on the subject at present, would render an inhabitant of a country where negro slavery prevails, an improper umpire between them.

114. It was once proposed among the Romans to discriminate slaves, by a peculiar habit; but it was justly apprehended that there might be some danger in acquainting them with their own numbers. – Gibbon's Hist. of the Rom. Emp. Vol. I. p. 59. What policy forbade the martial Romans to do, nature and the federal census have already done in Virginia, and the other southern states.

115. The Romans, before the time of Justinian, adopted a similar policy, in respect to their freed-men. Gibbon, vol. 1, 58.

116. See Spirit of Laws, 12, 15, 1. Blackst. Com. 417.

117. If, upon experiment, it should appear advisable to hasten the operation of this plan, or to enlarge the privileges of free negroes, it will be both easier. and safer so to do, than to retrench any privilege once granted, or to retard the operation of the original plan, after it has been adopted, and in part carried into execution.

118. The immense territory of Louisiana, which extends as far south as the lat. 25° and the two Floridas, would probably afford a ready asylum for such as might choose to become Spanish subjects. How far their political rights might be enlarged in these countries, is, however, questionable: but the climate is undoubtedly more favorable to the African constitution, than ours, and from this cause it is not improbable that emigrations from these states would in time be very considerable.

But it is not from the want of liberality to the emancipated race of blacks that I apprehend the most serious objections to the plan I have ventured to suggest. – Those slave holders (whose numbers I trust are few) who have been in the habit of considering their fellow creatures as no more than cattle, and the rest of the brute creation, will exclaim that they are to be deprived of their property, without compensation. Men who will shut their ears against this moral truth, that all men are by nature free, and equal, will not even be convinced that they do not possess a property in an unborn child: they will not

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distinguish between allowing to unborn generations the absolute and unalienable rights of human nature, and taking away that which they now possess; they will shut their ears against truth, should you tell them, the loss of the mother's labor for nine months, and the maintenance of a child for a dozen or fourteen years, is amply compensated by the service of that child for as many years more, as he has been an expense to them. But if the voice of reason, justice, and humanity, be not stifled by sordid avarice, or unfeeling tyranny, it would be easy to convince, even those who have entertained such erroneous notions, that the right of one man over another is neither founded in nature, nor in sound policy. That it cannot extend to those not in being; that no man can in reality he deprived of what he does not possess: that fourteen years labor by a young person in the prime of life, is an ample compensation for a few months of labor lost by the mother, and for the maintenance of a child, in that coarse homely manner that negroes are brought up: and lastly, that a state of slavery is not only perfectly incompatible with the principles of government, but with the safety and security of their masters. History evinces this. At this moment we have the most awful demonstrations of it. Shall we then neglect a duty, which every consideration, moral, religious, political, or selfish, recommends? Those who wish to postpone the measure, do not reflect that every day renders the task more arduous to be performed. We have now 300,000 slaves among us. Thirty years hence we shall have double the number. In sixty years we shall have 1,200,000: and in less than another century from this day, even that enormous number will be doubled. Milo acquired strength enough to carry an ox, by beginning with the ox while he was yet a calf. If we com plain that the calf is too heavy for our shoulders, what will the ox-be?

119. As it may not be unacceptable to some readers to observe the operation of this plan, I shall subjoin the following statement:

PRELIMINARY REMARKS.

1. The number of slaves in Virginia by the late census being found to be 292,427, they may now, in round numbers be estimated at -------- 300,000

2. Let it be supposed that the males and females are nearly or altogether equal in number.

3. According to Dr. Franklin, the people of America double their numbers in about twenty-eight years; and according to Mr. Jefferson, the negroes increase as fast as the whites, they will, therefore, double, at least every thirty years.

4. Let it be supposed that in thirty years one half of the present race of negroes will be extinct.

5. Let it be supposed that in forty-five years there will not remain more than one-fifth of the present race alive.

6. Let it be likewise supposed, that in sixty years the whole of the present race will be extinct.

further appear, that females only will arrive at the age of emancipation within the first forty-five years; all the males during that period, continuing either in slavery, or bound to service till the age of twenty-eight years. The earth cannot want *cultiva.*

7. For conciseness sake, let the present race be called ante-nati, those born after the adoption of the plan, post-nati.

FROM HENCE IT WILL FOLLOW,

1. That the present number of slaves being ---- 300,000

2. In thirty years their numbers will amount to ---- 600,000

3. But at that period as one half of them will be extinct, (rem. 4.) their numbers will stand thus:

Ante-nati, ---- 150,000 Post-nati, ---- 450,000

———————— 600,000

4. The mean increase of the post-nati for the next thirty years will therefore be 450000/30, annually, or, ---- 15,000

5. If one half of these be males, who are still to remain slaves, there will, in the first sixteen years, be born ---- 120,000

6. After the first sixteen years, the post-natae females will begin to breed; the proportion of males born to slavery in the next twelve years may be estimated at one-fourth of the whole number born after the commencement of that period. – Their number will be ----- 52,500

7. The number of slaves living in Virginia at the end of thirty years from the adoption of the plan, will be, ante-nati (prop. 3.) ------- 150,000

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Post-nati males born in the first 16 years, ---- 120,000 Post-nati males born in the last 12 years, ---- 52,500

——————— 322,500

8. The number of negroes at the same time will stand thus:

Slaves, - - - - 322,500 Post-nati free born, - 277,500 —————— 600,000

9. After twenty-eight years from the first adoption, this plan of gradual emancipation will first begin to manifest its effects, by the complete emancipation of one twenty-eighth part of the post-nati free born during that period each succeeding year, for twenty-eight years more; their numbers will be, 277500/28 or, ----- 9,910

total, whilst our population increases as at present, and three-fourths of those employed therein are held to service, and the remainder compellable to labor. For we must not lose sight of this important consideration, that these people must be bound

These will be all females.

10. It being admitted that the negroes double every thirty years, the supposition that in forty-five years, their numbers will be half as many more as in thirty, will not be very erroneous, if so, the whole race of them at that period will be --------- 900,000

11. Their numbers will stand thus:

Ante-nati, - - - 60,000 Post-nati, - - - 840,000

——————— 900,000

12. After twenty -eight years are past, the number of slaves born must continually diminish. Suppose their number born in the last seventeen years, to be one-fourth as many as those born in the preceding twelve years, they will be 52500/4, or, -------- 13,125

13. The slaves in Virginia in forty-five years will then be, ante-nati, ------ 60,000

Post-nati males born in the first sixteen years 120,000 Ditto, born in the next twelve years, ---- 52,500 Ditto, born in the last seventeen years, ---- 13,125

———————245,625

At this period the emancipation of males will begin.

14. But after twenty-eight years it has been shown that 9,910 negroes will annually arrive at the age of emancipation, their whole number in forty-five years will be ---- 168,470

15. The state of the negroes at the end of 45 years, will then be, slaves, ------ 245,625

Post-nati fully emancipated (females,) 168,470

Post-nati not emancipated - - - 485,905

——————— 900,000

16. In sixty years the whole number of negroes will be 1,200,000

17. At that period the whole of the present race will be extinct, and we also may infer that one half of those born to labor, if they do not voluntarily engage therein. Their faculties, are at present only calculated for that object; if they be not employed therein, they will become drones of the worst description. In absolving them from the yoke of slavery, we must not forget the interests of society. Those interests require the exertions of every individual in some mode or other; and those who have not wherewith to support themselves honestly, without corporal labor, whatever be their complexion, ought to be compelled to labor. This is the case in England, where domestic slavery has long been unknown. It must also in the first thirty years will be also extinct; the number of slaves born in that period has been shown, (prop. 7.) to be 172,500, the number of these then living will be 277500/2 or, 86,750

18. One half of the post-nati free born, during that period, being now fully emancipated, may be likewise presumed to be extinct; their numbers (prop. 8.) will be, 172500/2 or, --------- 138,750

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19. The state of negroes at the end of sixty years, will therefore be:

Slaves born during the first thirty years, 86,250 Ditto born after that period, ---- 13,125 Post-nati fully emancipated, - - 138,750 Post-nati under 28 years of age, - - 961,875

——————1,200,000

20. At the end of ninety years the number of negroes will be --------- 2,400,000

21. Of this number, those only born after the first thirty years, being supposed to be living, the number of slaves (prop. 12,) will then be reduced to ---- 13,125

22. And as the last mentioned number of slaves are supposed to be born within forty-five years, their whole number will be extinct in fifteen years more, that is, in one hundred and five years from the first adoption of the plan.

23. By prop. 19, it appears, that out of 1,200,000 negroes, there will then be 961,875 under the age of twenty-eight years, the period of emancipation.

24. We may, therefore, conclude, that from two-thirds to three-fourths of the whole number of blacks will always be liable to service.

120. Not to mention the modern codes of the Sugar-Islands, which exhibit awful proofs of the supposed necessity of such a cruel policy, the martial Lacedemonians, and not less martial Romans, held it justifiable, as well as necessary, to adopt the most severe regulations, and the most cruel treatment towards their numerous slaves, upon the principle of self-preservation. – See Gibbon's Hist. of the Rom. Emp. Vol. I, p. 57.

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NOTE I

Abstract of the Bill for the More General Diffusion of Knowledge, in Virginia

UNDER this head of subordinate magistrates, we must notice the aldermen, who are directed to be chosen in every county for the purpose of carrying into execution the act to establish public schools.

This act, so far as it extends, is nearly a transcript from the bill, "For the more general diffusion of knowledge," which was prepared by the committee of revisors appointed in 1776, and reported to the general assembly in 1779, but with many others was not acted upon by the legislature, when the consideration of the bills reported was taken up. That bill proposed, that three aldermen should be annually chosen by the freeholders of each county, who should divide the county into hundreds, in each of which a school-house should be built, in such place as the electors of the district should appoint; in which reading, writing, and common arithmetic should be taught gratis to all the free children in the district, for the term of three years; and as much longer at their private expense, as their friends might think proper. That an overseer, or visitor be appointed over every ten schools, to visit them, and examine the scholars. That the teachers' salaries be paid by the counties.

That the several counties be arranged into nineteen districts, in each of which a grammar school should be established, in such place as a majority of the overseers, or visitors of the hundred schools within the district, should appoint, containing a school room, a dining room, four rooms for a master and usher, and ten or twelve lodging rooms for scholars; where should be taught the Latin and Greek languages, English grammar, geography, vulgar and decimal fractions, and the extraction of the cube and square root. That one visitor of these schools should be annually chosen in each county by the overseers of the hundred schools. The expense of these establishments to be paid out of the public treasury.

That each hundred overseer, out of the schools visited by him, should annually choose some one boy, of at least two years standing in the school, and of the best and most promising genius and disposition, whose parents might be unable to give him farther education, to proceed to the grammar school of the district, there to be educated, for a further time.

That an annual visitation for the purpose of probation, should be held at each grammar school, at which one third of the boys of one years standing only, and who shall be found to be the least promising, shall be discontinued as public foundationers, and all of two years standing should also be discontinued, save only one, of the best genius and disposition, who should be at liberty to remain four years longer on the public foundation, and thenceforward be deemed a senior.

That the visitors for the districts south of James River, and those north thereof, should, alternately, every year, choose from among the seniors, one of the best learning, and most hopeful genius and disposition in each district school, to proceed to the college of William and Mary, there to be educated, boarded and clothed for three years at the public expense.

Such are the outlines of a plan that does honor to its authors, and if ever it be carried fully into effect, will evince of what importance its speedy adoption, in its fullest extent, may be to the commonwealth.

The act of 1796, c. 1, provides, that three aldermen be annually elected at the same time that members of assembly are elected, by the electors qualified to vote for delegates, whose election shall be certified to the county court, and entered of record – that the aldermen, or any two of them, shall meet annually at their court-house on the second Monday in May, and consider of the expediency of carrying the subsequent parts of the act into execution. If they judge it expedient, they are to

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divide their county into convenient sections, distinguishing each section by a particular name, and returning their division to the county court, there to be recorded. That the householders in each section on the first Monday in September, thereafter, shall meet at such place as the aldermen may direct, and choose the most convenient place within the section for building a school-house; which shall be built and kept in repair by the aldermen, and a teacher appointed by them; who shall teach reading, writing, and common arithmetic; and all the free children, male and female, within the section, shall receive tuition gratis for three years; and as much longer at their private expense as their friends may think proper. That the salary of the teachers, and other expenses of the schools, in each section, shall be defrayed by the inhabitants of each county, in proportion to the amount of their public assessment, and county levies, to be ascertained by the aldermen of each county. – The corporate towns are, by the same act, empowered to act distinctly from the counties, in which they are situate. – This act contains the following remarkable proviso. That the court of each county, at which a majority of the acting magistrates shall be present, shall first determine the year, in which the first election of aldermen shall be made, and until they so determine, no such election shall be made. And this subject the courts are to take into consideration in the month of March, annually, until each election be made.

It is easy to perceive, that this proviso, and that which authorizes the aldermen, when elected, to consider of the expediency of carrying the act into execution, are calculated to defeat it's execution, in every county where illiberal and parsimonious magistrates may compose the court; or, illiberal and parsimonious persons be chosen as aldermen. They prove also the existence of an opposition to the act in the legislature, itself, founded upon the most illiberal, and parsimonious principles, without any regard to the public good. For it must be evident that the act will only be carried into execution in those counties, where liberality of sentiment, and a just estimation of the value of education, prevail, and not in those, where they are most wanted.

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NOTE K

The Right of Expatriation Considered

"IT is a principle of universal law, that the natural born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another, put off, or discharge his natural allegiance to the former." Blacks. Com. Vol. I. p. 369.

The positive, and unqualified manner in which the learned commentator advances this to be a principle of universal law, would induce a supposition, that it is a point in which all the writers on the law of nature and nations are perfectly agreed. As my researches have led me to adopt a very different, or, rather, opposite conclusion, it will be the business of this note to examine the subject.

If it be contended that this is a principle of the divine law, I should wish to be informed in which of the books of the old, or new testament it is to be found. The family of the patriarch Jacob voluntarily became subjects to the Egyptian monarch. – And four hundred years afterwards, Moses, their prophet, and deliverer, voluntarily abandoned Egypt, his native country, and dwelt among the Midianites; and then he, with the whole of the descendants of Jacob voluntarily departed out of Egypt, under the immediate protection and guidance of Jehovah, himself. – David also, the man after God's own heart, abandoned his natural liege lord Saul, and went and dwelt with Achish, king of Gath; and even marched in his army against his native country, and liege lord, until the jealousy of the lords of the Philistines obliged him to turn back. I can not therefore believe that the divine law contains in it any such principle.

Neither can I well conceive how this can be considered as a principle of the law of nature; for according to that law, all men are equal. One man therefore can not owe allegiance to another, in virtue of that law; since there is neither prince nor subject among men according to the principles of it.

Nor yet does, this appear to be a principle of the law of nations, though perhaps it may have been the practice of particular nations to prohibit their subjects from migrating to any other: but in this case the prohibition arises from the particular law of the state, and not from the general law and practice of nations towards each other. The law of Solon, which prohibited the Athenians from admitting any person into their commonwealth, except such as were condemned to perpetual banishment from their own country, or else such as removed their whole families to Athens for the convenience of trade, and employment of the arts they professed, was not made so much to keep out foreigners, as to invite them to settle at Athens, by giving them assurance of incorporating them in the body of the common wealth. – For he made no doubt, says Plutarch, but both these sorts of people would make very good subjects, the one because they voluntarily quitted, and the other, because they were forced out of their own country. Plato says that, at Athens it was lawful for every private man, after he had examined the laws and customs of the republic, if he did not approve of them, to quit the city, and retire where he pleased with his effects. By the constitution of the Roman commonwealth, no citizen could be forced to leave the commonwealth, or if he pleased, not to leave it, when he was made a member of another which he preferred to it. And therefore Cicero says, that a little before his remembrance, several citizens of Rome, men of credit and fortunes, voluntarily left that, and settled themselves in other commonwealths. And the way, says he, lies open from every state to ours, and from ours to every other. This right he extols in the most emphatic manner. "What noble rights! which by the blessing of heaven have been enjoyed by us and our ancestors, ever since the Roman state begun, that none of us should be forced to leave our country, or stay in it against our wills. This is the immovable foundation of our liberty, that every man is master of his right, and

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may keep it or resign it, as he pleases." These instances, which are cited by Pufendorf,[1] on this subject, prove at least that this principle was neither to be found in the Athenian or Roman institutions.

The practice among more modern nations is various: among the Muscovites, emigration is not permitted.[2] The citizens of Neufchatel and Valengen, in Switzerland, may quit the country, and carry off their effects in what manner they please; a citizen of Bern may, if he pleases, remove to Fribourg, and reciprocally, a citizen of Fribourg may go and settle in Bern, and he has a right to take all his effects with him. On the other hand it appears from several historical facts, particularly in the history of Switzerland and the neighboring countries, that the law of nations established there by custom, for some ages past, does not permit a state to receive the subjects of another state into the number of its citizens.[3] This vicious custom, says Vattel, had no other foundation than the slavery to which the people were then reduced. A prince considered his subjects in the rank of his property and riches; he calculated their numbers, as he did his flocks; and to the disgrace of human nature this strange abuse is not yet every where destroyed.[4]

Although Grotius[5] denies that emigrants ought to leave the state in troops or large companies, (an opinion which is controverted by Pufendorf,[6] and Burlamaqui,[7]) yet he allows the case to be quite different when a single person leaves his country; it is one thing, says he, to draw water out of a river, and another to divert the course of a part of that river. And Pufendorf[8] expressly says, where there are no laws about the matter (for the laws of different countries differ in this respect), we must be determined by customs arising from the nature of civil subjection. What custom admits of, every subject is supposed at liberty to use. But if this gives no light to the matter, and the compact of subjection makes no mention of it; it must be presumed that every man reserves to himself the liberty to remove at discretion. For when a man enters into a commonwealth, it cannot be supposed that he gives up all care of himself and his fortunes, but rather that by so doing he takes the best expedient to defend and secure both. But because it often happens that the nature of the government does not suit with every private man's circumstances, or he thinks, at least, he can make his fortune with more advantage elsewhere; and since it would be unreasonable to reform and make alterations in the commonwealth at the desire, and for the benefit of only a few private subjects, the only method left is, to give them leave to remove and provide for themselves where they think best. Burlamaqui[9] scruples not to adopt the opinion of Pufendorf, altogether. So that we have the opinion of these four jurists that every man has a natural right to migrate from one state to another, and that this right can only be restrained under special circumstances, by the state to which he belongs, without imposing upon him an unwarrantable slavery.

Mr. Locke, in his essay on civil government[10] seems to have examined thoroughly the foundation of this pretended right in governments to prohibit the emigration of their subjects, or citizens. There are no examples, says he, so frequent in history, both sacred and profane, as those of men withdrawing themselves, and their obedience from the jurisdiction they were born under, and the family or community they were bred up in, and setting up new governments in other places: this has been the practice of the world, from its first beginning to this day; nor is it now any more hindrance to the freedom of mankind, that they are born under constituted and ancient politics, that have established laws, and set forms of government, than if they were born in the woods, among the unconfined inhabitants that run loose in them. For those who would persuade us, that by being born under any government, we are naturally subjects to it, and have no more any title, or pretense, to the freedom of the state of nature, have no other reason (bating that of paternal power) to produce for it, but only because our fathers, or progenitors passed away their natural liberty, and thereby bound

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up themselves and their posterity to a perpetual subjection to the government, which they themselves submitted to. 'Tis true, that whatever engagements, or promises, any one has made for himself, he is under the obligation of them, but cannot by any compact whatsoever bind his children, or posterity. For his son, when a man, being altogether as free as the father, any act of the father can no more give away the liberty of the son, than it can of any body else: he may, indeed, annex such conditions to the land he enjoyed, as a subject of any commonwealth, as may oblige his son to be of the community, if he will enjoy those possessions, which were his fathers; because that estate being his father's property he may dispose, or settle it as he pleases. And this has generally given the occasion to mistake in this matter; because commonwealths not permitting any part of their dominions to be dismembered, nor to be enjoyed by any but those of their community, the son cannot ordinarily enjoy the possession of his father, but under the same terms his father did, by becoming a member of the society; whereby he puts himself presently under the government he finds established, as much as any other subject of that commonwealth. And thus the consent of freemen, born under government, which, only, makes them members of it, being given separately in their turn, as each comes of age, and not in a multitude together; people taking no notice of it, and thinking it not done at all, or not necessary, conclude they are naturally subjects, as they are men.

And this mistake, it is evident Sir Matthew Hale has fallen into,* when he tells us, that a lawful prince who has the prior obligation of allegiance, can not lose that interest without his own consent, by his subjects resigning himself to the subjection of another; so that the natural born subject of one prince can not, by swearing allegiance to another prince, put off, or discharge himself from that natural allegiance; for this natural allegiance, says he, was intrinsic, and primitive, and antecedent to the other, and cannot be divested without the concurrent act of that prince to whom it was first due. And the authorities which he brings in support of this opinion clearly prove that he fell into mistake from the very reason assigned by Mr. Locke. For, in the next paragraph he tells us,[11] that there were very many that had been anciently *ad fidem regis Angliae et Franciae*, especially before the loss of Normandy: such were the *comes marescallus* that usually lived in England, and M. de Feynes, *manens in Francia*, who were *ad fidem utriusque regis*; but they ordered their homages and fealties so, that they swore or professed allegiance, only to one, *viz.* [that king in whose dominions they respectively resided;] the homage they performed to the other, [in whose dominions they held lands, but did not reside therein,] being not purely liege homage, but rather feudal: and therefore when war happened between the two crowns, *remaneat personaliter quilibet eorum cum oe, cui fecerat ligeant eam; et faciat servitium debitum ei, cum quo non steterat in persona*, namely the service due from the feud, or fee he held: but this did not always satisfy the prince, *cum quo non steterat in persona*, but their possessions were usually seized, and rarely, or not without difficulty restored, without a capitulation to that purpose between the two crowns. And all the cases which he there cites in support of his opinion proceed upon the same ground; namely, the right which each prince exercised to seize the lands and possessions within his dominions, which belonged to the subjects of the other with whom he was at war. Which clearly proves that the right of confiscation thus mutually claimed and exercised, did not proceed upon the ground that the party whose lands were seized had broken his natural allegiance, or that which he might be supposed to owe to the prince in whose dominions he was born; but that feudal obligation, only, which every inferior tenant owed to his superior lord, (whether such a superior were a sovereign prince, or merely a private person) of whom he held his lands.[12] Now this power which a prince might possess over the lands and possessions of a man who never resided within his dominions, can not be construed to give him any right over the person of such a man; neither on the other hand can that prince in whose territories he happens to be born claim any right to detain him therein, merely because he first saw

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the light there, as Mr. Locke has most dearly shown; the most that he can do is to prohibit him from carrying his property with him; which if it be lands he can not, and if it be goods, he may not (if the laws of the state forbid) carry away without the consent of the government.

From the whole that we have seen, it appears, that the right of emigration is a right strictly natural; and that the restraints which may be imposed upon the exercise of it, are merely creatures of the *juris positivi*, or municipal laws of a state. And consequently that wherever the laws of any country do not prohibit, they permit emigration, or, as I rather choose to call it, expatriation. Now I apprehend it is altogether immaterial to us in America, whether the laws of England, France or Spain, permit the subjects of those countries, respectively, to expatriate themselves, inasmuch as I have shown, or at least endeavored so to do, that the municipal law of no other country upon earth has any force, or obligation over the citizens of the United States, as such; or over the citizens of any one state in the union, otherwise, or in any greater degree than the constitution or laws of such particular state may have adopted the same: and then it obtains a force and operation, so far, and so far only, as the act of adoption extends, and not on account of any intrinsic obligation which it might be supposed to possess, or derive from any other source. And, although Virginia has adopted the common law of England, under certain restrictions, yet Virginia by a positive act of her legislature, so long since as the year 1783,[13] declared it to be a natural right which all men have, to relinquish that society in which birth or accident may have thrown them, and seek subsistence and happiness elsewhere, and accordingly pointed out the mode in which any citizen might exercise it. The constitution of Vermont, and the first constitution of Pennsylvania contain similar declarations. Can it then be doubted that the citizens of those states, respectively, possess the right of exercising this natural privilege, whatever may be the laws of the other states in the union? If a doubt exists upon what principle it is founded? perhaps it will be answered, upon the power granted to congress by the constitution to establish an uniform rule of naturalization. I have given an answer to this, in a preceding tract.[14] Perhaps; upon the faith of our treaties with France, England, and other European nations. But those treaties only stipulate for the conduct of the citizens of the United States, so long as they remain such; not, for their conduct after they shall have abandoned that character in the manner which the laws of the respective states permit.

If a person violates the treaties, and remains a citizen, the treaties stipulate that he shall be punished, or be abandoned by the U. States, as a pirate, and robber. But, if before he attaches himself to any other nation, he renounces his character of an American citizen, I cannot see that he is any longer amenable to the United States for his conduct; nor can they be considered as any longer responsible for a conduct which in ninety nine cases out of an hundred, they can by no possibility control, or punish; the parties having forever bidden adieu to their territory and jurisdiction.

NOTES

1. Law of Nature and Nations B. 8. c. 11.
2. Grotius of War and Peace, B. 2. c. 5. Sec. 24.
3. Vattel, B. 1. c. 19. Sec. 225.
4. Ibidem.
5. B. 2. c. 5. Sec. 24.
6. B. 8, c. 11. S. 4.
7. B. 2. part 2. c. 5.

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8. B. 8. 11. Sec. 2.
9. B. 2. part 2. etc.
10. Sect. 115, etc.
11. 1 Hale, H. P. C. 68, 69.
12. Co. Litt. Sec 85, 91, etc.
13. Oct. 1783, c. 16. Edi. 1794, c. 110.
14. Upon the common law; Note E. part I.

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NOTE L

Of the Rights of Aliens in the United States

LET us now compare the situation and rights of aliens in England with those in America. An alien in England remained the subject of that king or government under which he was born; he migrated to England for the temporary purposes of merchandise, and not of perpetual residence; because, as he continued to be the subject of a foreign power, he was always supposed to retain the *animum revertandi* to his natural sovereign; and, consequently, whenever a war broke out between his own nation and that of Great Britain, he was (however attached to the place of his residence, it's laws or government,) considered as an enemy, unless he could obtain a special letter of license from the crown to remain in England; he could not be made a denizen, but by the special favor of the crown; nor be naturalized, but by the like favor of the supreme legislature, (whose power extends even to an alteration of the constitution itself.) Both these acquisitions must be obtained as a matter of the highest grace and favor, and not of right. Yet, under all these circumstances, an alien, whose nation is in amity with England, is clearly and indisputably entitled to the full protection of the laws in every matter that respects his personal liberty, his personal security, and his personal property, as fully and completely as if he had been naturalized by act of parliament, or had acquired all the rights of an Englishman by his birth.[1]

An alien in America, antecedent to the revolution, was entitled to all the rights and privileges of an alien in England, and many more; to all that an alien in England could claim, because, as has been remarked elsewhere, the common law of England and every statute of that country made for the benefit of the subject, before our ancestors migrated to this country, were, so far as the same were applicable to the nature of their situation, and for their benefit, brought over hither by them; and wherever they are not repealed, altered, or amended by the constitutional provisions, or legislative declaration, of the respective states, every beneficial statute and rule of the common law still remains in force. An alien in America was also entitled to many more rights than an alien in England. 1st, By the very act of migrating to, and settling in, America, he became ipso facto a denizen, under the express stipulations of the colonial charters, (all of which, it is believed, contained similar clauses) whereby it was stipulated for the better encouragement of all who would engage in the settlement of the colonies, that they, and every of them that should thereafter be inhabiting the same, should, and might, have all the privileges of free denizens, or persons native of England.[2] 2d, By the same act of migrating he had a right to be naturalized under the sanction of a pre-existing law, made not only for the benefit, but for the encouragement, of all in a similar situation with himself.[3] The operation of these laws was immediate, not remote; he became a denizen, as of right, instantly; he became naturalized upon payment of the legal lees for his letters of naturalization, and taking the usual oaths.

By the adoption of the constitution of the United States, the rights of aliens to become citizens was by no means intended to be taken away – on the contrary, it is expressly provided, that congress shall have power to establish an uniform rule of naturalization, throughout the United States. The dissimilarity in the rules of naturalization, in the several states, was supposed to have laid the foundation for intricate and delicate questions, under that article of the confederation which declares, that the free inhabitants of each state, paupers, vagabonds, and fugitives from justice excepted, should be entitled to all privileges and immunities of free citizens in the several states, under which provision, it seems to have been apprehended, that the free inhabitants of one state, although not citizens thereof, might be entitled to all the privileges of citizens in every other: to obviate this and similar inconveniences, this power of prescribing an uniform rule of naturalization was vested in the

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federal government.[4] And here we may observe, that congress are authorized to prescribe the mode by which aliens may be naturalized, but it never was intended to authorize it to take away the right. For, among the acts of misrule alleged against our rejected sovereign, George the third, in the declaration of independence, it is asserted, "that he had endeavored to prevent the population of these states; for that purpose obstructing the laws for naturalization of foreigners, and refusing to pass others to encourage their migration hither." Every alien coming into the United States, in time of peace, therefore acquired an inchoate right, under the constitution, to become a citizen; and when he has, in compliance with the laws, made the requisite declarations of his intention to become a citizen, and to renounce for ever all allegiance and fidelity to any foreign prince, or state, and particularly that prince or state whereof he was last a citizen or subject, he seems to have acquired a right, of which no subsequent event can divest him, without violating the principles of political justice, as well as of moral obligation. For the government, in requiring this declaration of renunciation on the part of the alien, previous to his admission to the rights of citizenship, and that at a very considerable period before his right can, by the rule prescribed, be consummated, tacitly engages not to withdraw its protection from him; and much more, not to betray him, by sending him back to that sovereign, whose allegiance he had, in the most solemn manner, disclaimed, and whose subject and adherent he could no longer be considered to be, whatever political relations the two nations may thereafter stand in, with respect to each other. If this position be just with respect to those who might, under different circumstances, have been regarded as alien enemies, (as being antecedently subjects of a power with which the United States may thereafter be at war), how much more powerfully will the same reasoning apply in favor of those who can, under no possible view of the case, be considered in that light? And, in fact, nothing could more effectually discourage emigration, (no, not even a total incapacity ever to be naturalized,) than such an interpretation of our constitution and laws, as would lay a snare for every foreigner disposed to settle in this country; from whence, upon any personal pique or national quarrel, in which he had no part or share, he might be banished, and sent back to that very sovereign whom he must have offended by making the declarations prescribed by our laws.

Aliens, in the United States, are at present of two kinds. Aliens by birth, and aliens by election. – 1. Aliens by birth, are all persons born out of the dominions of the United States, since the fourth day of July, 1776, on which day they declared themselves an independent and sovereign nation, with some few exceptions, viz. 1. In favor of infants, "wheresoever born, whose father, if living, or otherwise, whose mother was a citizen at the time of the birth of such infants; or who migrated hither, their father, if living, or otherwise their mother becoming a citizen of the commonwealth; or who migrated hither without father, or mother," during the continuance of the act of May, 1779, c. 55, declaring who should be deemed citizens, which was repealed October, 1783, c. 16, of that session, so far as relates to the two latter cases; but continued as to the first. 2. Such persons as have obtained a right to citizenship under the existing laws of the state, whether infants, or otherwise. Edi. 1794, c. 110. 3. Such persons as have been naturalized under the act of 1 Cong. 2 Sess. c. 3. 4. Such persons as have, or may acquire the rights of citizenship pursuant to the act of 3 Cong. c. 85, and the children of such persons duly naturalized dwelling within the United States, and being under the age of twenty-one years, at the time of such naturalization; and the children of citizens of the United States, born out of the limits and jurisdiction of the United States. But the same act declares that the right of citizenship shall not descend to persons, whose fathers have never been resident in the United States. – All persons born before the fourth day of July, 1776, who were not natural born subjects of the crown of Great Britain; nor were on that day residents within, or inhabitants of the United States; nor have since that time become citizens of the United States, or some one of them,

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are also aliens by birth.

2. Aliens by election are all such natural born, or naturalized subjects of the crown of Great Britain, as were born, or naturalized before the fourth day of July, 1776, and have not since become actual citizens of the United States; or, having been actual citizens, have at anytime thereafter during the revolutionary war, voluntarily joined the armies of Great Britain, and borne arms against the United States, or any of them; or been owner or part owner of any privateer or other vessel of war; or a member of the refugee board of commissioners at New York; or have acted under their authority; or have been for any other cause proscribed by any state in the union.[5]

This distinction between aliens by birth, and those by election, is of importance. Aliens by birth are generally subject to all the Incapacities to which aliens are subject by the rules of the common law. Aliens by election (although during the revolutionary war they were subject to many incapacities, and even penalties) are now upon a much more eligible footing; possessing rights, (partly derived from the rules of the common law, and partly from the provisions contained in the treaty of peace in 1783, and the treaty of London in 1794) to which aliens by birth can have no claim, except as they may be derived (under the treaty of 1794) by descent, devise, or purchase, from aliens by election.

Aliens by election may then be shortly described to be those subjects of the crown of Great Britain on the fourth day of July, 1776, who have elected to remain such, and have not since become, and continued to be, citizens of the United States, or some one of them. These, by the common law, upon the separation of the two countries, were still capable of inheriting and holding lands in the United States, notwithstanding such separation; and on the other hand, the citizens of the United States born before the separation, had the like capacity to Inherit, or hold lands in the British dominions. 7 Co. Calvin's case. But it is conceived that upon the death of these *ante nati*, as they are called, their lands in both countries, would have been liable to escheat, if their heirs should be *post nati*, or born after the separation. But that is provided against by the treaty of London, 1794, Art. 9, whereby it is agreed, "that British subjects, who THEN held lands in the territories of the United States; and American citizens who then held lands in the British dominions, shall continue to hold them according to the nature and tenure of their respective estates, and titles, therein: and might grant, sell or devise the same to whom they please, in like manner as if they were natives; and that neither they, their heirs or assigns, shall, so far as may respect the said lands and the legal remedies incident thereto, be regarded as aliens."

The citizens of each state shall be entitled to all privileges and immunities in the several states. C. U. S. Art. 4.

What other rights those aliens who may have taken the oath of allegiance to any state, since the adoption of the federal constitution, but have not been naturalized under the laws of the United States, may be entitled to, will be noticed under the head of denizens.

In the appendix to the succeeding volume, we shall have occasion to resume the subject of the rights of aliens to hold lands in Virginia; and shall take a view of the laws concerning escheats and forfeitures from British subjects, passed in Virginia, during the revolutionary war.

The manner in which aliens may be naturalized in the United States, will form the subject of a note under the head of naturalization. post. note 12.

NOTES

1. 2 Inst. p. 55.

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2. Queen Elizabeth's charter to Sir Walter Raleigh.

3. L. V. 1705, c, 11. Edi. 1769.

4. Federalist, No. 42.

5. See V. L. 1779, c. 14 and 55. Oct. 1779, c. 18. Oct. 1783, c. 16, 17. Edi. 1785. 1786, c. 10. 1794, c. 110. L. U. S. 1 Cong. 2 Sess. c. 3. 3 Cong. c. 85.

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NOTE M

Summary View of the Laws Relative to Glebes and Churches

THE act of 1661, c. 1, enacts, "that there be a church decently built in each parish, unless any parish as then settled by reason of the fewness or poverty of the inhabitants be incapable of sustaining so great a charge; in which case such parishes shall be joined to the next great parish of the county, and a chapel of ease be built in such place, at the particular charge of that place.

1661, c. 2, For the making and proportioning the levies and assessments for building and repairing churches and chapels, provision for the poor, maintenance of the minister, and such other necessary uses, and for the more orderly managing all parochial affairs, vestries are appointed to be elected: but none shall be admitted to be of the vestry, who do not subscribe to be conformable to the doctrine and discipline of the church of England.

1651, c. 3, No minister shall be admitted, but such as shall produce to the governor a testimonial of his ordination by some bishop in England, and subscribe to be conformable to the orders and constitutions of the church of England.

1661, c. 10, Church wardens to keep the church in repair; to provide books, ornaments, etc. as the ability of the parish will permit.

1661, c. 3, [purvis] – That for the better encouragement and accommodation of the ministry, there be glebes laid out in every parish, and a convenient house built for the reception and abode of the minister according to his majesty's instructions.

1667, c. 3, [purvis 156] – The like liberty shall be granted for two acres of land, and no more, for erecting churches, as by that act is granted for the erection of mills (as at present) provided that in case of desertion of any structure the land shall revert to the first proprietor, he paying what he received for it.

1696, c. II.[1] Recites, that whereas the law then in force entitled "glebes to be laid out" in making such provision, does appear very deficient and uncertain, it is therefore enacted, that the said act be repealed. And it is further enacted, that every vestry shall be, and are authorized and empowered, where the same is not already done, to purchase and lay out a tract of land for the glebe, in their discretion, and at the charge of their respective parishes; and likewise to build and erect a convenient dwelling house for the reception and abode of the minister of such parish. Provided always, that if the vestry of any parish shall find their parish to be so small and poor, as not to be able to allow and maintain a minister as aforesaid, that then upon application of the vestry to the governor, for the time being, that their parish may be united and consolidated to the next adjacent parish, the said governor is thereby desired to unite and consolidate the said parishes.

1727, c. 6, [Edi. 1733] – In parishes where glebes are not already purchased and appropriated, with convenient tenements for the habitation of the ministers, the vestry may purchase 200 acres of land at the least, for a glebe, and may erect thereon a convenient mansion house, and other necessary outhouses for the habitation of the ministers; and it is further enacted and declared that the vestry of every such parish are thereby authorized, empowered, and required to levy the charge of the said several buildings, and purchase of the glebe on the titheable persons in their respective parishes. – And the vestries of vacant parishes are empowered and required to put all the buildings upon the glebe of the parish into good and sufficient repair for the reception of the succeeding minister.

1748 c. 28, Re-enacts the provisions contained in the last mentioned act of 1727, c. 6, vestries right

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of presentation for twelve months.

1776 c. 2, Oct. Sess. All dissenters of whatever denomination, from the church by law established, shall be totally free and exempt from all levies, taxes, and impositions, whatever, towards supporting and maintaining the said church, as it now is, or hereafter may be established, and it's ministers. With an exception as to arrears of salary, and engagements already entered into by vestries, and provision for the poor. – The act then proceeds – There shall, in all time coming, be saved and reserved to the use of the church, by law established, the several parts of the glebe land already purchased, the churches and all arrears of money or tobacco, arising from former assessments, or otherwise; and there shall be, moreover, saved and reserved, to the use of such parishes as may have received private donations for the better support of the said church and it's ministers, the perpetual benefit and enjoyment of all such donations.

1779, c. 36, Oct. Sess. Repeals all and every act providing salaries for the ministers, and authorizing the vestries to levy the same; provided nevertheless, that the vestries might levy and assess all salaries and arrears of salaries due to ministers for their services to January 1,1777, and moreover might make such assessment on all titheables, as will enable them to comply with their legal engagements, entered into before the same day, etc.

1784, c. 88. The act for incorporating the protestant episcopal church, enacts, that every minister of the protestant episcopal church now holding a parish, either by appointment from a vestry, or induction from a governor, and all the vestrymen in the different parishes now instituted, or which hereafter may he instituted within the commonwealth, that is to say, the minister and vestrymen of each parish respectively, or in case of a vacancy, the vestry of each parish, and their successors for ever, are thereby made a body corporate and politic, by the name of "the ministry and vestry of the protestant episcopal church, in the parish where they respectively reside, and by the name, stile, and title aforesaid they and their successors shall, for ever, lawfully have, hold, use, and enjoy all and every tract or tracts of glebe land, already purchased, the churches and chapels already built, with the burying grounds belonging to them, and such as were begun and contracted for, before the first day of January, 1777, for the use of the parishes, with their hereditaments and appurtenances; and all books, plate, and ornaments, appropriated to the use of, and every other thing, the property of the late established church, to the sole and only proper use and benefit, of the protestant episcopal church, in the parish where the respective ministers and vestries reside; (except the glebe in the county of Augusta) and where the property is situate, and being, agreeable to the true intent for which it was purchased or given: and by the name, stile, and title, aforesaid, they shall be capable in law to hold, maintain, and recover, all their estates, rights, and privileges, and to sue and be sued, etc. and have a common seal: and to take, acquire, and purchase lands, and to demise, alien, improve, and leave the same, glebe lands intended for the ministers' residence excepted, unless during a vacancy, and to build and repair churches, and dwelling houses for the use of the minister, etc. All former laws relating to vestries and church-wardens, and to the support of the clergy repealed, and all former vestries dissolved, the next Easter day, etc. etc. etc.

1785, c. 37. Provides for the election of vestries, where the same had not been done pursuant to the last-mentioned act of 1784, c. 88.

1786, c. 12, Repeals the act for incorporating the protestant episcopal church: saving to all religious societies the property to them respectively belonging, who are thereby authorized to appoint, from time to time, according to the rules of their sect, trustees, who shall be capable of managing and applying such property to the religious use of such societies. And to guard against all doubts and

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misconstructions, it is further enacted and declared, that so much of all laws then in force as prevents any religious society from regulating it's own discipline, shall be, and are thereby repealed.

1788, c. 47. Declares, that the trustees appointed in the several parishes to take care and manage the property belonging to the protestant episcopal church, and their successors, shall, to all Intents and purposes, be considered as successors to the former vestries, and shall have the same power of holding and managing all the property formerly vested in them, whether for charitable purposes, by private donation, or in trust for the use of individuals.

1788, c. 53. Enacts, that the trustees of any religious society, shall have full power and authority to prosecute suits heretofore instituted, and now depending, upon bond, or otherwise, for any arrearages due to the different parishes, with the churchwardens.

1798, c. 9. Recites, that "Whereas the constitution of the state of Virginia, has pronounced the government of the king of England, to have been totally dissolved by the revolution: has substituted in place of the civil government so dissolved, a new civil government; and has, in the bill of rights, excepted from the powers given to the substituted government, the power of reviving any species of ecclesiastical or church government, in lieu of that so dissolved, by referring the subject of religion to conscience: And whereas the several acts presently recited, do admit the church established under the regal government, to have continued so, subsequently to the constitution; have bestowed property upon that church; have asserted a legislative right to establish any religious sect; and have incorporated religious sects, all of which is inconsistent with the principles of the constitution, and of religious freedom, and manifestly tends to the establishment of a national church: For prevention whereof. – It is, therefore, enacted:

That the several laws, the titles whereof are as follow: "An act, for exempting the different societies of dissenters, from contributing to the support and maintenance of the church as by law established, and its ministers, and for other purposes therein mentioned." – "An act, to repeal so much of the act, for the support of the clergy, and for the regular collecting and paying the parish levies, as relates to the payment of the salaries heretofore given to the church of England." – "An act, for incorporating the protestant episcopal church." – "An act, to authorize the election of certain vestries." – "An act to repeal the act, for incorporating the protestant episcopal church, and for other purposes" – "and, "An act for giving certain powers to the trustees of the property of the protestant episcopal church," be, and the same are hereby repealed, and declared to be void and of none effect. And it is further declared, that the law, entitled, "An act, for establishing religious freedom," is a true exposition of the principles of the bill of rights and constitution.

1801, c. 5, Further recites, that, "Whereas the general assembly, on the twenty-fourth day of January, one thousand seven hundred and ninety-nine, by their act of that date repealed all the laws relative to the late protestant episcopal church, and declared a true exposition of the bill of rights and constitution respecting the same, to be contained in the act, entitled "An act for establishing religious freedom," thereby recognizing the principle, that all property formerly belonging to the said church, of every description, devolved on the good people of this commonwealth, on the dissolution of the British government here, in the same degree in which the right and interest of the said church was derived therein from them: And although the general assembly possesses the right of authorizing a sale of all such property indiscriminately, yet being desirous to reconcile all the good people of this commonwealth, it is deemed inexpedient at this time to disturb the possession of the present incumbents."

It is therefore enacted by the general assembly, That the overseers of the poor and their successors,

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or a majority of them, within each county of this commonwealth, wherein any glebe land is vacant, or shall become so, by the death or removal of any incumbent, shall have full power and authority, and they or a majority of them are hereby directed, on giving at least thirty days public notice, at the front door of the court-house of their county, to sell all such lands and appurtenances, and every other species of property incident thereto, on the premises, to the highest bidder, on twelve months credit, taking bond with good security for the amount thereof payable to themselves and their successors; provided that no sale of any such property shall take place, where any person is in possession thereof, under a lease from any person or persons in behalf of the said church, whether called trustees or not, prior to the passing of this act, until the said lease shall expire; and all sums of money or tobacco due thereon, or to become due, shall be recovered by action in the names of the said overseers of the poor, or a majority of them conducting every such sale, or their successors, on receiving satisfactory security for the amount thereof, be, and they are hereby authorized and directed, to convey all such property sold by them as aforesaid, to the purchaser or purchasers thereof, by good and sufficient deeds for that purpose; that in all cases where any person or persons may have received any sum or sums of money or tobacco, for the use of the episcopal church as established under the former government, and shall not have paid the same as directed by law, the said overseers of the poor and their successors, or a majority of them, shall be entitled to receive the same, and on non-payment thereof, to recover it by action in any court of record within this commonwealth: That when any person or persons, other than an incumbent or his tenant, shall have had the use of any glebe land or other property incident thereto, and may not regularly have accounted for the profits of the same, they shall hereafter account to the said overseers of the poor, or a majority of them, of the county in which such property lies; and in case any such person or persons, their executors or administrators refuse to account accordingly, the said overseers of the poor or their successors, may sue for and recover the same, in any court of record within this commonwealth. That in all cases where such property is in possession of any incumbent or his tenant, either or both of them shall be restrained from the commission of waste, in like manner as other tenants for life or years may be, by the said overseers of the poor or their successors, in whom the right of action for that, and the purpose of carrying this act into effect, is hereby vested. That in every case where the overseers of the poor, or any one or more of them in any county, shall have good reason to believe, that the incumbent therein shall be about to remove any or the whole of the personal estate, which he holds as formerly belonging to the episcopal church from such county, they or any one or more of them shall upon application to any magistrate therein, obtain from him an attachment which he is hereby authorized to grant, against the estate so about to be removed, upon the execution of which, and the return thereof, being made to the next court of such county, the said court may compel the said incumbent, on due proof thereof, to give bond with sufficient security; not to remove the said property, or any part thereof, from the premises; and, in case of refusal, the said court may order the said property to be delivered to the said overseers of the poor, and their successors, or a majority of them, to be by them disposed of, as in other cases. That in all cases, where there shall be any just demand, unpaid by any parish, the said overseers of the poor and their successors, or a majority of them, in every county comprehending such parish, or the greater part thereof, shall, from any of the funds aforesaid, before they are otherwise applied, pay the same: and shall then be entitled to a credit with the overseers of the poor of the county comprehending the residue of such parish, for their proportion thereof. That in cases where a glebe shall be in, or a parish run into, more counties than one, the overseers, as aforesaid, of the county wherein the glebe, or the greater part thereof, shall lie, shall sell the same, as aforesaid; and in all cases, the said overseers, and their successors, or a majority of them, shall appropriate the money arising therefrom, to the poor of such parish or to any other objects, which a majority of the freeholders and

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housekeepers therein, may direct, by a writing from under their hands directed to the said overseers. And in all other cases the money arising therefrom, as aforesaid, shall be, by the said overseers of the poor, or a majority of them, in the counties respectively, applied in like manner, unless directed otherwise as aforesaid; Provided, – That nothing herein contained, shall authorize an appropriation to any religious purpose, whatsoever. – That the said overseers of the poor or a majority of them, or their successors, shall meet as often as they may deem it necessary, for the purpose of carrying this act into effect. That the overseers of the poor, and their successors in each county where any such property remains, shall perform all the duties required of them, respectively, by this act, under the penalty of two hundred dollars each, to be recovered in any court of record, by any one who will sue for the same. That the said overseers and their successors or a majority of them, who shall perform the duties hereby required, shall be entitled to receive for advertising, selling and conveying, any of the said property, a commission of three per cent. and for collecting and appropriating any of the funds by them received, three per cent. more; and shall be accountable to their successors, as in other cases. That nothing herein contained shall authorize a sale of the churches and the property therein contained, or the church-yards, nor in any manner affect any private donation made prior to the first day of January one thousand seven hundred and seventy-seven, for church and other purposes, where there is any person in being entitled to take the same under any private donor; nor to affect the property of any kind, which may have been acquired by private donations, or subscriptions by the said church, since the date last mentioned."

Thus far what may be considered as public acts – there are a multiplicity of private acts,[2] scattered among the sessions acts of our legislature which may contribute to throw an additional light upon this subject.

From the whole of these private acts, it may be collected, that the glebes and churches were purchased at the expense of the parishioners generally. – That they were considered as having an interest therein – that on the division of parishes, the inhabitants of one part of the parish, were frequently reimbursed by the other for their contributions towards the purchase of the glebe and church for the first parish – or the glebes were sold, the money divided between the parishes in proportion to their number of titheables, and vested in the vestries respectively for the purpose of purchasing other glebes. It also appears that in some instances, by a special provision in the acts, the vestries were declared to be persons capable of taking the conveyances and holding the lands.

Since the preceding note was transcribed for the press, the following report of a case in the high court of chancery at Richmond, has been published in several of the newspapers; although the editor cannot vouch for its authenticity, he deems it of too much importance to be pretermitted.

The question relative to the glebe lands which has, for many years, excited so much attention in this country, has been discussed at much length, during the present term of the high court of chancery. At the last session of assembly an act passed, declaring that the overseers of the poor in each parish, where there was no incumbent, should proceed to sell the glebe, and apply the money to such a purpose as the majority of the parishioners should direct. This property which was formerly claimed and held by the church of England, has, since the revolution, been claimed by the protestant episcopal church as the successors of the church of England. The overseers of the poor in the parish of Manchester and county of Chesterfield, were about to proceed to execute the law of the last session; and, in order to stop their proceedings, the church wardens and vestry of that parish applied to the chancellor for an injunction to stay the sale: In their bill the complainants contended that the property in the glebe was vested In the vestry and church wardens for the benefit of the church of England; that all the rights of that church now belonged to the protestant episcopal church; that the

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legislature had, by many successive acts, recognized and secured the rights of the present church; and that the last act of the legislature attempting to divest those rights was void.

In opposition to this, it was contended – that the revolution had completely destroyed every thing like an established church in this country; that the bill of rights guaranteed the right of religious freedom, and inhibited any preference of one sect to another; that the church of England being destroyed by the revolution, the property given to support it revested in the community; that the acts which had passed since the revolution, some of which vested the property of the church of England in the protestant episcopal church, and one of which incorporated that church, were contrary to the bill of rights and constitution, and therefore void; that it followed that the act of the last session was valid, and that the court ought not to award the injunction.

After the arguments on both sides were concluded the chancellor proceeded to give his decision. He examined into the rights of the church and the effect of the revolution on them: he Inquired how far the principles of civil and religious freedom, as declared by our bill of rights, and secured by our constitution, were inconsistent with the pretensions of the church; and their enjoyment of property, which was originally given for the support of an English hierarchy; he refuted the arguments which attempted to show any injustice in the act of the legislature; and demonstrated, that by restoring it to be disposed of by the majority of the parishioners, it effectuated the purposes of justice, without contravening the rights of property, or violating the approved maxims and rules of law; and finally decided that the law of the last session (1801. c. 5.) was valid, and refused to award an injunction to stay the sale of the glebe of the Manchester parish which was, confessedly, vacant.

Similar applications being made respecting a glebe in the parish of Loudon, and one in the county of Fauquier, as the bill stated that they had incumbents at the time the law passed, and at present; and, as they did not come within the law, provided the allegations were true, he awarded the injunctions; leaving it to the overseers of the poor to controvert the fact of the incumbency if they thought fit. – He further directed the bill, in the case in which the validity of the law was called in question, to be amended, that the attorney-general, on the part of the commonwealth, might be made a party; so that by a demurrer to the bill, he might, if he chose, bring on the question in such a shape as would allow an appeal to the court of appeals, that this subject which has so long agitated this country should receive the solemn decision of that tribunal.[3]

During the pendency of this important question, it would be equally presumptuous, and indecorous in the editor to express any opinion upon the subject, (had he formed one) as it might relate either to the merits of the question, or the constitutionality of the several laws, on which each party seems to rely for the support of their opposite claims. Nevertheless, he cannot, consistently with his own feelings and impressions, refrain from addressing some few hints to those who may be called upon to discharge the important duty of legislators, upon the subject of a general provision to be made by law for the support of those who may be willing to undertake the office of instructors in morality and religion, without regard to sects, or denominations, and without preference to any. This he does with the greater diffidence, as he has reason to believe the subject was once discussed in the legislature, with consummate ability, both by the advocates, and opposers of the measure. As he was not happy enough to hear the debate, a difference of sentiment from that which then prevailed, is perhaps attributable to that cause, only. He therefore respectfully submits to the candid opinion of his enlightened countrymen, the following questions.

Is it not presumable that a steadfast belief, and thorough conviction of the existence of a Supreme Being; of his attributes, and his providence; of the immortality of the soul, and of a future state of

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conscious existence, has, or may have a powerful effect upon the moral conduct of all who sincerely embrace and believe in those doctrines? And is it not equally presumable that the moral character of every man has a powerful influence over his social conduct?

Is it probable, that the great bulk of mankind, by the mere light of their own reason and reflection, unassisted by the reason and reflections of others, will imbibe such a conviction, and belief in these respects, as to produce an equal effect upon their moral conduct, as if they had received such aids?

Is it not probable, that those who have devoted their lives to the study of the divine nature, and of the nature of moral obligation and social duty; and who feel an unfeigned conviction of their truth and importance, will be more capable of enforcing a sincere conviction and belief of them in others, than those who have not received the benefits of education, or, who are compelled by imperious necessity to devote the greater part of their time to other avocations and pursuits?

Is not the culture of morals, and of social duty, an object worthy of the attention of every wise legislature?

Does any clause or article of the bill of rights or constitution of the commonwealth inhibit the legislature from imposing a reasonable tax for those purposes?

If those purposes can be most effectually promoted by the employment of men of learning and ability, and of exemplary lives and conversation as teachers of the duties enjoined by religion and morality, will not a wise legislature have recourse to such means for the culture of morals, and of social duty?

If the last question be answered in the affirmative, it may not be deemed improper to suggest the following skeleton of a plan for that purpose.

Let the courts of the several counties within the commonwealth impose a yearly tax within their respective counties, in proportion to the taxes payable to the commonwealth for the same year, and not exceeding one tenth, nor less than one twentieth part of the tax, which each person pays to the commonwealth, to be set apart and unalienably appropriated to the support of teachers of religion and morality, and for the erection and keeping in repair places of worship, and public schools. Let all persons whose tax to the state shall amount to less than one dollar, be wholly exempt from this tax.

Let the tax be collected by the sheriffs at the same time that the taxes to the state are collected, and let them be allowed the same commissions thereon, and be subject to the same penalties in case of default; and let them pay the same to the clerk of the county, within ten days of the time that the public taxes are payable into the treasury. Let one fourth part of the sum so collected, be unalienably appropriated to the erection of places of worship and public schools, in such parts of the county as the court, or a majority of the inhabitants of the several parishes, sections, or sub-divisions of the county, respectively, may choose; and let the residue be paid annually to such teacher of religion and morality, duly authorized by law to solemnize marriages, as the person paying the same may direct.

Let the clerk of the county be allowed a moderate commission on the sums which he may receive and pay. Let him enter, gratis, the names of all persons paying any tax for the support of the teachers of religion and morality, together with the name or names of the person to whom the payer shall direct the same to be paid, and the amount of each person's tax, in a book to be kept for that purpose; let him, when required, furnish the persons entitled to receive the tax with a list of the names of those who pay it, and the amount thereof, after deducting his commissions and the sheriffs, and the

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fourth part set apart for useful and necessary buildings, as before mentioned. Let him receive one cent, and no more, for every name contained in such list, from the person requiring it.

Let any person be at liberty, at any time, to withdraw the payment of his tax from the person to whom he may formerly have directed the same to be paid, and to authorize the payment thereof to another, provided the same be done before the tax shall come into the hands of the clerk.

Let every teacher of religion, claiming any benefit under these regulations, be required and compelled to reside in the county from which the tax is collected; and to keep a public school therein, for the teaching of reading, writing, and arithmetic; and to instruct the children of all persons who do not pay a tax of two dollars yearly to the state, for three years, gratis; and all other children within the county, on moderate terms.

If there be any thing in this imperfect sketch incompatible with the most perfect liberty of conscience in matters of religion, the writer has not made the discovery; and making it, would be among the first to disapprove of it.

NOTES

1. The title of this act, occurs in the Edi. of 1733, page 109. "An act for the better support and maintenance of the clergy." – In a manuscript (page 175,) collection of public papers lent me by Mr. William Hornsby, which appears to be very old, there is a copy of the act at large, from which I have extracted what is here inserted. See also V. L. abridged, Edi. 1722, p. 17.

2. See acts of 1734, c. 19, 20. 1736, c. 16,22. 1738, c. 20. 1740, c. 4. 1742, c. 30, 31. 1744, c. 19, 23, 25, 27, 31. 1747, c. 2. 1753, c. 19, 21. 1755, c. 19. 1762, c. 26, 28, 31, 33, 34. 1769, c. 45, 49, 50, 51, 61, 62, 64, 67. 1772, c. 47, 49, 58. Octo. 1776, c. 44. May 1777, c. 21, 25, 26. Octo. 1777, c. 30, 34, 37. May 1778, c. 13. Octo. 1778, c. 31. May 1779, c. 37, 39. Octo. 1779. c. 36, 46, 49. Octo. 1780, c. 19. – The above are all private acts. See also 1730, c. 18, 19. 1732, c. 16, 18.

3. Extracted from the Petersburg Intelligencer of September, 28,1802.

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APPENDIX
to Vol. 3

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NOTE A

Concerning the Tenure of Lands in Virginia, and the Mode of Acquiring Them

QUEEN ELIZABETH, by letters patent bearing date March 25, 1584, licensed sir Walter Raleigh to search for remote heathen lands, not inhabited by Christian people, and granted to him in fee simple, all the soil within two hundred leagues of the places where his people should within six years make their dwellings, or abidings, reserving only to herself, and her successors, their allegiance and one fifth part of all the gold and silver ore they should obtain. After some unsuccessful attempts to settle a colony on Chesapeake Bay, Sir Walter granted to Thomas Smith and others, in consideration of their adventuring certain sums of money, liberty of trade to his new country, free from all customs or taxes for seven years, except the fifth part of gold or silver ore to be obtained, and stipulated that he would confirm the deed of incorporation which he had given in 1587. Sir Walter at different times sent five other adventurers to Virginia. In 1603, he was attainted. Some gentlemen and merchants supposing that by his attainder, the grant to him was forfeited, petitioned James the first for a new grant of Virginia to them. He accordingly executed a grant to Sir Thomas Gates and others, under which a settlement was effected at Jamestown the same year. This grant was superceded by letters patent dated May 1609, from the same king to the earl of Salisbury and others, granting to them and their successors by the name of the treasurer and company of adventurers, etc. for the first Virginia colony, all the lands in Virginia, to be held of the king and his successors, in "free common socage and not *in capite*" yielding one fifth part of the gold and silver ore to be therein found, for all manner of services. Afterwards on the 12th of March 1612, the king granted another charter, confirming all former grants. In 1624, the king suspended the company's powers by proclamation, and his son Charles the first took the government of the colony into his own hands. The northern parts of the colony were granted away to the lords Baltimore and Fairfax; the former obtaining the rights of separate jurisdiction and government, settled the colony of Maryland. In 1650, the parliament having deposed the king, and succeeded to all his powers, assumed a right over the colonies; the colony of Virginia which had maintained an opposition to the powers of Cromwell and the parliament, in 1651, agreed to lay down their arms, having previously secured their most essential rights by a solemn convention, which Mr. Jefferson has given us at large in his notes on Virginia. Among these it is agreed, "that all patents of land granted under the colony seal by any of the precedent governors, shall be and remain in their full force and strength, and that the privilege of having fifty acres of land for every person transported into that colony shall continue as formerly granted." King Charles the second, by his charter, dated October 10, 1676, declares and grants, that for the encouragement of such of his subjects as shall go to dwell in Virginia, there shall be assigned out of the lands not already appropriated, fifty acres for every person so going thither to dwell, as has been used and allowed since the first plantation. How the lands thus granted by the authority of the government of England were acquired, no authentic documents, that the editor has had access to, ascertain. But Mr. Jefferson assures us, "that the lands in this country were taken from the Indians by conquest, is not so general a truth as is supposed. I find in our historians and records, repeated proofs of purchase, which cover a considerable part of the lower country; and many more would doubtless be found, on further search. The upper country we know has been acquired altogether by purchases made in the most unexceptionable form." Notes on Virginia, articles aborigines, and constitution.

The mode of acquiring lands in the earliest times of our settlement was by petition to the general assembly. If the lands prayed for were already cleared of the Indian title and the assembly thought the prayer reasonable, they passed the property by their vote to the petitioner, etc. The company also, sometimes, though very rarely, granted lands, independently of the general assembly. As the colony

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increased, it was thought better to establish general rules by which all grants should be made, and to leave the execution of them to the governor, for which purpose, what are usually called the land-laws were passed, and from time to time amended. According to these, lands were to be located and surveyed by a public officer: the breadth of the plat was to bear a certain proportion to its length; the grant was to be executed by the governor, and the lands were to be improved in a certain manner, within a given time.[1] Hence, according to Mr. Jefferson, the state claimed an exclusive power to take conveyances of the Indian right of soil, since according to these regulations an Indian conveyances alone, could give no right to an individual. Such conveyances have accordingly been declared void by law;[2] and the law has in this respect been confirmed by the constitution of the commonwealth. By the act of 1662, c. 78, the bounds of lands were to be renewed every fourth year, by the view of the neighbors. This admirable provision has by several subsequent acts[3] been continued to the present day, and where it has been complied with, very few disputes about boundaries arise; but there is reason to apprehend that the execution of it has been very much neglected of late years, especially in those counties which have been settled, and the lands therein granted, since the commencement of the revolution. The several acts of 1680, c. 21; 1710, c. 13. and 1748, c. I. confirm all patents antecedent to the first day of June 1710. The act of 1736, c. 3. confirms the titles of the grantees of land held under lord Fairfax in the northern neck of Virginia; and the act of 1748, c. 41, confirms the grants of the crown within the same limits, antecedent thereto.[4] By the act of May 1779, c. 13, the reservation of royal mines, of quit-rents, and all other reservations and conditions in the grants of land under the former government, are declared null and void; and that all lands thereby granted shall be held in absolute and unconditional property, to all intents and purposes whatsoever; in the same manner with the lands thereafter to be granted by virtue of that act; and that ap petition for lapsed lands be admitted or received on account of any failure, or forfeiture whatever, incurred after the 29th day of September, 1775.

By the last mentioned act the land office of the commonwealth was established, and the terms and manner of granting waste and unappropriated lands were ascertained. The legislature at the same time passed an act[5] for adjusting and settling the titles of claimers to unpatented lands previous thereto. This act declared,

I. That grants might issue for lands founded upon any of the following rights or claims, *viz.* 1. Upon all surveys of waste and unappropriated lands upon any of the western waters, made before the first day of January 1778. And 2. upon all surveys made upon any of the eastern waters, at any time before the end of that session of the general assembly, by any county surveyor commissioned by the masters of William and Mary College, acting according to the laws and rules of government then in force, and founded either upon,

1. Charter rights:

2. Importation rights; duly proved, and certified according to the ancient usage, as far as relates to indebted servants, and other persons, not being convicts. The ancient usage in this case seems to have been for the party to prove his title, or right, before the governor and council, or to produce a certificate from the county court, to the secretary's office;

3. Upon treasury rights; for money paid the Receiver General, duly authenticated; upon entries on the western waters, regularly made before the 26th day of October 1763.

4. Or, on the eastern waters, at any time before the end of that session of assembly, for tracts of land not exceeding 400 acres, according to act of assembly, upon any order of council; or entry in the council books, and made during the time in which it shall appear that such order or entry remained

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in force, the terms of which have been complied with, or the time for performing which, is unexpired.

5. Or upon any warrant from the governor for the time being for military service, in virtue of any proclamation, either, 1. from the king of Great-Britain, or 2. from any former governor of Virginia; all which rights are by that act declared good and valid: but all surveys of waste and unpatented lands, made by any other person, or upon any other pretense whatsoever are declared null and void. Provided that all officers or soldiers, their heirs or assigns claiming under the late governor Dumviddie's proclamation of a bounty in lands to the First Virginia Regiment, and haying returned to the secretary's office surveys made by virtue of a special commission from the president and masters of William and Mary College, shall be entitled to grants thereupon; and all officers and soldiers, their heirs and assigns under proclamation wan-ants for military service, having located lands by actual surveys, made under such special commission, shall have the benefit of such locations. Every person, his heirs and assigns, claiming lands under any of the before recited rights, and under surveys made as before mentioned, against which no caveat was theretofore legally entered, should upon the plots and certificates of such survey being returned to the land office, together with the rights, entry, order, warrant, or authentic copy thereof upon which they were respectively founded, within twelve months after the end of that session of assembly (which period has been from time to time extended by a multiplicity of acts) be entitled to a grant for the same, in the manner prescribed by that act.

II. Grants might be issued upon settlement rights accruing, 1. To all persons who before the first day of January 1778, have really and bona fide settled themselves or their families; 2. Or, at his, her, or their charge have settled others, upon any waste and unappropriated lands on the western waters, to which no person has any legal right or claim, allowing for every family so settled four hundred acres of land, or any smaller quantity. 3. Such as have settled in villages or townships, are allowed six hundred and forty Acres, whereon such villages are situate, and to which no person has a legal previous claim, with the like quantity of four hundred acres for every family: but no family was entitled to the allowance granted by that act, unless they had made a crop of corn, or had resided one year, at the least from the time of the settlement.[6]

III. Grants for lands might be obtained under the act of the same session, c. 13. By the officers and soldiers on the continental, or state establishment, to whom a bounty in lands had been engaged, either by ordinance of convention, or any laws of the commonwealth; the proportions of which by an act passed in October, 1779, c. 31, were fixed as follows; to a colonel 5000 acres; a lieutenant colonel 4500 acres; a major 4000 acres; a captain 3000 acres; a subaltern officer 2000 acres; a non-commissioned officer who having enlisted for the war, should serve to the end thereof 400 acres; a soldier or sailor under the like circumstances 200 acres; a noncommissioned officer enlisted and serving for three years, 200 acres; and a soldier or sailor under the like circumstances, 100 acres; with the like provisions for the officers in the navy in proportion to their rank: and where any officer, soldier or sailor shall have fallen, or died in the service, his heirs, or legal representatives, should be entitled to his proportion of land. To satisfy these claims all the lands lying between the Green River and the Tennessee River from the Allegheny mountains to the Ohio River except the tract granted to Richard Henderson and Company were especially reserved, to give them the choice of good lands not only for the public bounty due to them for military service, but also in their private adventures as citizens.

IV. Any person might acquire title to so much waste and unappropriated lands as he might desire to purchase on paying the consideration of 40£[7] (paper money, and since fixed at two hundred

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dollars) into the treasury of the commonwealth, in any part thereof, except within the limits of the Cherokee Indians, or on the northwest side of the Ohio, or on the lands reserved by law for any particular tribe of Indians, or on the lands granted by law to Richard Henderson and Company, or those reserved for the army, as before mentioned. By another act passed in May 1780, c. 2. a further reservation of all lands on the sea shores, the Chesapeake Bay, or on any river or creek, theretofore used as common, was likewise made.

It appears by the act of 1785, c. 36, that the issuing of land warrants had been before that time prohibited by resolution of the general assembly, which prohibition was by that act removed for a limited time, and has never since been repeated, that I can discover. In the same session two other acts c. 42, and 47, were passed; the first, for disposing of waste and unappropriated lands on the eastern waters; the price of which was fixed to 35£ the hundred acres: the second related to the lands within the Northern Neck, which the assembly appear to have supposed vested in the commonwealth on the death of lord Fairfax, and authorized grants of accordingly to the purchasers from lord Fairfax's devisee appear to have relinquished their title to the lands so granted by the commonwealth. Sessions acts, 1796, c. 14.

V. Grants or patents for lands escheated to the commonwealth, might be obtained by any person purchasing the same, under an act passed in May 1779, c. 14, entitled "an act concerning escheats and forfeitures from British subjects," whereby the purchaser should be entitled to the same fully and freely exonerated from the right, title, claim, and interest legal and equitable of any British subject whatsoever; and also of all and every person whatsoever, under any mortgage, the equity of redemption whereof had not been foreclosed, at the time of such sale. These titles were further confirmed by the act of October 1779, c. 39. And although by the treaty of peace, congress undertook to recommend to the several states that such estates might be restored, upon the purchasers being reimbursed, the price given for the same, yet the titles of the purchasers have not hitherto been shaken, or questioned.

VI. Lands forfeited to the commonwealth for non payment of taxes for the space of three years, might be granted to any person desiring to purchase the same, on payment of 15£ specie for every hundred acres, under the act of 1790, c. 5, and 1785, c. 42, therein referred to. The act of 1792. (Edi. 1794, c. 86,) raised the price to one hundred dollars, but now by the act of 1795, c. 9, any person desiring to locate such lands shall procure from the commissioners of the land tax, a certificate of the price at which the same stands charged, which being paid, and other requisites of the act complied with, the party shall be entitled to the commonwealth's right therein.

This sketch of the land laws of the commonwealth may suffice in this place; the manner in which the grants of the commonwealth must be perfected, will be more properly considered hereafter. I shall conclude this note with referring to the laws, in general, which respect grants, or titles of lands from the commonwealth: they are so numerous that I may possibly have omitted several, there being no index to help such researches, and the titles being very frequently an insufficient guide. By the act of 1748, c. 1, Edi. 1769, all patents granted before the first day of June 1710, being confirmed, I shall only refer to that, and subsequent acts. Acts of 1769, c. 33; C. V. Art.20,21; Acts of May 1779, c. 12, §14; Oct. 1779, c. 2, 18, 21, 27; May 1780, c. 2, 7, 9; Oct. 1780. c. 11, 12, 27; March 1781, c. 10; May 1781, c. 22; Nov. 1781. c. 5, 13, 19, 29, 40, §4. 17; May 1782, c. 7, 18, 34, 39 §9, c. 47, 49; Oct. 1782, c. 1, 8. §4, 24. c. 13, 24, 30, 33, 34. 45; May 1782, c. 31, 36, 38, §9; Oct. 1783, c. 4, 18, 21, 29, 32, Edi. 1785; Sessions acts of 1784, c. 10, 14, 30, 34, 38, 39, 48, 71, 79; Sessions acts of 1785, c.31, 36, 39, 41, 42, 47, 67; Sessions acts of 1786, c. 3, 4, 11, 104; Sessions acts of 1787, c. 15, 40, 42, 46; June 1788, c. 4, authorizing inclusive patents; Oct. 1788, c. 4,20, 21; 1789,

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c. 34,39, 49; 1790, c. 1, 5,10, 13, 14; 1791, c. 4, 5,6, I4; 1792,c. 5, 7,8, 16, 20. Sessions acts; l793, c. 38. Sessions acts; 1794; c. 11,47; Sessions acts; Edi. 1794, c. 86; Sessions acts 1795,c. 9, 22; Sessions acts, 1796, c. 24, 47, 51, 52; See also the resolutions of the federal congress, August 14, and 27, 1776. Ordinance of congress, May 20, 1785, and July 13,1787, and L. U. S. A Cong. c. 30, 46. 5 Cong. 3. Sess.c. 135, 140; 6 Cong. I Sess. c. 8, 13,45, 55, 59. 2 Sess. c. 5, 2S; 7 Cong. 1 Sess. c. 30. 44., L. V. 1796, c. 14,24,47,51,52,60, 63; 1797, c. 10,13, 17,44; 1798, c. 20, 27; 1799, c. 50; 1800, c. 6, 52; 1801, c. 5, 7.

NOTES

1. V. L. 1710, c. 13. Edi. 1733 –1748, c. 1. Edi. 1769. V. L. 1662. c. 136. Purvis 97.
2. Ibid. 1705, c. 14. Edi. 1769, p. 52. May 1779, c. 25. Edi. 1785. J Constitution of Virginia Art. 21. V. L. 1794, c. 122.
3. V. L. 1710, c. 13. 1748, c. 1.1785, c. 4. Edi. 1794, c. 86. Sec. 56. 1795, § 9. 1796, c. 24.
4. V. L. Edi. 1784, c. 3, 4. V. L. Edi. 1785.
5. V. L. Edi 1785, c. 12. May 1779. V. L. 1662, c. 68. Purvis. page 52.
6. V. L. May 1779, c. 13. Edi. 1785.
7. V. L. May 1779, c. 13. Edi. 1785. V. L. Edi. 1794, c. 86.

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NOTE B

Discourse Concerning the Several Acts Directing the Course of Descents

BY the several charters granted to the first settlers in the colony of Virginia, all the lands therein were held of the crown in free and common socage: and as the common law of England and all statutes made in aid thereof prior to the fourth year of James the first were recognized in our courts, as the law of the land, in all cases to which they were applicable, the rules respecting landed property in Virginia were conformable to the laws of England, in respect to socage lands; at least so far as respected the course of inheritances, either by the common law, or as regulated by the statute *de donis conditionalibus* [of conditional gifts], by virtue of which it was held that lands might be entailed in Virginia, as well, as in England: a doctrine much favored by the legislature of Virginia before the revolution, and even extended to slaves as well as lands; insomuch that the ordinary methods of docking entails in England were absolutely prohibited here; nor could any estate tail be unfettered, without a special act of assembly passed for that purpose,[1] until the act of 1734, c. 6, paved the way for doing it by writ of *ad quod damnum* [at what loss], where the estate was under the value of two hundred pounds sterling.[2] – But immediately after the commencement of the revolution, the legislature passed an act, declaring tenants of lands, or slaves, in tail to hold the same in fee simple: and from that period, till the commencement of the act of 1785, c. 60, entitled an act directing the course of descents, all lands in Virginia descended in the same course of inheritance, as lands in fee simple in England by the rules of the common law. That important act wholly changed the course of descents; introducing and establishing principles in direct opposition to those of the common law, and scarcely agreeing with it in any one principle. For the better understanding of it, I shall first transcribe the act at large, and then endeavor to collect such general rules, as I conceive are deducible from it; after which, I shall, as far as my abilities will enable me to do so, attempt to point out the difficulties which have been created by two subsequent acts passed upon the same subject.

I. First then; the act declares,

Sect. 1. That henceforth, when any person having title to any real estate of inheritance, shall die intestate as to such estate, it shall descend and pass in parcenary to his kindred male and female in the following course, that is to say,

Sect. 2. To his children or their descendants, if any there be:

Sect. 3. If there be no children nor their descendants, then to his father:

Sect. 4. If there be no father, then to his mother, brothers and sisters, and their descendants, or such of them as there be.

Sect. 5. If there be no mother, nor brother, nor sister, nor their descendants, then the inheritance shall be divided into two moieties, one of which shall go to the paternal, the other to the maternal kindred, in the following course, that is to say;

Sect. 6. First to the grandfather;

Sect. 7. If there be no grandfather, then to the grandmother, uncles and aunts on the same side, and their descendants, or such of them as there be;

Sect. 8. If there be no grandmother, uncle nor aunt, nor their descendants, then to the great grandfathers, or great grandfather, if there be but one;

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Sect. 9. If there be no great grandfather, then to the great grandmothers or great grandmother if there be but one, and the brothers and sisters of the grandfathers and grandmothers and their descendants, or such of them as there be;

Sect. 10. And so on in other cases without end; passing to the nearest lineal male ancestors, and for want of them to the lineal female ancestors, in the same degree, and the descendants of such male and female lineal ancestors, or such of them as there be.

Sect. 11. But no right in the inheritance shall accrue to any persons whatever, other than to children of the intestate, unless they be in being and capable in law to take as heirs at the time of the intestate's death.

Sect. 12. And where for want of issue of the intestate, and of father, mother, brothers and sisters, and their descendants, the inheritance is before directed to go by moieties to life paternal and maternal kindred, if there should be no such kindred on the one part, the whole shall go to the other part: And if there be no kindred either on the one part or the other, the whole shall go to the wife or husband of the intestate. And if the wife or husband be dead,.it shall go to her or his kindred, in the like course as if such wife or husband had survived the intestate and then died entitled to the estate.

Sect. 13. And in the cases before mentioned, where the inheritance is directed to pass to the ascending and collateral kindred of the intestate, if part of such collaterals be of the whole blood to the intestate, and other part of the half blood only, those of the half blood shall inherit only half so much as those of the whole blood: But if all be of the half blood they shall have whole portions, only giving to the ascendants (if there be any) double portions.

Sect. 14. And where the children of the intestate, or his mother, brothers, and sisters, or his grandmother, uncles, and aunts, or any of his female lineal ancestors living, with the children of his deceased lineal ancestors male and female in the same degree, come into the partition, they shall take *per capita*, that is to say, by persons; and where a part of them being dead, and a part living, the issue of those dead have right to partition, such issue shall take *per stirpes*, or by stocks, that is to say, the share of their deceased parent.

Sect. 15. And where any of the children of the intestate or their issue, shall have received from the intestate in his life time any real estate by way of advancement, and shall choose to come into partition, with the other parceners, such advancement shall be brought into hotchpot, with the estate descended.

Sect. 16. In making title by descent, it shall be no bar to a demandant, that any ancestor through whom he derives his descent from the intestate, is or has been an alien. Bastards also, shall be capable of inheriting or of transmitting inheritance on the part of their mother, in like manner as if they had been lawfully begotten of such mother.

Sect. 17. Where a man having by a woman one or more children, shall afterwards intermarry with such woman, such child or children, if recognized by him, shall be thereby legitimated. – The issue also in marriages deemed null in law, shall nevertheless be legitimate.

Sect. 18. This act shall commence and be in force from and after the first day of January, one thousand seven hundred and eighty seven.

I shall now proceed to collect such general rules, as I conceive are deducible from this act, with a view to compare them with the correlative rules of the common law.

1. The first general rule to be drawn from this important act, and which may serve as a guide and

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clue to the whole, will be best expressed in the very words of the act, itself: viz:

"When any person having title to any real estate of inheritance, shall die intestate as to such estate, it shall descend and pass in parcenary to his kindred male and female; in the course thereinafter prescribed."

The correlative rule of the common law may be thus expressed. – "When any person having title to an estate of inheritance in fee simple, shall die actually seized of such estate, intestate, it shall descend and pass to his eldest son or his issue; or other most worthy heir of the whole blood of the intestate, or of the first purchasers; in exclusion of his younger children, and their issue, and of all other lineal, or collateral kindred of the intestate."

The essential and irreconcilable difference between those two., primary general rules, or canons, will be better understood by comparing their several parts together.

1. First then; by our law when any person having title to any teal estate of inheritance, shall die intestate as to such estate, it shall descend in the course therein prescribed. Whereas the common law superadds the necessity of an actual seizin of the estate, in order to constitute the person having title thereto, such an ancestor, as that an estate of lands or tenements can be derived from him; it being a maxim in that law that *seisina facit stipitem* [seizin makes the stock]: and, therefore, he shall not be accounted an ancestor who has only a bare right or title to enter or be otherwise seized.[3] – And, therefore, if a man purchase lands in fee simple, and die leaving issue two daughters by one venter, and his wife enseint with a child of the half blood, to the daughters, and the daughters enter into his estate, and then the son is born, this son may enter upon the possession of his sisters, as heir to his father; but if he dies without entry into the estate, or perception of the rents, by himself or his guardian, in this case, by the common law, the heirs of the whole blood to the son, shall not inherit from him, and divest the estate of the daughters, as the .son himself, might have clone; for he, having never had actual seizin of the lands, is not such an ancestor, as that an estate in lands could be derived from him. Whereas, now, I apprehend, that in the same case, the heirs of the son shall succeed to his portion of the inheritance, which descended from his father, equally, as if he had been actually seized of the land. – For all the children being parceners, and all the parceners making but one heir, the entry of one shall enure, as the act and entry of the whole;[4] and the heirs of him, who was never actually in possession, shall, nevertheless, be entitled to partition with the rest, in the same manner, as if he had actually entered into the lands, in his life-time: and this rule of the common law, in respect to parceners, is not confined to such as are parceners by the common law, but extends also to parceners by custom;[5] and being founded in reason, seems equally applicable to parceners by the statute at this day.

But the reason upon which I principally rely in this case, is this; that it was the intent and meaning of the framers of this law, to change and annul the former rule of the common law, which required actual seizin of lands, in order to transmit the inheritance thereof, to the heirs of the person having title to enter therein: and I ground this conclusion upon several reasons.

1. The framers of the act, were all persons profoundly skilled in the law, and if they had not intended to introduce a new rule of law, would certainly have adhered to the usual, and obvious, technical phrase of dying seized.

2. The situation and local usages in this country, from the first settlement: whereby lands which have never been cultivated, have been transmitted for a series of years, by inheritance, without any actual entry, or seizin, in any person, whatsoever, other than such a legal seizin, as the first patentee, derived from his patent.

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It may be objected, that all lands were liable to forfeiture by law, before the late revolution, if not seated within three years after the date of the patent.

To this we may answer, that the seating, required by law, was partial and temporary; and often colorable;[6] and that the lands were frequently devised to different persons, from whom they afterwards descended, without cultivation, or any actual entry therein.

3. That the policy of the present law, was to prevent disputes, in all such cases, as might have otherwise happened for want of actual seizin; and to preserve to the heirs of minors and absentees, the rights which such minors and absentees derived from their deceased ancestors.

4. That inasmuch as by an act of 1792, c. 76, actual possession need not be proved to maintain a writ of right, it is evident that the legislature thereby, intended to show that it was their intention, that in future, actual possession should not be necessary to transmit an inheritance: for if the demandant in a writ of right, bring his suit for the recovery of a tract of land, granted to his grandfather deceased, by whom the land was devised to the demandant's father, being a younger son, and the elder brother, or a stranger, enters by abatement, within fifty years, and holds the lands during his life, and during the life of his younger brother, to whom they were devised; and then dies, and his son enters and holds the lands, against whom the writ is now brought; yet, as the law now stands, I apprehend, the demandant shall recover, although the grandfather be dead more than fifty years, and yet, in this case the demandant claims as heir to his father, who was never actually seized. For inasmuch as he claims under the devise from his grandfather, who has been dead more than fifty years, he must be barred unless he be admitted to claim as heir to his father, who never was actually seized of the lands; but had merely a right to enter upon the possession of his elder brother, or other abater, by virtue of the devise. And, if, in this case, the demandant shall not be barred by virtue of the act of 1794, c. 76, but permitted to claim as heir to his father, without showing any actual seizin in his father, I can see no reason why he shall be barred in any parallel case.

5. The whole policy of our law being in every other respect diametrically opposite to that of the common law, I conclude that the framers of the act meant to render it uniform, and conformable throughout.

6. Because the law of the same session[7] directs, that personal property shall be distributed to the same persons, and in the same proportions, as lands are directed to descend by this law. And, if a right to personal property cannot be transmitted to representatives without actual possession thereof, by the person having the right, the intention of that law would be altogether defeated. And, if the rule in the case of lands be, *seisina facit stipitem*, the correlative rule, in respect to personal estates, must be, that possession does the like: it rule which, it is presumed, the legislature never intended to introduce. For, if that be made the rule of personal property, the children of a son entitled to distribution of his father's personal estate, would, in many instances, be deprived thereof, because the executorship was not closed – and yet they might be entitled to their father's portion of the real estate, because he might have made an actual entry therein, though no part of the personal estate had come to his hands. So that under this construction of the law, the personal estate would not be distributed in the same proportions, and to the same persons, as the real estate. On the other hand, if the rule with respect to personals be dispensed with, but insisted on as to real estate, it might happen that the children of the son might have their proportion of the personal estate, but not of the real estate, for want of entry therein by the father; which would be contrary to the act, for in this case they would not have the same proportions. Therefore, it must be construed alike, as to both kinds of estates; and inasmuch as real estates are now put upon the same footing in general, that personal estates were formerly, if the rule with respect to personals cannot be made to conform to the

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common law rules, respecting real estates, the interpretation ought to be made so as to reconcile both together, and establish one uniform rule which may apply, without inconvenience, to either. And since real property is neither susceptible of motion, nor liable to alienation, but by certain and notorious acts, which is not the case of personal property, there seems to be less reason for adhering to the feudal maxim of *seisina facit stipitem* real estates, than for requiring the actual possession of personals, in order to transmit to the representatives of a person having title, a right to a share thereof.

For these reasons I conclude, that actual seizin of lands and tenements, is not necessary at this day to transmit an inheritance; but that any estate of inheritance, into which the intestate at the time of his death has the right to enter, may be transmitted to his heirs, by descent, in the same manner as if he had been thereof actually seized.

2. By our law, any estate of inheritance to which the intestate has a title, shall descend according to the course prescribed by the act: whereas, by the common law, and the statute "*de donis conditionalibus*," heirs may be either general or special, according to the course in which the land has descended to the intestate, or been acquired by him. Thus the lands which might have descended on the part of the father, shall go to the heirs on the part of the father only, and not to those on the part of the mother; and, vice versa, whilst those purchased by the intestate might go to the heirs on either part, preferring those first on the part of the father; and if the inheritance were in tail general or special, the descent in that case was regulated by the deed or will of him by whom the estate tail was created. Whereas by our law, it matters not how, or from whom, the estate may have descended, or been acquired; nor in what manner the original donor may have marked out the course in which he wished the succession to take place.[8] The estate being once vested in the intestate, must follow the rules of the law, without inquiring into the mode by which it was acquired, or the will of him who gave it.

3. A third and most important distinction between these two general rules, or canons is, that by our law, all lands shall descend in parcenary, whereas, by the common law, sole seizin in lands is more favored than several seizin: and, therefore, the heir male shall always be preferred to the heirs female in the same degree; because the heir male shall take the entirety of the lands to himself, whereas the heirs female take several portions, and may compel a partition of the lands to be made between them. And upon the same principle it is that the common law favors joint-tenancy more than tenancy in common, not only because the seignorial rights are better preserved where the services incident to the feud are indivisible, as in the former case; but, because if the jointure be not severed during the life of the joint-tenants, the survivor shall be sole seized of the whole, by the *jus accrescendi* [right of survivorship], instead of the moiety of him who dies first descending to his heirs. But this *jus accrescendi*, we may remember, is now abolished in Virginia, our law favoring a tenancy in common, wherein the portion of each tenant descends to his heirs, more than joint-tenancy by which the impartibility of estates is favored. And, upon the same principle it is, that incur law, descents in parcenary are more favored than descents in severally. For thereby all the children or collateral kinsmen of the intestate, in the same degree of consanguinity to him, shall share his estate, as being all, probably, equally entitled to share his affection and bounty. The law in this case making that will for him, which it presumes he would have made had he died testate.

4. But although our law declares that inheritances shall descend in parcenary, yet is there an essential difference between parceners by the common law, or parceners by particular custom, in different parts of England, and that course of descents in parcenary, which is established by our law. For, by the common law, females only shall be parceners; and, by the custom, males only; but, by our law,

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both males and females shall be parceners together, without any distinction between them. And not only may males be coparceners with females, or females with males, by our law; but lineal ancestors may be parceners with their own descendants, and other collateral kindred of the intestate; and kinsmen of the half blood with kinsmen of the whole blood; and bastards with legitimate kindred, as will be more fully shown hereafter.

5. A further distinction between the rules of the common law and our law, under this head of parceners, arises from the different methods in which the portion of such of the kindred of the intestate as may be deceased, shall be divided among their descendants; our law preferring, in certain cases, the succession *per capita*, according to the course of the Roman law, to that *per stirpes*, which the common law uniformly adopts in the same cases, as will be more fully explained hereafter; being mentioned here, only for the sake of method.

Thus, these two primary rules, or canons, which may be considered as the ground-work and foundation of the two systems of law, established in England, by immemorial usage on the one hand; and in this country, by the mature consideration of the most eminent sages of the law, and confirmed by the deliberate voice of the legislature on the other, are found in no one instance whatsoever agreeing, but, on the contrary, in continual and diametrical opposition to each other. The former being the offspring of feudal barbarism and prejudice, the latter the dictates of enlightened reason, following the course which nature herself seems to have marked in the human breast, and endeavoring to obliterate the traces and memorials of the former, wheresoever they could be discerned. We shall now proceed to examine the application of this primary canon, or fundamental general rule, to particular cases, according to the course prescribed by the act, comparing each subordinate rule, with the correlative rules of the common law.

2. Secondly, then; "the inheritance of any person dying intestate, shall descend and pass to his children, or their descendants, if any there be."[9]

The correlative rule of the common law, is, "that inheritances shall lineally descend to the issue of the person who last died actually, seized, in infinitum."

Nearly as these two rules may appear to conform to each other, their interpretation is essentially different, and even opposite; for by the common law, the word issue is limited to certain particular descendants, in exclusion of all the rest, as to the eldest son, in exclusion of his brothers and sisters; or to the eldest son of such eldest son, in exclusion of his uncles and aunts, as well as of his own brothers and sisters; whereas the rule of our law, comprehends the whole of a man's children, or other descendants without regard to sex or primogeniture; all of whom, of whatever age or sex, or however remote, (if in ease at the time of the death of the intestate) shall have a portion of the inheritance. Thus if I. S. die leaving a son, a daughter, and two grandchildren, the issue of a son or daughter, deceased; the grand children shall take a portion of the inheritance, as well as the son and daughter; whereas by the common law, the eldest son only, or if he were dead leaving issue a son or a daughter that son or daughter should have succeeded to the whole inheritance, in exclusion of all the rest.

Another essential distinction between the common law rule and the rule in our law, is this: that by the common law, any descendant of I. S. the person last actually seized, to whom the inheritance should have descended (if *in esse* [in being], at the time of the death of I. S.) although born at any remote period after that event takes place, may succeed to the inheritance, unless barred by the statute of limitations; whereas by the act of 1785, no right to the inheritance shall accrue to any person whatever, other, than the children of the intestate, unless they be in being and capable in law,

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to take as heirs, at the time of the intestates death. Thus, if I. S. have one son only, who dies in the lifetime of his father; leaving two daughters, and his wife enseint or big with child of another daughter; and before the birth of such other daughter, L S. the grandfather dies, by the law of England, the inheritance should descend to the two daughters of the son of L. S. as parceners, until the birth of the third daughter happened; and then, such third daughter should succeed to one third part of the inheritance as coparcener with her sisters. And if such after born child had been a son, he should have had the whole inheritance in exclusion of his sisters; and this may be carried so far, by the common law, that the same estate may be frequently divested by the subsequent birth of nearer presumptive heirs, before it fixes on an heir apparent. As, if an estate is given to an only child, who dies, it may first descend to an aunt, who may be stripped of it by an after born uncle, on whom a subsequent sister may enter, and who again may be deprived of the estate by the birth of a brother.[10] Whereas, such after born children under the provisions of the act of 1785, would, I apprehend, be totally excluded from any participation in the inheritance. For I understand the words of the act *viz.* "unless they be in being and capable," according to the common law[11] construction; *viz.* such as are already born. And, that this is the true construction, may be inferred from the provisions in favor of posthumous children, contained in the statute 10 and 11 W. 3.c. 16, which enabled them to take the benefit of a remainder, as if born, and which have been likewise introduced into our own statute book, but do not extend to the case here spoken of; posthumous children, other than the children of the intestate himself, remaining in the same condition with respect to inheritances, as they were in respect to remainders, before the last mentioned statutes.

3. "If there be no lineal descendant, the inheritance shall ascend to the father, or other nearest lineal male ancestor, or ancestors, in preference to the lineal female ancestor, or ancestors, and collateral kindred in the same degree; but the mother or other nearest lineal female ancestor, or collateral kinsman, in the same degree, or their descendants, shall be preferred to a more remote lineal male ancestor, or ancestors."

Thus the father shall succeed to the whole inheritance, in exclusion of the mother, brothers and sisters and their descendants; the grandfather in exclusion of the grandmother, uncles and aunts, and their descendants; and the great grandfathers or great grandfather, if there be but one, in exclusion of the great grandmothers, and all the collateral relations of the deceased, or their descendants, in the same degree. But the mother, brothers and sisters, and their descendants, in infinitum, shall be preferred to the grandfather, and so of the rest. For, we may remember, that according to the rules[12] of consanguinity, the father, mother, brothers and sisters, are all related to the intestate in the same degree: and the grandfathers, grandmothers, uncles and aunts, are in like manner related to him in the same degree with each other. And this preference to the lineal male ancestor, or ancestors, is the only preference which our law makes in favor of that sex: for in all cases of lineal descendants or collateral heirs, no regard is paid to sex or primogeniture.

The ascendible quality communicated to real estates by the act of 1785, is diametrically in opposition to one of the fundamental maxims of the common law, according to which, inheritances should rather escheat, than violate the laws of gravitation.[13]

And here it may be proper to notice another departure from the rules of the common law; for, by that law, the lineal descendants, in infinitum, of any person deceased, shall represent their ancestor; that is, shall stand in the same place, as the person himself would have done, had he been living. And these representatives shall take neither more nor less, but just so much as their principals would have done: thus the child, grandchild, or great grandchild (either male or female) of an eldest son, or eldest brother, or eldest uncle, succeeds before the youngest son, and so in infinitum. According to

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which rule, whenever the father, if alive would be the next heir, his child, (or children if daughters) should represent him; that is to say, should take neither more nor less than he would have done. But in this case, by our law, the children of a deceased father, do not represent him; but come into the inheritance *jure propinquitatis*, *i.e.* in their own rights, and not *jure representationis*, or in right of their father. For the mother shall come in with them, and shall have an equal portion of the inheritance with them; and if there be children on the part of the mother, of the half-blood to those on the part of the father, they also shall be admitted into the inheritance; So that the children on the part of the father do not take the same, or, neither more nor less, than their father if living would have taken; therefore they do not represent him in this case. And even in the case of succession among the lineal descendants, or collateral kinsmen of the intestate, we shall find that the children sometimes claim *jure propinquitatis*, as being all in equal degree; though in some cases, the right of representation is admitted: as where nephews or nieces come into partition with their uncles and aunts. Collateral kindred in the same degree of consanguinity with a female ancestor, shall be admitted to an equal portion of the inheritance with her; and the descendants of such of them as are dead, shall be admitted to their ancestor's portion thereof.

Thus the brothers and sisters shall share the inheritance with the mother; and if any of the brothers or sisters be dead, the descendants of such brother or sister shall inherit that portion of the estate, to which their ancestor, if living, would have been entitled, hi this latter case, the children of the deceased brother or sister are said to take *per stirpes*, by stocks, but the mother, brothers, and sisters, who are living, take *per capita*, or by heads.

4. "If there be neither child, father, mother, brother, sister, nor descendant from either of them, the inheritance shall be divided into moieties, one of which shall go to the paternal, the other to the maternal kindred, respectively, according to the foregoing rules; but if there be no kindred on the one part, the whole shall go to the other part."

This also is diametrically opposite to the rule of the common law, which allows of no such participation between the paternal and maternal stocks in any case; but would rather the land should escheat, than descend to any other, than the blood of the first purchaser, how remote soever he may be from the person last actually seized.

According to this rule of our law, the grandfathers, respectively, shall be preferred to the grandmothers, uncles and aunts, on the same side; and these last and their descendants, shall succeed all together, in like manner as the mother, brothers, and sisters, and their descendants should have done. And here it must be observed, that if there be two great grandfathers living, on the same side, each of them, (if there be no person nearer to whom the inheritance may descend) shall be entitled to an equal portion of the moiety: but if there be only one, he shall have the whole moiety, in exclusion of the other great-grandfather's descendants, or wife though living; which is one answer to the objections against the great number of heirs, who are admitted to share the inheritance: which objection is further narrowed, by that clause, which declares that no person, other than children of the intestate, shall have any portion of the inheritance, unless they be in being at the time of the intestate's death, of which we have before taken notice and shall again have occasion to speak.

5. "Collateral heirs may be of the half-blood only, but they shall only inherit half portions; but if all be of the half blood they shall have whole portions, only giving to the ascendants (if there be any) double portions."

This rule is expressly contrary to the maxims of the common law; by which the half blood are wholly excluded from any portion of the inheritance, which shall rather escheat for want of heirs.[14]

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If there lie two brothers and a sister of the whole blood, and a brother of the half blood, and one of the brothers of the whole blood die, in this case the inheritance being divided into five parts, the brother and sister of the whole blood shall have two parts each, and the brother of the half blood one, only. And in this case, if the mother had also been living;, the inheritance should have been divided into seven parts, of which she should have two, and the remaining five parts be divided as before mentioned.

6. "Bastards may inherit, or transmit an inheritance on the part of their mother; and if the parents of the bastards marry, and the bastard be afterwards recognized by the father, he shall inherit or transmit an inheritance on the part of the father."

This rule is also diametrically opposed to the common law principle; by which bastards are rendered incapable of inheriting even from their mothers.[15] And the rule above laid down, extends to all persons, who would have been bastards at the common law, as being the issue of marriages deemed null in law; such issue, by the provisions of this act, as also of the act of 1788, c. 32, being declared legitimate.

7. "If there be no kindred either on the part of the father or of the mother, the husband or wife of the intestate shall succeed to the inheritance: and if the husband or wife be dead, the inheritance shall go to his or her kindred, as if he or she had survived the intestate, and the estate had descended from such wife or husband." This also is an express deviation from the maxims of the common law; by which the husband, or wife, as such, can never succeed to the inheritance of each other. It is still further removed from the principles thereof in this instance that a stranger to the blood of the intestate, may, by possibility, be his next immediate heir. Thus if I. S. be an alien and afterwards be naturalized and purchase lands, and marry, and his wife die, and I. S. afterwards die without issue, and without heirs, other than aliens, the next of kin to his wife deceased, although utter strangers to his blood, shall succeed to his estate.

8. "Where several persons succeed to the inheritance at the same time, if they be all related to the intestate in equal degree, they shall take *per capita*, *i.e.* by persons; but if part of them be more remote than the others, the more remote shall take *per stirpes*, that is to say the share of their deceased parent. But no right of representation shall be admitted, where the inheritance is directed to go to the lineal ancestor, or ancestors of the intestate, if living; but it shall descend to the surviving lineal ancestor or ancestors, or such collateral kinsmen as shall be entitled to partition, according to the third rule."

In the former case we find that the *jus representationis* or right of representation, which is one of the fundamental maxims of the common law, is entirely done away. For by the common law the representatives of any person deceased, shall stand in the same place precisely, that the ancestor himself, if living, would have done. Thus if John Stiles die leaving six grand-daughters, three, the children of one daughter deceased, two, the children of a second daughter deceased, and one of a third daughter deceased; in this case the inheritance, by the law of England, would have been divided into three portions only, os which, the three daughters of the eldest daughter, should have had one; the two daughters) of the second, another; and the daughter of the third daughter the third portion: but by our law, the inheritance shall be divided into six portions, of which, each of the grand-daughters shall have one. And herewith the Roman law agrees. But where some of those entitled to partition are more remote front the intestate than the rest, in this case, the representatives of any person deceased, who if alive would have come into partition, shall take neither more nor less, but just so much as their principals would have done, unless such principal be also the ancestor of the intestate. As if there be two sisters, Margaret and Charlotte, and Margaret dies leaving six

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daughters, and then John Stiles the father of the two sisters dies without other issue, these six daughters shall take among them exactly the same as their mother Margaret would have done, had she been living: that is, a moiety of the lands of John Stiles, in coparcenary: and this, also, by the common law, with which ours still agrees in this respect. – So if John Stiles had had two sons, only, and one had died in his lifetime, the issue of such son should have succeeded to his father's portion of the inheritance by virtue of the act of 1785, c. 60. J U. But if John Stiles had died without any descendants, or lineal ancestor living, his brothers, and sisters, uncles, and aunts, should not take as representing their deceased father, or mother, but in their own rights, as next of kin to the intestate, Therefore if L. S. die leaving a brother of the half blood on the part of his father, deceased, and two of the half blood on the part of his mother deceased, these shall take equal portions of the inheritance, instead of the whole going to the brother on the part of the father *jure representationis*; or the portion of the mother being divided between her two sons, as representing her. And this doctrine of the right of representation is still further narrowed by the next rule.

9. "No right to the inheritance shall accrue to any person whatsoever, other than the children of the intestate, unless they be in being, and capable in law to take as heirs, at the time of the intestate's death."

This rule was sufficiently explained under the second, here laid down. But although this rule excludes posthumous heirs in general, from the succession, yet we must be careful to remember, that it does not extend to the children of the intestate, who are still further favored by the act of 1785, c. 61. which declares, that every last will and testament, made when the testator had no child living, wherein any child he might have is not provided for, or not mentioned, if at the time of his death he leave a child, or leave his wife enseint of a child which shall be born, shall have no effect during the life of such after born child, and shall be void unless the child die without having been married, or before he shall have attained the age of twenty-one years. – Also, posthumous children, if unprovided for by settlement, and neither provided for, nor disinherited, but only pretermitted by the testator, shall succeed to the same portion of the father's estate, as if such father had died intestate.[16]

10. "Where more than one person succeed to the inheritance, they shall take as parceners, and not as joint-tenants or tenants in common."

A consequence of this rule, is I presume, that as all the parceners make but one heir, the act and entry of one, shall enure as the act and entry of the whole; and the heirs of him, who was never actually in possession, shall, nevertheless, be entitled to partition with the rest, in the same manner as if he had actually entered into the lands in his lifetime, as was before observed.

A second consequence of this rule is, that the heirs may sue and be sued jointly, for any matter respecting their joint inheritance; which tenants in common cannot.[17]

A further consequence is, that they may have an action of waste, against each other, which, in the case of joint-tenants, may be questionable. Moreover, the *jus accrescendi*, or right of survivorship between joint-tenants, does not take place among coparceners. And although this right of survivorship to be now abolished,[18] yet the act by which that rule was established, was posterior in it's commencement to the law of descents!

11. "Lastly, the person having title to any estate of inheritance, is considered as the first purchaser; that is to say any relation, either in the paternal or maternal line ascending or collateral, may succeed to the inheritance, subject to the preceding rules, without regard to the blood of that ancestor from whom the estate was derived."

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The correlative rule of the common law is, that upon failure of issue of the last proprietor, the estate shall descend to the blood of the first purchaser; or, that it shall result back to the heirs of the body of that ancestor, from whom it either really has, or is supposed, by fiction of law to have originally descended.[19] A consequence of which was, that if the lands descended from the father's side, no relation of the mother, as such, could ever inherit: because he could not possibly be of the blood of the first purchaser; and vice versa; but the lands shall rather escheat to the lord of the feud, than violate this fundamental principle of the feudal system.[20] And even where lands descended from the first purchaser himself, the common law still preferred a remote collateral relation, on the part of the father, how far soever removed, to the brother of the half blood, or other nearest collateral relation on the part of the mother; which absurd preference, as it has no foundation in reason or in nature, our law has carefully abolished, not only in the last case here spoken of, but in all cases whatsoever. And this, upon the soundest reason and principle, I conceive; for the right of disposing of property after one's death, being once admitted, it is most reasonable that the law should prefer those relations of the deceased, which he himself would most probably have preferred, if he had made a will. Now the inheritance being once indefeasibly vested in any person, it would seem that the disposition of the law ought to conform to what may be presumed to be his will; and not to the will of any other person who may formerly have possessed it, and either actually has, or may be presumed to have exercised his will over it already.

Thus having collected all the fundamental rules of our law, and compared them with those which formerly governed inheritances in this country, in lieu of which they have been substituted; and finding an irreconcilable opposition in every one of the latter, to those of the former, we may I apprehend be justified in concluding, that by the act of 1785, c. 60, the common law rules of inheritance were wholly and entirely abolished, and an entire new system of jurisprudence substituted for them in Virginia, the grounds and foundations of which, are wholly incompatible with those rules and maxims, which were generated by, and interwoven with the feudal system, of which, it appears to have been the policy and intention of the framers of our law, to eradicate every germ, and obliterate every former trace.

II. But this act has since undergone a very material alteration, in the case of the death of an infant, having title to an estate of inheritance, by two several acts: the first of which passed in 1790, c. 9, s. 34, and which I shall first consider, provides, that,

1. "Where an infant shall die without issue, having title to any real estate of inheritance, derived by purchase or descent from the father, the mother of such infant shall not succeed to, or enjoy the same, or any part thereof by virtue of the act directing the course of descents, if there be living any brother or sister of such infant, or any brother or sister of the father, or any lineal descendant of either of them."

2. "Where an infant shall die without issue, having title to any real estate of inheritance, derived by purchase or descent from the mother, the father of such infant shall not succeed to, or enjoy the same, or any part thereof, by virtue of the said recited act, if there be living any brother or sister of such infant, or any brother or sister of the mother, or any lineal descendant of either of them."

Here let us ask, does this act revive the common Jaw rules of inheritance, in the case of an infant dying Without issue, having title to lands of inheritance? To this we may answer,

1. First, that if the lands be derived to the infant in any other manner, whatsoever, except by descent, or purchase, from one or the other of his parents, the lands in any such case shall descend in the same manner as if he had been of full age.

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2. The parent from whom the lands are derived, is not excluded from the inheritance, although the other parent be so excluded. – And therefore if a man gives lands to his son, and the son dies under age, and without issue, the father is clearly not within the act: and consequently shall be heir to his son, in preference to a brother, or uncle, who might have been the next heir at common law. And if lands be given to an infant by his mother, and the infant die without issue, the mother is not within the act.

3. The parent, from whom the lands are not derived, may still inherit them, if the infant lives to attain his age of twenty-one years: for the law takes no notice of the case of an adult person.

4. The brothers and sisters of the infant, are clearly not excluded by the act; for if lands descend from a father to his son, and then the son dies under age, and without issue, his brothers and sisters of the whole blood may undoubtedly inherit his estate in parcenary, by virtue of the act of 1785; for they are not named, and consequently, are not excluded by the second act. –

And if the father had other children of the half blood to the infant, still shall they also come into the inheritance; for clearly the law meant not to exclude any descendant of the father, from a portion thereof, as is incontestably proved, by the further amendments afterwards introduced into the law, as it now stands. Neither would the brothers and sisters of the half blood, on the part of the mother be excluded; for they were not named in the act, any more than the others. And, therefore, there is no more reason for excluding them, than for excluding the brothers or sisters, (other than the heir at common law) on the part of the father. For the disability of the younger brothers and sisters, of the whole blood, to take during the life of the elder brother, or his issue, was equally as great at common law, as the disability of the half blood.

5. That the general system of inheritances, being changed, by the act of 1785, the rules of that act cannot be changed but by a subsequent legislative act:[21] it being a rule of construction, that no statute can be repealed by implication;[22] now the act of 1785, having substituted the father as next heir general to a son dying without issue, in the room of the former heir at the common law, the preference which this general law has once given him, shall never be taken away by mere implication, but his disability to take shall be confined to the single case in which the law expressly incapacitates him to be heir: nor can the heir at common law avail himself of the father's disability, so as to exclude his brothers, and sisters, and their descendants, who are of equal capacity with himself, under the act of 1785 to take the inheritance. And, therefore, unless that act be repealed and the common law revived by implication, the heir at common law, as such, can never be the person, in whom the estate shall exclusively vest.

But whatever doubts might have been entertained, as to the revival of the common law, by implication, under the former rules of construction, viz: that the repeal of a repealing law revived the former law; yet the legislature by the act of 1789, c. 9, which was too recent not to have been remembered by them in 1790, prescribed a positive rule of construction, viz: "That whenever one law which shall have repealed another law, shall be itself repealed, the former law shall not be revived without express words to that effect." Consequently, although it should be conceded, that a former statute may be repealed by implication; the doctrine that a former law may be revived by implication, is now totally exploded in our courts, by that act. Now nothing can be more certain, than that the common law rules of inheritance were totally repealed by the act of 1785, and there are no express words in the act of 1790, whereby any one rule of the common law, can in any manner be supposed to be revived. Those rules being once expunged from our code of jurisprudence, are as foreign from it at present, as those which appertained to military tenures, or other ancient branches of the feudal system. And we could with as much propriety adopt the ancient feudal doctrine, that

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none but the issue of the feudatory, or grantee of lands could inherit them, and that in defect of such issue, they should revert to the grantor, as to substitute the heir at common law, at this day, in the room of those whom the act of 1785, has marked out as general heirs of a person dying intestate.

The positive disability of the father or mother, to take as heir to the son, in a particular case, must not therefore be construed any otherwise, than as the act itself prescribes; *viz.* as merely personal to the father, or the mother, in the particular cases mentioned in the act, and not as extending that disability, by implication, to any other case, or to any other person, not named in the act: nor as reviving by implication, the right of the heir at common law, which had been totally extinguished and abolished, by the former act; nor yet as creating by implication, any new right; or directing by implication any other course in which an inheritance shall descend, except that which the act of 1785, expressly prescribes. Now from the cases before put, it is manifest that the father is still intended to be the general heir to his son, in every case, but this of an infant dying without issue, having title to lands derived from his mother: for if the infant attain his full age, and die the same day, the father shall be heir to all his lands without distinction. It is also manifest that the act of 1790, had no intention to. extend the disability of the father, to the children of the mother, all of whom may certainly be regarded as equally favored by that act, as by the act of 1785. Neither can we be authorized to extend the disability of the Father, to the grandfathers on either part; for they are not named in the act. And although it should be contended, that the father's father, was disabled by implication, yet it would be difficult to distinguish his case from that of the mother's father, against whose inheritable .blood, no reason, even by implication, can be suggested. The same remark applies to the uncles and other collateral relations on the part of the father, for these come into partition at the same time with those of the same degree on the part of the mother, by the act of 1785, and the former are no more excluded by the act of 1790, than the latter. The disability created by, the act of 1790, is, therefore, merely personal to the father, or mother; and temporary, being removed the instant the infant arrives at full age; and moreover, contingent, as depending upon the circumstance that the infant may have collateral relations, in the degree of a brother, or uncle, or their descendants, on the part of the mother, or father, from whom the lands were derived, living at the time of his death. – For if the mother gives lands to her son, who dies an infant, having no such collateral kinsman as is mentioned in the act, and then the mother has another son or daughter, this son or daughter, not being in esse at the time of the infant's death, shall not divest the father's title which vested the moment of the infant's death; but the father shall retain the lands, because at the death of the infant, he was under no disability to inherit as next heir to his son. And these circumstances all tend to show the difference between the disability of the father, by our law, and the disability of an alien, or of a person attainted by the common law: for an alien never had any inheritable blood in him; and the blood of the person attainted is forever corrupted: and the corruption extends to his issue as well as to himself.[23] And if in a similar case to that last above mentioned, the father had died leaving lands to his son, being an infant, and leaving his wife ensient with child, and before the birth of the child, the infant die; in this case the mother shall succeed as next heir to her infant son: for her posthumous child was not in esse, and capable in law to take as heir to his brother, at the time of his death; and, therefore, the mother shall have the whole of his portion of his father's estate. And yet this posthumous child would succeed to one half of the lands which descended from his father to his brother: not, indeed, as heir to his brother, but as heir to his father, under the express provisions in the act in favor of posthumous children of persons having title to lands at the time of their death.

From what has been said, I presume, it may be evident, that in the case of an infant dying without issue, entitled to lands by descent or purchase from either parent, the common law, in respect to

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inheritances, was not revived by the act of 1790, but remains for ever dead in such cases, until the legislature shall think fit, by an express declaration to that effect, to give it a new existence in this country. And consequently, that inheritances must be governed by the rules contained in the act of 1785, in all cases where those rules are not expressly altered and repealed by some subsequent act. And where any difficulties arise under any such subsequent act, the solution of them must first be sought for there; where the legislature has thought fit to collect all those general rules, by which it intended all cases of inheritance should henceforward be governed in Virginia.

We may now proceed one step further and observe; 6. Sixthly; that the act of 1790, while it prohibits the father or mother, under certain circumstances, to succeed to the inheritance of a son, does not proceed to declare to whom the lands under such circumstances shall descend: an omission to which all the difficulties and perplexities which may arise in the construction of our law of descents, are to be attributed. That omission may be ascribed to the solicitude which the penner of that act probably felt, to prevent the operation of the former law, in some particular case, without considering or regarding the general principles upon which that law was framed. And having found a remedy for that case, it seems to have been supposed, that it's efficacy, like some famous specifics in medicine, would be equally as great in all others. To demonstrate the fallacy of such a conclusion, let us put the following case. "John Stiles, the propositus, being an infant, dies without issue, having title to lands derived to him from his mother, Lucy Baker, deceased; his father Geoffry Stiles, his paternal grandfather George Stiles, his maternal grandfather Andrew Baker; and several maternal uncles and aunts being living; but having neither brother nor sister of his own living." How will the inheritance descend?

I. By the act of 1785, Geoffry Stiles, his father, should have had the inheritance, not only in preference to all the relations above mentioned, but even to the brothers and sisters, and mother of the infant, if there had been such living. But, by the act of 1790, the father shall not succeed to or enjoy the inheritance, if there be living any brother or sister of the infant, or any brother or sister of his mother, or any of their descendants; and here are brothers and sisters of his mother; therefore, the father in this case cannot inherit. But can the brothers and sisters of the mother take the lands? I should apprehend they cannot.

1. Because, by the general rule prescribed in the act of 1755, both the grandfathers shall succeed, each to a moiety of the estate, before the uncles and aunts shall be admitted to any portion of it. Now the grandfathers are not mentioned in the act of 1790: of course I should conclude, that the order of succession, as to them, remains unaltered; for in the case now put, if the father had died in the life-time of the infant, the inheritance should have gone immediately to the two grandfathers by moieties.

2. Because here is no declaration contained in the law, that the brother or sister, uncle or aunt, shall succeed to the inheritance, notwithstanding the priority established in favor of the father and grandfathers by the act of 1785; but merely a declaration, that the father shall not succeed to, or enjoy the inheritance, if there be such persons living as this case supposes. This disability is merely personal, and may be temporary, perhaps:[24] for, if the maternal uncles and aunts should die, there seems no longer any reason for excluding the father from the inheritance: a reason which certainly had it's commencement in that unnatural principle, mentioned by Sir Edward Coke, that to commit the guardianship of a child to his next heir, was "*quasi agnum committere lupo, ad devorandum*" ["like committing the lamb to the wolf to be devoured"].

3. A third reason why the maternal uncles and aunts should not succeed to the inheritance in this case is, because, under the act of 1785, the paternal uncles and aunts shall come into the inheritance

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with them, taking one moiety thereof; whereas, if the maternal uncles and aunts were to succeed alone, they would take the whole inheritance. And, according to that act, where the first degree of consanguinity is passed, without heirs either lineal or ascending, the inheritance shall go by moieties to the most remote relation on either side, before the whole shall unite in either the paternal or maternal stock. And there is nothing in the act of 1790, which abolishes that rule.

4. A fourth reason is, that there is no ground upon which we can possibly suppose, that the law meant to prefer the maternal uncles and aunts, in this case, to the maternal grandfather, whose priority is established by the act of 1785, and not taken away by this act; for although it should be alleged, that the law, for good reasons, meant to exclude the paternal grandfather, yet those reasons could never be applied to the maternal grandfather in this case. No implication, therefore, necessarily arises in favor of the maternal uncles and aunts; and, without an absolute necessity, no implication is ever to be admitted.

II. If the maternal uncles and aunts cannot take the inheritance, can the grandfathers inherit it?

I apprehend not. The words of the act of 1785, are, "if there be no father, then to the mother," etc. If there be no mother, etc. then ½ to the grandfathers;" which seems to be equivalent to this; "if there be neither father, nor mother," etc. for the word "then," most clearly postpones the course which the law directs, to the event which it contemplates, *viz.* the death of the father. But here the father is alive: it is true he cannot take the estate during the life of his wife's brothers, or sisters, or any of their descendants then in being: but, as we have before observed, here is no provision in the law, that the inheritance shall vest in the next heir; and without such a provision the grandfathers must, I presume, be excluded. To this it may be answered, that the father being pretermitted by the law, and there being neither mother, nor brother, nor sister, it is the same as if they were neither father nor mother, etc. and, therefore, the grandfathers should take presently, by implication, notwithstanding the life of the father. But such an implication is altogether inadmissible, for even in wills, no implication is ever allowed which is not absolutely and indispensably necessary. Now the implication in favor of the uncles and aunts succeeding in preference to the grandfathers, is full as strong, as that the grandfathers shall succeed notwithstanding the life of the father. And, that the law did not intend to prefer the grandfathers to the father, is evident from this j that if there be neither children nor brethren of the mother, nor any descendant from them, living at the death of the infant, the father shall be heir to the infant, in preference to the mother's father, although he may still be in life; and we must be wholly at a loss for any principle, upon which the father's father shall be preferred to the father himself.

III. But let us put the case, that the infant's mother, from whom the land was derived by purchase, were still in life, and that there were also brothers and sisters, of the infant living, the father being also living, should the mother, brothers and sisters, have succeeded in that case, jointly?

Here too, I should presume they could not, the father being still living, until whose death, by the act of 1785, the title of the mother, brothers and sisters, could not accrue. Now by the act of 1790, the parent, from whom the land is derived by purchase, if he or she survive the infant, is not excluded from the succession, although the other parent be. From hence I infer, that the act does not give the estate by implication, to those relations, during whose life, the parent from whom the land was not derived, is incapable of inheriting. As if John Stiles the father, give lands to his son, an infant, in fee, and the infant die without issue, under age, during the life-time of his mother, here the father should presently succeed to the inheritance, notwithstanding the life of the mother, in exclusion of the brothers and sisters of the infant. And in this case, if the lands had been given to the infant by his mother, and the father should die in the life-time of the infant, and then the infant die, the mother

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should enjoy the inheritance, in preference to her brothers and sisters; yet if the father had survived the infant, the succession of the mother, according to the act of 1785, must have been suspended, until the death of the father. – The same reasoning will apply to the grandfathers and grandmothers, under the act of 1785. Hence I conclude, that no estate by implication, is raised in favor of the uncles and aunts, by the act of 1790 – but that they are incapable of succeeding to the inheritance, during the life of the grandfathers, and shall not take it exclusively of, but in common with, the grandmothers. In all these cases the obstruction to the descent, occasioned by the life of the father, who is general heir to his son, seems to resemble those cases at the common law, where the succession of a special heir may be obstructed, by the life of a general heir. Thus the succession of an after-born son of a person attainted and pardoned; is impeded by a brother, born before the attainder. For, although the elder brother cannot inherit any lands, to which his father, if living, might have been heir, because his blood is corrupt, yet the younger son is not benefitted thereby: but the lands shall rather escheat, for want of heirs, than descend to the younger son, whilst his elder brother or any of his issue, are in life; and yet, if the elder brother had died without issue, the younger might well have inherited.[25] Thus new perplexities, seem to spring out of every new case; nor can we resort to any one rule, which presents itself to my mind, "unless we suppose the inheritance to be in abeyance during the joint lives of the pretermitted parent, and of the person or persons during whose life or lives, that parent is excluded from the inheritance."

"The fee-simple or inheritance of lands, and tenements," says Blackstone,[26] "is generally vested and resides in some person or other." Yet sometimes, the fee may be in abeyance, that is, in expectation, remembrance, and contemplation of the law. Thus, in a grant to John, for life, and afterwards to the heirs of Richard, the inheritance is in abeyance, during the joint lives of Richard and John.

When a parson dies, the freehold of his glebe is in abeyance, until a successor be named, and then it vests in the successor.[27]

And, according to Littleton, the fee-simple of all glebe-lands, which are granted to a parson and his successors, remains always in abeyance. For by a grant to a sole corporation and his successors, the fee passes out of the grantor,[28] yet the parson or incumbent himself, has only a freehold, and not the fee-simple in him – nor is it in any other; but the right of the fee-simple is in abeyance.[29]

If an earl, whose dignity is limited to him and his heirs, dies, having issue one daughter, the dignity shall descend to that daughter.[30] But if he have two, the dignity shall be in abeyance, till the king declare his pleasure, for he may confer it on which of them he pleases.[31] But if he do nothing with it, and one of them then die, the survivor, I apprehend, should succeed to the dignity, for here is no longer any uncertainty who is entitled to it.[32]

Where a feoffment was made to the use of a man, and such wife as he should afterwards marry, for term of their lives, and he afterwards married, it was held that the husband and wife had a joint estate, though vested at different times: because the use of the wife's estate was in abeyance, and dormant, till the intermarriage, and then had relation back, and took effect from the original time of the creation.[33]

So if a devise be made to A in fee, and if A die within age or without issue at. the time of his death, then to the right heirs of B in fee[34] this limitation, I presume, would be good, by way of executory devise, and if B should survive A, the inheritance would remain in abeyance, during the life of B, for it could not be known to whom the inheritance should descend, by virtue of that devise, until the death of B, "*nam nemo est haeres viventis*" ["no one is the heir of the living"]: for it is not necessary that an executory devise should vest immediately upon the determination of the precedent estate,

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and being limited to take effect upon an event, which depends upon a life in being, it is good; as was adjudged in the case of Taylor, vs. Biddal.[35]

In this case, the testator having parted with the whole fee, by the first devise to A in fee, nothing remained to his heirs, who, therefore, upon the death of A, living B, could have no right to enter. It may be alleged indeed, that the heir of A might enter and hold the land until the death of B, for inasmuch, as the fee was granted to A and his heirs, his heirs after his death should have the lands, until it could be known who should succeed thereto, as the right heir of B. But what, if the devise had been to A in fee: but if A die without issue under the age of twenty-one years, then to B for life, and after the death of B, to the right heirs of C. – Now if A dies without issue, under the age of twenty-one years, living B, the whole fee will pass from A and his heirs, at once, and B's estate for life, immediately commence. Then, if B die in the life-time of C, there is no person in whom the estate can possibly vest. For the testator had parted with the whole fee, as in the former case, and the estate of A and his heirs was spent, upon the commencement of B's life estate; and B's life estate being also spent, before it can be known who is entitled to the inheritance, on the death of C, it must remain in abeyance until that event takes place. – Yet this is a good executory devise, for it is a rule "That whenever one limitation of a devise is taken to be executory, all subsequent limitations must, likewise, be so taken.[36]

In all the cases, under this act, which we have before put, there is no person to whom the inheritance can descend, during the life of the pretermitted ancestor. Yet there is one case, in which, I presume, the inheritance would not be in abeyance; and that is, where an infant having lands by descent or purchase from his father deceased, shall die without issue, having a mother, brothers and sisters living. Here, I should apprehend, the brothers and sisters, or their descendants would be presently entitled to the whole estate: for the mother, brothers and sisters succeed altogether, at the same time, and on the same event, and not successively, to each other, as to the father: now inasmuch as the act of 1790, totally excludes the mother from any part of the inheritance, the brothers and sisters, who come into partition with her by the act of 1785, shall take the whole. But it would have been otherwise, had there been no brother or sister of the infant, nor descendants from either of them, but only brothers and sisters of the father, from whom the inheritance descended; for these being postponed by the act of 1785, not only to the mother, but also to the grandfather; and being also wholly excluded by that act, from one moiety of the estate, if there be any kindred on the part of the mother; the inheritance for the reasons above assigned, would, during the joint lives of the mother and the paternal uncles and aunts, or such of them as were in esse at the time of the infant's death, have remained in abeyance.

Here we must remember, that the utmost limit for which the inheritance, under this construction, can remain in abeyance, is for a life or lives in being, at the time of the infant's death. For if there be no brother nor sister, nor uncle nor aunt of the infant, nor any of their descendants in being, at the time of the infant's death, the parent shall immediately succeed to the inheritance. And when the parent dies, the inheritance shall go to the person, next in the order of succession, according to the act of 1785. If on the contrary the brother or sister etc. die without descendants, here, also, the obstacle to the parents succession seems to be removed.

These points, however, remain to be settled by our courts of judicature. It will now be proper to notice one or two particular circumstances (not yet touched upon) arising under this act.

1. By this act one of the rules of the common law, by which all purchased lands were considered in the same light as "*feudum novum*" ["new fee"] to be held "*ut antiquum*" ["as ancient"] and therefore that any heir, whether "*ex parte paterna*" or *materna* ["on the father or mother's side"], may succeed

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to the inheritance, is abrogated, in the case of an infant, so far as relates to his next heir in the ascending line; whereas before the act of 1790, all estates derived by descent were assimilated to estates taken by purchase; which rule is in this instance reversed; lands purchased of the father or mother, being put upon the same footing with such as are derived by descent.

2. Although the father or mother be excluded from the inheritance, the brothers or sisters of the half blood are not, nor are the grandfathers and grandmothers, or the more remote collaterals of the half blood, not even those of the pretermitted parent excluded. Hence we may conclude, that the legislature considered only the danger which might arise to an infant from his guardian being his next heir, without recurring to the principle of the common law, that the inheritance should be confined to the blood of that parent from whom it was derived.

Let us now consider the operation and effect of the act passed in 1792,[37] the four first sections of which, are, word for word, the same as the act of 1785. See the edition of 1794, c. 93.

Sec. 5. "Declares that where an infant shall die without issue, having title to any real estate of inheritance, derived by purchase or descent from the father, neither the mother of such infant, nor any issue which she may have by any person, other than the father of such infant, shall succeed to or enjoy the same or any part thereof, if there be living any brother or sister of such infant on the part of the father, or any brother or sister of the father or any lineal descendant of either of them. Saving however to such mother any right of dower, which she may claim in the said real estate of inheritance."

Sec. 6. "Where an infant shall die without issue, having title to any real estate of inheritance, derived by purchase or descent from the mother, neither the father of such infant, nor any issue which he may have by any person other than the mother of such infant, shall succeed to, or enjoy, the same or any part thereof, if there be living any brother or sister of such infant on the part of the mother, or any brother or sister, of the mother, or any lineal descendant of either of them. Saving however, to such father, the right which he may have as tenant by the curtesy in the said estate of inheritance."

Sec. 7. "If there be no mother, nor brother, nor sister, nor their descendants, and the estate shall not have been derived either by purchase or descent from either the father or the mother, then the inheritance shall be divided into two moieties, one of which shall go to the paternal, the other to the maternal kindred, in the following course; that is to say;" as in the act of 1785.

The words in Italics in these sections were added at that period; the rest of the act is an exact transcript from the act of 1785.

Upon this act we may remark;

1. First; that by the fifth and sixth sections, the brothers and sisters of the half blood to the infant, on the part of the pretermitted parent, are excluded in the same manner as the pretermitted parent is, if there be living any brother or sister of such infant on the part of the parent, from whom the estate was derived; or any brother or sister of such last mentioned parent, or any descendant of either of them. The same rules and conclusions, therefore, which apply to the case of a pretermitted parent under the act of 1790, seem also to apply to the case of a brother and sister of the half blood, under the fifth and sixth sections of this act, if there be brothers and sisters only, on the part of the parent from whom the lands were derived.

2. That by the seventh section as it now stands, the partibility of the infant's estate into moieties, in any case where there may be brothers and sisters of the parent from whom the land was derived, or any of their descendants, in being, at the time of the infant's death is altogether impeded: but does

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this give the inheritance by implication to those collateral relations? As for example. – "If an infant die without issue, having neither father, mother, brother, nor sister living, nor any descendant from either of them, both his grandfathers and grandmothers being living; having also uncles and aunts on the part of both parents living;" who shall take the inheritance?

1. By the common law, the eldest uncle, or his issue, on the part of the parent from whom the land descended; or (if the land were acquired by purchase instead of descent) the eldest uncle on the part of the father should have succeeded to the inheritance; but we have shown that the act of 1785, has totally repealed those rules of succession, nor is there any reason to believe the legislature meant to revive it again by this act, for the reasons mentioned in the former part of this tract.

2. By the act of 1785, the grandfather is preferred to his own children, who may be collateral to the infant, and the grandmother comes in *simul et semel*, and in like proportion with them. Now there is as much reason to suppose, that the legislature intended to give the whole inheritance to the grandfather, on the side of the parent from whom the lands were derived, as to suppose the law meant to exclude him from the moiety, which the act of 1785, gave him. Of course, no implication can be supposed to be raised in favor of his children (who are the uncles and aunts of the infant) to his own prejudice. For being neither named in the law, nor within the reason of it, upon any possible grounds: no such implication can be supported under this act, any more than under the former. It might seem, therefore, that in this case, he would take the whole inheritance; for the same reason that the brothels, and sisters of an infant, dying entitled to lands derived from the father, would have taken it under the act of 1790, in exclusion of the mother; and as those of the whole blood will now take it, in exclusion both of the mother and the brothers and sisters of the half blood also. For both the grandfathers coming into the inheritance together, under the act of 1785, these cases may, perhaps, be considered as perfectly parallel to each other. But they are by no means parallel. The act of 1785, declares that the mother shall inherit *simul et semel* with her children. The act of 1790, declares she shall not have any part or share of the inheritance. The act of 1785, likewise directs that in the case therein mentioned, the inheritance shall be divided into moieties; the act of 1792, says, it shall be so divided, if it were neither derived from the father, nor the mother. But to whom the whole inheritance (when not thus divisible) shall go, the law has not declared. The two grandfathers were equally incapable of inheriting by the common law; the act of 1792, gives no preference to either. The collateral relations on both sides, (expect the next heir at common law) stand likewise in the same predicament. The act of 1792, neither prefers the one to the other, nor makes any provision for the course, which the inheritance must follow in this case. Thus new difficulties crowd upon us in every new case. Nor can I devise any other possible mode by which they can be solved, and one uniform interpretation of the law established, than that before mentioned, *viz.* considering "the inheritance to be in abeyance, during the joint lives of the pretermitted heirs, and of the persons during whose lives those heirs are excluded from the inheritance."

On the other hand, perhaps, this unlucky section may be interpreted as a general rule, not confined to the case of infants only, but extending to the case of every person, whether infants or adults, dying without issue, and without father, mother, brother, or sister, or their issue living; and, consequently, as repealing all the subsequent sections of the act of 1785. A construction, nevertheless, utterly unavoidable, if the act of 1792, had been an entire new law. But being, in its present form, altogether a piece of patch work, the same construction cannot be made upon it, as if it had been originally what it now is. For in the latter case, all omitted cases must have been supplied by reference to the common law, the rules of which, in every case not within the purview of the act, must still have prevailed. But the act of 1785, having abolished and annihilated all those rules, and established a complete system, in which, there is perhaps, not a single *casus omissus* [omitted case], and the act

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of 1789, c. 9. prohibiting us from resorting again to the common law, to supply omitted cases: we are driven, in construing the act to the necessity of confining them to such as the legislature certainly contemplated, viz: to the case of infants only, and not of adults.[38] – Nor even to the case of infants, always; for if the estate be derived from any other person than a parent, this case is not within the act: yet if the descent were mediately from the parent, but immediately from a brother or sister, perhaps, in that case, a doubt might arise upon the construction of the words "derived by descent," etc; but it would seem advisable to construe these deviations from the general system established by the act of 1785, as strictly as possible, so as to exclude as many cases of difficulty, as a due respect for the intention of the legislature, (where it can be understood, and enforced, without manifest contradiction, and absurdity,) will permit.

Some doubts were entertained with respect to the period when this last act came into operation, occasioned by the passing of an act of the same session, which suspended this act, among a number of others, until the first of October, 1793; although a clause in this act declares it shall commence from the passing thereof. The question was discussed in the case of Harrison et al. vs. Allen. Wythe's Reports, 33. And the chancellor decided it, upon principles which were not deemed convincing by the judges of the general court, in the case of one Ephraim Potter, adjourned thither from the district court of Prince Edward; this, however, was a criminal case, and the question was, whether upon the repeal of all British statutes, as also of the former laws of Virginia, which took away the benefit of clergy from horse-stealers, the suspension of the new law, made the same session, entitled the criminal to the benefit of clergy; which was decided in his favor. But a third case having arisen, in which the same question occurred, as to the commencement of the new act concerning foreign bills of exchange, the court of appeals removed the difficulty, by deciding, that all the laws of the session of 1792, whose operation was suspended by an act passed at the close of the session (Edi. 1794, c. 150,) although they contained a clause of commencement from the passage of each, respectively, must be considered as commencing from the first day of October, 1793.[39]

In the annexed table, I have endeavored to explain the course of descents, as established by the act of 1785, of which I shall now proceed to give the student some idea; comparing it, as we proceed, with the English rules of inheritance.

1. Let us suppose John Stiles, the Propositus, in the table, to have died intestate, having title to an estate of inheritance, and leaving two sons, Mathew and Gilbert, and two daughters, Margaret and Charlotte; these shall all share the inheritance equally, without regard to sex or primogeniture: whereas we may remember, that, according to the common law rules of inheritance, Mathew Stiles, the eldest son, or his issue, if he were dead, leaving any, should have succeeded in preference to the younger son Gilbert; and that Gilbert and his issue would also have been preferred to the daughters. But no preference whatever is given by our law; and if either of the sons or daughters were dead, leaving issue, that issue should succeed in the same manner to the portion of his or her deceased parent. This class is distinguished in the table by number I.

2. If there be no child, or other descendant of John Stiles, his father (number II,) shall next succeed to the inheritance; whereas, by the law of England, the father can never inherit to the son, in a lineal course: but the uncle, or other collateral kindred in the most remote degree, shall be preferred to him; and, in default of these the land shall escheat to the lord of the fee.

3. If there be no father, the mother, if living, together with the brothers and sisters of John Stiles (number III,) shall divide the inheritance between them in equal portions, if of the whole blood, or, in half portions, if of the half blood, either on the part of the father, or the mother; and if any of them be dead leaving issue, such issue shall inherit the share of his deceased parent; even though it were

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a bastard, if the mother were one of those entitled to a portion of the inheritance. Whereas, by the common law, neither the mother, nor the brothers or sisters of the half blood, nor the bastard, could have any portion of the inheritance, by any means whatever. And the younger brother, and sisters of the whole blood, would have been all postponed to the elder brother, Francis Stiles, and his issue, in infinitum.

4. If there be none of these relations, the inheritance shall be divided into two equal moieties; one of which shall go to the paternal, and the other to the maternal kindred, in the following course ; that is to say, first to the grandfather; (number IV,) whereas by the common law no partition between paternal and maternal kindred, as such, can ever take place; nor could the grandfather inherit lineally from his grandson, but the land should rather escheat, for want of heirs. And, in the case here supposed, should descend to the issue of the paternal grandfather, if any, or, if none, to his nearest collateral kindred of the whole blood.

5. If the grandfather be dead, then the moiety to which, if living, he would have been entitled, shall be equally divided between the grandmother of the same side, if living, and the descendants of such grandfather and grandmother, or such of them as there be; (number V,) and this likewise, without regard to sex, or primogeniture, or half blood, or bastardy, where the mother of the bastard may have been one of those entitled to the inheritance: but the half blood take half portions only. And here we may remark, that even those of this class, who might by possibility come into the inheritance by the rules of the common law, if they happen to be of the maternal kindred, (as for example, the issue of Andrew and Esther Baker) come in only in the fourteenth place, instead of the fifth, as may be seen by referring to judge Blackstone's table of descents.

6. In default of kindred in any of these degrees, the inheritance of each moiety shall go to the great grandfathers of the same side, (number VI,) or great-grandfather, if there be but one. That is, the paternal moiety shall go to Walter Stiles and Luke Kempe, or to whichever of them may be living, if the other be dead; and the maternal moiety shall in like manner go to Herbert Baker and James Thorpe, or the survivor of them, if either be living, in exclusion of the great grandmothers and collateral kindred in the same, or a more remote degree. But, if both the male ancestors in the same degree, and of the same side, be dead, then the female ancestor or ancestors of the same side, together with the descendants of such deceased male or female ancestors, or ancestor, (number VII,) shall come into the inheritance, according to the foregoing course. Whereas, in this case, the issue of Walter and Christian Stiles, (number VIII in Blackstone's table, and number VII in this) according to their sex and seniority, would, by the rules of the common law, have succeeded to the whole inheritance, instead of a moiety only; in exclusion of all others, either in an equal or more remote degree.

7. In the same manner, the male ancestors in the next degree, of whom we may observe that there are four in each line, (number VIII,) or the survivors, or survivor of those on the same side, shall succeed to the inheritance of each moiety respectively, in exclusion of female ancestors and collaterals, in the same degree; but, if all the male ancestors in that degree, be dead, then the female ancestors, or ancestor, and collateral kindred in the same degree (number IX,) and the descendants of such of them as may be dead, shall take each moiety respectively. And, if there be no such kindred of the one part, the whole shall go to the other part; and if there be no kindred on either part, then the inheritance shall go to the wife or husband of the intestate, (number X,) and if the wife or husband be dead, it shall go to his or her kindred, (number XI,) in the like course as if such wife or husband had survived the intestate, and then died entitled to the estate. So that, in such a case, the wife or husband is to be considered as the *propositus*, or stock from whom the estate descends; and

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his or her kindred are to be sought out according to the preceding course.

The second table is intended to explain to the student the manner in which partition is to be made, pursuant to the act of 1792, e. 93. Sect. 16, which declares, that where the children of the intestate or his mother, brothers and sisters, or his grandmother, uncles and aunts, or any of his female lineal ancestors living, with the children of his deceased lineal ancestors, male and female in the same degree, come into the partition, they shall take *per capita*, that is to say, by persons; and where a part of them being dead, and a part living, the issue of those dead have right to partition, such issue shall take *per stirpes*, or by stocks, that is to say, the share of their deceased parent.

1. The order of succession to the intestate's estate is, in this second table, denoted by the Roman numerals I, II, etc. pursuant to the course directed in the second, third, fourth, seventh, eighth, ninth, and tenth sections of the law, and show that all the persons thus distinguished alike, shall succeed at the same time to the inheritance in the order of those numbers. Thus the class marked (I,) or the descendants, in infinitum, of such of them as are dead, if such descendants be in esse at the time of the intestate's death, shall succeed altogether, before any of the other classes, (marked II, III, etc.) are admitted to any part of the inheritance. And here, let it be remembered, that these different classes can never come into the partition together: but the first must be totally extinct before the second can come in; and the second must likewise be extinct before the third can be admitted to any portion of the inheritance; and so on, with all the rest.

2. The succession *per capita*, or by persons, is marked in each class by the letters A, B, C. Thus, if all those marked A, be living, they shall come into the partition *per capita*, and exclude the others, who are more remote from the intestate, from any share of the inheritance; if all those marked A be dead, those marked B, being now the next of kin to the intestate in equal degree, shall take the inheritance among them, if they be all living, *per capita*: to the exclusion of those marked C. But if all those marked A and B be dead, then the class marked C shall also inherit *per capita*, they being now related to the intestate in equal degree, together. But if a part of those marked A be living, and a part of them be dead, the descendants of the latter, who are marked B, shall not take *per capita*, with those marked A; but they shall take the share of their deceased parents only, which shall be divided among themselves; and this is what the law calls taking *per stirpes*, or by stocks. And, in like manner, if all those marked A, were dead, and a part of those marked B, were also dead, leaving issue, or other descendants, in esse, (marked C,) such issue could not come into the partition, *per capita*, with the class marked B, but they come *per stirpes* , taking the share of their deceased parent, only, which is to be divided among themselves, by persons. And this course is to be observed, as well in the collateral, as in the descending line, from the intestate.

Thus, if John Stiles, the propositus in the Table, die, leaving issue Mathew, Gilbert, and Charlotte Stiles, all living at the lime of his death, (see the class marked A in the descending line) they shall take *per capita*, and inherit equal portions; but if one of them, Charlotte, be dead, leaving two sons,, James and Benjamin, (marked B.) they shall not/take with Mathew and Gilbert, *per capita*, but only their deceased mother's part, which they shall divide equally between them. But, if Mathew and Gilbert were also dead at the time of the death of their father, the latter without issue, and the former leaving three children, Joseph, Esther, and Richard, still living here, these three children of Mathew, and the two sons of Charlotte, being now the nearest of kin to the intestate, and all of them in equal degree, (see the class marked B.) they shall take *per capita*, and not *per stirpes*, as they must have done, if either of the children of John Stiles, suppose Gilbert, (who belongs to the class marked A.) had then been living. So, if all the children of John Stiles were dead, leaving issue as above supposed, except James, the son of Charlotte, now dead, leaving issue Mary and Daniel, (class C.)

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these children of James should not share the inheritance, *per capita*, with the three children of Mathew, and Benjamin the other son of Charlotte, but should take the portion of their father James only; yet, if Benjamin, the other son of Charlotte, and all the children of Mathew, were also dead, so that Anne, Robert, Philip, Mary, Daniel and William (class C.) would be .all the nearest of kin to the intestate, living at the time of his death, these being all related to him in equal degree, should take the inheritance among them, *per capita*, and not *per stirpes*, as they must have done, if Gilbert, or any other person in the class marked A, or if Joseph, the son of Mathew, or any other person in the class B, had then been living.

It now only remains to explain the principles upon which the proportions of those who come into the partition together, may be adjusted, where they are to take *per stirpes*, for in such cases it may happen that two persons who are related to the intestate in an equal degree, may take such different proportions, that one may have a third, and the other not more than a twentieth or thirtieth part of the inheritance. Thus if John Stiles, the propositus, should die intestate, his son Mathew being dead leaving eight children, and Gilbert being also dead, leaving one child, and Charlotte being still living: here, inasmuch as the succession of Mathew's children, and Gilbert's child must be *per stirpes*, each taking the share of their respective parents, the child of Gilbert will have one third of the whole estate; whilst the children of Mathew have only one eighth part of his proportion, each, or a twenty-fourth part of the whole estate. – But, if they had taken *per capita*, their portions must have been all equal.

And here I must premise one general rule, whenever the inheritance is to be divided *per stirpes*; that is to say, the inheritance must first of all be divided into as many different parts, as the number of persons then living in the nearest degree of consanguinity to the intestate, together with those in the same degree of consanguinity, who may be dead, leaving issue still living, will amount to. Thus if John Stiles during his life had eight children, two of whom died in his lifetime, leaving issue, and two without issue, and the remaining four still living; here the primary division of his estate must be into six equal parts, or portions; because so many children, or their representatives, will be entitled to share the estate: but to be more particular.

If John Stiles, the propositus, in the Table, die leaving issue three children (class A.) these being in the nearest degree of consanguinity to him, his inheritance, if he die intestate, shall be divided into three equal parts, which they shall take between them *per capita*, or by persons; but if one or more of them be dead, leaving issue, and one still living, the inheritance shall still be divided into three parts, of which the survivor, or survivors shall each have one, and the issue, (or other descendants in infinitum) of such as be dead shall take the share of their deceased ancestor, or ancestors, respectively, *per stirpes*, which shares shall be divided among the immediate representatives of the deceased, in equal degree, *per capita*; or again subdivided among the descendants of such of them as may be dead, *per stirpes*. Therefore, if Mathew Stiles (class A.) he dead, leaving three children, Joseph, Esther and Richard (class B.) and Charlotte Stiles, (class A.) be likewise dead, leaving two children, James and Benjamin (class B.) and then John Stiles the father die, leaving his second son Gilbert, (class A.) living; in this case the inheritance shall be divided into three equal parts, of which Gilbert shall have one; the children of Mathew, a second; each of whom shall take one third part thereof, or, one ninth part of the whole inheritance: and the remaining third part shall go to the children of Charlotte, each taking one moiety thereof, or one sixth part of the whole inheritance. Again; if Mathew be dead, leaving his son Joseph, (class B.) and two grand-children, Anne and Robert, (class C.) children of his daughter Esther, deceased; and Philip, (class C.) son of his son Richard, deceased: and James and Benjamin, the sons of Charlotte, be likewise dead, together with their mother, leaving Mary and Daniel, (class C.) children of James; and William the son of

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Benjamin; and then John Stiles die intestate, leaving his son Gilbert (class A.) still living; in this case the inheritance shall first be divided into three equal parts, of which, Gilbert shall have one, as before; the second shall go to the descendants of Mathew, *per stirpes*; that is to say, Joseph, his son, shall take one third part thereof, or one ninth of the whole inheritance, as before; Anne and Robert, the children of his daughter Esther, shall take one other third part, as her representatives, between them; or, one eighteenth part of the whole inheritance, each: and Philip shall take the remaining third part of Mathew's portion, as the sole representative of his father Richard, deceased: and the remaining third part of the whole inheritance shall go to the descendants of Charlotte Stiles deceased, in like manner, *per stirpes*; that is to say, Mary and Daniel shall take the portion which their father James, if living, would have been entitled to, in equal proportions; or, one twelfth of the whole inheritance each; and William the son of Benjamin shall take his entire portion, or one sixth part of the whole inheritance, as the sole representative of his father, deceased.

But if Gilbert Stiles, the second son of John, were also dead, leaving no issue living at the death of his father; Mathew and Charlotte, being dead, leaving issue, as above supposed. – In this case, the inheritance must be divided according to the number of stocks, in the second class; (marked B.) for these are now in the nearest degree of consanguinity to John Stiles: that is to say, into five equal parts, one of which must go to each of the living grandchildren of John Stiles, and one to the descendants of each of those who are dead. Joseph, therefore, (class B.) will have one entire fifth part, the number of stocks being five; Anne and Robert, the children of Esther, (class C.) will have one other fifth part between them, as representing their mother; Philip, the son of Richard, will take another entire fifth part, as representing his father: the children of James will take another fifth part between them; and the remaining fifth part will go to William, the son of Benjamin, Here Anne and Robert the children of Esther, and Mary and Daniel the children of James, will each take one moiety of their respective parent's share; while Joseph the grandson of John Stiles Bind Philip the son of his grandson Richard, and William the son of his grandson Benjamin, will each take one equal fifth part of the whole inheritance.

But if there he neither child (class A.) nor grandchild, (class B.) living, then the great grandchildren (class C.) shall come in *per capita*, and not *per stirpes*. A consequence of which is, that they shall take the whole inheritance among them, in proportions; or, one sixth part, each, of the whole inheritance: they being now the nearest of kin to the intestate who are entitled to share his inheritance.

From what has been said, it will he evident; that whenever one class, whether those marked A. B. or C. come into the partition together, without either of the other classes having a share with them, the individuals of such class take *per capita*, and not *per stirpes*; but if any two classes, or all three come into the partition together, the nearest relations of the deceased shall take *per capita* and the more remote *per stirpes*; yet liable to a further subdivision *per capita*, where there may be more than one child of the same parent, who, if alive, would have been entitled to partition.

This differs from the rules of succession in parcenary, at the common law, where the right of representation is uniformly preserved, agreeing with the civil law in those cases, where all the persons entitled to partition are equally remote from the intestate.

THE act of 1785, c. 63, confirmed by that of 1792, Edi. 1794, c. 91. Sect. 27, declares, that the surplus of the personal estate, after payment of debts and funeral charges, and deducting the wife's third part, if there be a wife, shall be distributed in the same proportions, and to the same persons, as lands are directed to descend in, by the acts of 1785, c. 60, and the act of 1792, entitled, An Act to reduce into one the several acts directing the course of descents:[40] provides, that nothing therein

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contained shall be understood so as to compel the husband to make distribution of the personal estate of his wife, dying intestate.

But the act of 1801, c. 13, declares, "that when an infant having title to personal estate, shall die before the attainment of the age when one may legally bequeath that kind of property, or after attaining such age, shall die without bequeathing it, those of his or her kindred shall succeed to the said infant, who would have succeeded, if he or she had been at the time of his or her death, of the age of twenty-one years."

This act was probably occasioned by a decision in the court of appeals, in October term 1801, in the case of Tomlinson vs. Dilliard, a report of which was published in some of the newspapers soon after, and was in substance, as follows:

Tomlinson, by his last will in February 1797, gave a moiety of a tract of land, in Greensville County and seven negroes, to his wife, and also the use, dining her life, of the plantation whereon he resided; which devises included all the property he had received with her, and much more. He then devised all the rest of his estate to the child of which he supposed his wife to be pregnant: she was accordingly delivered of a child, after his death, which lived till September, 1798, and then died, in the life-time of the mother, who had married Dilliard, and died soon after her child. –

The question was, whether Dilliard, in right of his wife was entitled to the personal estate, or not. The chancellor decreed in his favor, and the Tomlinsons appealed from his decree to the court of appeals, where the same was reversed, for the following reasons:

That the act of assembly passed in the year 1792, for the distribution of intestates' estates, (Edition of 1794, c. 92, J. 27.) having enacted, that, if there be no wife or children, the surplus of the personal estate shall be distributed to the same persons, and in the same proportions as lands are directed to descend by the act of 1792, to reduce into one, the several acts directing the course of descents; has adopted the exceptions in the fifth and sixth sections, of that act, which exclude the father and mother, and their children by another husband or wife from succession to the lands of an infant intestate, which came to him from the other parent, as well as the rule to which they are exceptions; and extends that exclusion equally to a distributive share of the personal estate coming to the infant in the same manner.[41]

It does not appear, from this statement, whether the Tomlinsons or Dilliard was the complainants in Chancery; nor in what degree the former were related to the child of Mrs. Dilliard, born after the death of her first husband: Circumstances which, in the apprehension of the author of this tract might have a very important influence upon the case, for reasons, which may be collected from what is therein contained.

NOTES

1. 1 L. V. 1710, c. 13, °. 4. – 1727, c. 4, °. 11, etc- 1748, c. 1, Sec. 14.

2. A copy of this act may be found bound up with some of the editions of 1733. It is also abridged by Mercer, p. 202. The act of 1748, c. 1, Sec. 15 and 16, contains some further provisions, than that of 1734, c. 6.

3. 2 Bl. Comm. 209.

4. Co. Litt. 163, 188, 243, Litt. Sec. 398.

5. Co. Litt. 243.

6. 1748, c. 1, Sec. 28, 4", fcc.

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7. 1785, c. 63

8. 1785, c. 62.

9. Sec. 2.

10. vi. Chris, notes on B. C. V. 2. 208.

11. 2. B. C. 169. 1 Salk 228. 1 Inst. 29. 6. The rule in the civil law is *Qui in utero sunt, in jure civili intelliguntur in rerum natura esse, cum de eorum commodo agatur*. [Those who are in the womb, are considered by the civil law to be in the nature of things, as they are capable of being benefitted.]

12. V. L. 1781, c. 62 Etli 1794. c 90.

13. 2. B.C. 208, 210, 212. 1 Inst. 11.

14. 3 Blacks. Com. 227.

15. 1 Blacks. Com. 459.

16. Children pretermitted in their father's will, further provided for. 1794. c. 170.

17. 2. B C. 188. 194 – Co. Litt. 164. 200. – 2. Wils. 232. S I/MO. c. 15. V. L.

18. V. L. 1786, c. 60.

19. It took effect, July 1, 1757. 2. B.C. 223.

20. 2. B. C. 230.

21. 4 Bac. Abr. 638. 2 Wash. 296, 209.

22. Gub. Hist C. P. 212.

23. 2 B. C. 249, 254. V. L. 1785. c. 60, Sec. 11.

24. By the statute 1 James I. c. 4. Sec. 6, any child sent beyond seas for a popish education, was disabled from inheriting, having, or enjoying; any lands within the realms of England, but the statute contained no declaration who should have the lands. And thereupon, a subsequent statute, 3 Jas. 1, c. 5. Sec. 17, was made, declaring, that his next of kin, not being a popish recusant, shall have and enjoy the land, until such time as the person beyond seas shall conform himself to the injunctions of the statute.

25. 2 Blacks. Comm. p. 255.

26. Ibid. P- WT.

27. Litt. Sec. 647.

28. 1 Inst. 8, 6.

29. Litt. Sec. 646.

30. Co. Litt. 165.

31. Ibid. 165. & 2 B. C. 217.

32. The king, in the case of parceners of a title of honor, may direct which one of them, and her issue shall bear it; and if the issue of that one, become extinct, it will again be in abeyance, if there are descendants of more than one sister remaining. But upon the failure of the issue of all, except one, the descendant of that one, being the sole heir, will have a right to claim, and to assume the dignity. – Christian.

There are instances of a title, on account of a descent to females, being dormant, or in abeyance, for many centuries. Harg. Co. Litt. 165.

33. Dyer, 340. 1 Rep. 101. 2 Blacks. Com. p. 182.

34. Fearne 307, 315.

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35. Cited Fearne 318. 1 Eq. Ca. 188, Case 11.

36. Fearne 593, 394. Carth. 310.

37. L. V. Edi. 1794, c. 93.

38. Since this tract was transcribed for the press, the author of it has been gratified in finding his ideas upon this subject confirmed by the decision of the court of appeals in the case of Drown et al. vs. Turberville et al. 2. Call's Reports 390, just published. The case was shortly this: George Waugh of full age, died intestate without issue, and unmarried, seized and possessed of an estate partly derived by devise from his father Goury Waugh, and partly by descent from his brother Robert Waugh, leaving an uncle, and three cousins, children of a deceased uncle of the whole blood, on the mother's side, and an uncle of the half blood, likewise on the mother's side, and two relations on the father's side. The estates were ordered to be divided into two moieties, of which one was to be divided between the two relations on the father's side; and the other to be allotted to those on the part of the mother, as follows: two fifths to the uncle of the whole blood; two fifths to the three cousins; and one fifth to the uncle of the half blood. – 2. Call's Rep, 390.

39. Call's Hep. 1 vol 394.

40. L. V. Edi. 1794, c. 93.

41. Extracted from the Examiner of November 20, 1801.

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NOTE C

Of the Right of Aliens to Purchase and Hold Lands

BY the common law of England all persons born out of the king's dominions, or allegiance, were, with very few exceptions,[1] held to be aliens. And this maxim proceeded upon the general principle, that every man owes allegiance where he is born, and can not owe two such allegiances, or serve two masters at once.[2] The statute Edw. 3. Stat. 2, enacted that all children born abroad, provided both their parents were at the time of their birth in allegiance to the king, and the mother had passed the seas with her husband's consent, might inherit as if born in England. And by some later statutes, which perhaps were never in force here, all children born out of the king's ligeance, whose fathers were natural born subjects, were declared to be natural born subjects themselves, to all intents and purposes, without any exception.

According to these principles all persons born within the United States, whilst colonies of Great Britain were the natural born subjects of the crown of Great Britain. This was indeed stipulated on the part of the colonists emigrating to this country, and confirmed to them, expressly by the several charters granted by Queen Elizabeth to Sir Humphrey Gilbert and Sir Walter Raleigh, and the subsequent charters of King James the first; by all which the colonists and their heirs, and every of them were declared to be entitled to all the privileges ½ of free denizens, or persons native of England. – Thus stood the law at the period of the American revolution. The natives of the colonies, and the natives of the parent state were in consequence thereof of equal capacity to inherit or hold lands in the different parts of the British empire, as if they had been born and their lands situated in the same country. And, in fact many native Americans did hold estates in England, and on the other hand great numbers of the natives of Great Britain, who had never been in America, possessed estates in lands, in the colonies.

By the declaration of independence, the colonies became a separate nation from Great Britain. Yet according to the principles of the laws of England,[3] which we still retained, the natives of both countries, born before the separation, attained all the rights of birth; or in other words, American natives were still capable of inheriting lands in England, and the natives of England who remained subjects to the crown of Great Britain, were still capable of inheriting lands in America, or of holding those which they already possessed. – This principle seems to have been laid down by Bracton, and is recognized in Calvin's case.

In May, 1777, an act[4] passed to oblige the free male inhabitants of this state above the age of sixteen years to give assurance of allegiance to this state.[5] This assurance consisted in an oath abjuring all allegiance to the king of Great Britain, his heirs and successors, and of fidelity to the commonwealth of Virginia as an independent state. All recusants were thereby directed to be disarmed, and further, were declared incapable of holding any office in the state; serving on juries, suing for debts; electing or being elected; or buying lands, tenements, or hereditaments. By the act of October, 1777, c. 2. the delinquents were subjected to double taxes. In the same session an act[6] passed for sequestering British property, and enabling those indebted to British subjects to pay off such debts; the preamble recites, that divers persons subjects of Great Britain had during our connection with that kingdom acquired estates real and personal within this commonwealth; and had also become entitled to debts to a considerable amount, and such estates having been acquired, and debts incurred, under the sanction of the laws, and of the connection then subsisting, and it not being known that their sovereign had as yet set the example of confiscating debts and estates under the like circumstances, the public faith and the law and usages of nations required that they should not be confiscated on our part; but the safety of the United States demanded, and the same law and usages of nations

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would justify, that we should not strengthen the hands of our enemies during the continuance of the war. Wherefore it was enacted that the lands, slaves, etc. of whatever nature within this commonwealth, the property of any British subject shall be sequestered into the hands of commissioners: and further, that any citizen owing money to a subject of Great Britain might pay the same or any part thereof into the loan-office, taking a certificate for the same in the name of the creditor, with an endorsement under the hand of the commissioner, expressing the name of the payer, who shall deliver such certificate to the governor and council, whose receipt shall discharge him from so much of the debt. In the succeeding month[7] the congress of the United States, "Resolved, that it be earnestly recommended to the several states, as soon as may be, to confiscate and make sale of all the real and personal estate herein of such of their inhabitants, and other persons, who have forfeited the same, and the right and protection of their respective states, and to invest the money arising from the sales in continental loan-office certificates, to be appropriated in such manner as the respective states shall thereafter direct."

It does not appear that any measures were taken in this state, in pursuance of this recommendation, until the May session of 1779, when an act[8] passed declaring who should be deemed citizens of this commonwealth. Whereby it is declared, "that all white persons born within the territory of this commonwealth, and all who had resided therein two years next before the passing of that act; and all who should thereafter migrate into the same, other than alien enemies, and give assurance of fidelity, etc. to the commonwealth. And all infants wheresoever born, whose father if living, or otherwise whose mother was a citizen at the time of their birth, or who should migrate hither, their father if living, or otherwise, their mother becoming a citizen, or who should migrate hither without father or mother, shall be deemed citizens of this commonwealth. – And all others, not being citizens of any of the United States of America shall be deemed aliens." In the same session an act[9] passed, entitled an Act concerning Escheats and Forfeitures from British subjects, the preamble of which declared, that, "Whereas during the connection which subsisted between the now United States of America and the other parts of the British empire, and their subjection to one common prince, the inhabitants of either part had all the rights of natural born subjects in the other, and so might lawfully take and hold real property, and transmit the same by descent to their heirs in fee simple, which could not be done by mere aliens; and the inhabitants on each part had accordingly acquired real property in the other, and in like manner had acquired personal property, which by their common laws might be possessed by any other than an alien enemy, and transmitted to executors and administrators; but when by the tyrannies of that prince, and the open hostilities committed by his armies and subjects inhabitants of the other parts of his dominions, on the good people of the said United States, they were obliged to wage war in defense of their rights, and finally to separate themselves from the rest of the British empire, to renounce all subjection to their common prince, and to become sovereign and independent states; the said inhabitants of the other parts of the British empire, became aliens and enemies[10] to the said States, and, as such, incapable of holding the property, real or personal, so acquired therein; and so much thereof as was within this commonwealth became by the laws vested in the commonwealth. Nevertheless the general assembly, though provoked by the example of their enemies to a departure from that generosity which so honorably distinguishes the civilized nations of the present age. yet desirous to conduct themselves with moderation and temper, by an act passed at their session, in the year one thousand seven hundred and seventy-seven, took measures for preventing what had been the property of British subjects, within this commonwealth, from waste and destruction, by putting the same into the hands and under the management of commissioners appointed for that purpose, that so it might be in their power if reasonable, at a future day, to restore to the former proprietors the full value thereof."

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"And whereas it is found that the said property is liable to be lost, wasted, and impaired without greater attention in the officers of civil government, than is consistent with the discharge of their public duties; and that from the advanced price at which the same would new sell, it may be most for the benefit of the former owners, if the same should be restored to them hereafter, or to the public if not so restored, that the sale thereof should take place at this time, and the proceeds be lodged in the public treasury, subject to the future direction of the legislature:" it was therefore declared and enacted, "that all the property real and personal within this commonwealth, belonging at that time to any British subject, or which did belong to any British subject at the time such escheat or forfeiture may have taken place, shall be deemed to be vested in the commonwealth, the real estate by way of escheat, and the personal estate by forfeiture." The sales were directed to be made for ready money, and the escheator's certificate of the payment thereof entitled the purchaser to a grant for the same freely and fully exonerated from all the right, title, claim and interest legal and equitable of any British subject thereto, and also, from the right, title, claim and interest of every person, under any deed of mortgage the equity of redemption whereof had not been foreclosed, at the time of the sale.

The act of October, 1779, c. 39, for confirming the titles of purchases of escheated and forfeited estates, declares, that in every case where any estate should have been found to belong to a British subject, in which the clerk of the general court has certified or should certify, that no claim has been filed to such estate; or where any claim should have been filed and discussed for the commonwealth, the title of the purchaser or purchasers thereto should be thereby confirmed to him, his heirs and assigns upon due payment of the purchase money, notwithstanding any defect in the inquisition, or, that the requisitions of the act concerning escheats and forfeitures from British subjects may not have been complied with.

These acts taken together evince the intention of the legislature to have been to repeal the common law principle that the *antenati* of both countries might, notwithstanding the separation, continue to hold and inherit lands in any part of the dominions which were formerly united. For the act declaring who shall be deemed citizens of this commonwealth in express terms declares that all persons not comprehended within the description therein contained shall be deemed aliens. But this could not have been the case at the common law, (according to the rule in Calvin's case) since they were natural born subjects with respect to the natives of this country, being born under the same allegiance with them; nor could they by any *ex post facto* [after the fact] circumstance, except an express legislative ordinance be made aliens.[11] But the act concerning escheats and forfeitures goes still further and pronounces them not only to be aliens, but enemies. And this circumstance was made the foundation of the law of confiscation and forfeiture.

And here it will be proper to consider these two acts separately, and independently of each other. And first, by the act declaring who shall be deemed citizens of this commonwealth, all persons (other than such as were by that act declared to be citizens) holding lands or tenements within the state were liable to lose the same by escheat; since by the common law, which in this respect was unaltered, no alien can purchase, or hold lands or tenements, but they shall escheat to the commonwealth; and this in the case of an alien friend, as well as of an alien enemy. But here a distinction occurs between alien friends and alien enemies; for if they had been alien friends they might have hired an house for necessary habitation; and their goods and chattels would not have been subject to forfeiture, to which, as alien enemies they, were. They might also have resided here peaceably, and have earned on trade, maintained personal actions, etc. – But in order to vest the property in lands of an alien friend in the commonwealth, an inquest of office, called an office of entitling is absolutely necessary; for until such office found the commonwealth has no right. Nor can

the commonwealth take or part with any thing but by matter of record.[12] And the nature of the inquiry in this case is "whether I. S. be an alien, or died without lawful heirs," etc. There is another inquest of office called an office of instruction; and that was, where the estate of the land was lawfully in the king before, but the particularity of the land does not appear of record, so that it might be put in charge. As if one were attainted of high treason, all his lands by stat, of 33. Hen. 8. were presently in the king; but it does not appear to the court of exchequer of, what lands the person attainted was seized, at the time of his attainder, and this inquest is necessary to instruct the king of the certainty of the land.[13] And herewith the act concerning escheats and forfeitures from British subjects, seems to agree. For that act declares that "all the property, real and personal within the commonwealth, belonging at that time to any British subject, or which did belong to any British subject at the time such escheat and forfeiture may have taken place, shall be deemed to be vested in the commonwealth; the lands, slaves and other real estate by way of escheat, and the personal estate by forfeiture." – This act could operate only upon estates or property then or before that time vested; the other act might operate as well upon property thereafter acquired, as upon such as was already vested; the proceedings upon the act concerning estates were in the nature of an office of instruction; the commonwealth being already entitled under this legislative declaration, as fully as the king was under the Sta.33. Hen. 8, without office; but yet the office of instruction was necessary in order that the commonwealth might with certainty know the land. But as to lands thereafter acquired by aliens, there the commonwealth would have no title whatsoever until an office of entitling was found. Yet such lands were liable to be escheated; but until office found the alien might hold the lands. And this distinction is clearly shown in Plowden, where it is said that the vova forfeit in the act of attainder of sir F. Lovel did not vest a reversion, whereof he was seized in the king, but is only effectual to vest a right or title in the king, and that it ought to appear by record what land or tenements he had; and therefore that it did not vest the possession, nor could the king enter without office first found.[14] But if the king's tenant in capite be in like manner attainted of treason, then after the death of the person attainted, the freehold in law shall be in the king until office found, in the nature of a common escheat, and not in the nature of an escheat, for treason.[15] Now here the legislature passed a kind of general bill of attainder against all British subjects holding lands, op other property in this state, thereby confiscating the same to the use of the commonwealth, which is analogous to the word forfeit in sir F. Lovel's case.[16] Yet until an office of instruction, the commonwealth could not enter or take possession. And the fact, whether a person were a British subject or not, could not be traversed by such person, or by any one in his behalf, but he was put to his *minstrans de droit*, by the act of Octo. 1779, c. 18, contrary to the common law practice; whereby a party found an alien by inquest of office might traverse it, and plead that he was *indigena*, or natural born.[17] The legislature aware of this circumstance, and also aware that *ante nati* natives of Great Britain were according to the principles of the common law *quasi* natural born, in Virginia, would not permit the party to contest the fact established by the inquest *viz.* that the lands were the property of a British subject, and to avail himself of this constructive nativity, but compelled him to show that he was within some of those special provisions contained in the act, in favor of infants, feme covers, and others whose cases were deemed worthy of exceptions in their favor. This legislative confiscation and disfranchisement is not without precedent. In the reign of Philip and Mary, sir Thomas Wyatt was attainted of high treason by act of parliament, which declared that his estate should be vested and adjudged to be in the actual possession of the crown without any other office or inquisition.[18] By the Stat. 5. Geo. I, c. 27, any manufacturer etc. then or afterwards being in any foreign country, who shall not return after warning so to do, shall be deemed an alien – a regular consequence of which is, that their lands should escheat to the crown.

By the definitive treaty of peace concluded between Great Britain and the United States, it was

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agreed that Congress should earnestly recommend to the Legislatures of the respective States to provide for the restitution of all estates, etc. confiscated, belonging to real British subjects; and that all persons having any interest in confiscated lands, should meet with no lawful impediment in the prosecution of their just rights. That Congress should earnestly recommend to the several States a reconsideration and revision of all acts or laws concerning the premises, and finally that no future confiscations should be made, and that no person should in future suffer any loss, or damage, either in his person, liberty, or property on account of the part which he might have taken during the war.

In the month of October following[19] the legislature of this state passed an act for the admission of Emigrants, and declaring the rights of citizenship, by which it was declared that all free persons born within the commonwealth; all persons not being natives who have obtained the rights of citizenship, under the act declaring who shall be deemed citizens;[20] all children wheresoever born, whose fathers or mothers are, or were citizens at the time of the birth of such children, shall be deemed citizens; and that all persons other than alien enemies, who shall migrate into the state, and give satisfactory proof before some court of record that they intend to reside therein, and take the oath of fidelity to the commonwealth, shall be entitled to all the rights of citizenship, except electing or being elected to any office, until an actual residence for two years, after taking such oath; and further until they shall have evinced a permanent attachment to the sate by intermarrying with a citizen of the commonwealth, or of the United States, or shall have purchased lands to the value of one hundred pounds therein. By this act, the former act[21] declaring who shall be deemed citizens, by which it was declared that all others should be deemed aliens, is expressly repealed: at the same session, another act[22] prohibiting the migration of certain persons into this commonwealth, was also passed, whereby such as had borne a commission under the United States, or any of them; or being natives, or residents in the United States on the 19th of April 1775, had voluntarily borne arms against the United States, within their territories, or on their coasts, or were owners of privateers, or members of the refugee board of commissioners in New York, or had acted under their authority, were prohibited from migrating to, or becoming citizens of this State. The succeeding year an act[23] was passed declaring that no future confiscations should be made; provided however that the act should not extend to any suit depending in any court, prior to the ratification of the treaty of peace. No steps were taken pursuant to the recommendations stipulated in the fifth article of the treaty. By the adoption of the constitution of the United States that treaty became a part of the supreme law of the land, and as such paramount to the acts of the state legislature. The operation of it remains to be considered. To do this, let us take a short review of the subject.

1. By the common law, upon the separation between America and Great Britain taking place, the natives of Great Britain were constructively natural born in America, and notwithstanding that separation, might hold lands here, as if they had been residents in America.

2. By the act of May 1779, c. 55. declaring who shall be deemed citizens, they were expressly declared to be alien, a consequence of which I presume was, that their lands were liable to be escheated to the commonwealth, upon the common law principle that an alien, whether friend or enemy, is incapable of purchasing or holding lands: the proceedings in this case, as we have shown, were by an inquest of office to entitle the commonwealth to the lands so held.

3. By the act of the same session concerning Escheats and Forfeitures, they were further declared to be enemies, as well as aliens: and it was further declared that all their property, whether real or personal belonging to them then, or at any lime before, when such escheat or forfeiture may have taken place, should be deemed to be vested in the commonwealth, the real estate by way of escheat, and the personal estate by way of forfeiture. This act appears to have vested a title in the state to all

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such estates, etc. but an office of instruction was necessary to show the lands, etc. with certainty, and to put the commonwealth in possession.

4. The operation of the treaty of peace upon the property declared to be escheated and forfeited by the last mentioned act might have been doubtful, had not the act of 1784, c. 55, authorized us to pronounce that the legislature thereby released the right of the commonwealth in all cases, where no inquest of office had been found, and a suit thereon depending, at the time of the ratification of the treaty: and it would seem that the treaty was an effectual bar to the subsequent confiscation or escheating of any property belonging to a British subject, which became vested at any time after the act of 1779, concerning escheats and forfeitures took effect. For that act, as we have already observed, could operate only on property then, or before vested, and not on any which might thereafter be acquired by British subjects.

5. By the treaty of peace the common law principle that the *ante nati* of both countries were natural born to both, and as such capable of holding or inheriting in both, seems to have been revived; in consequence of which they are now capable of holding, purchasing, or inheriting in the same manner as if they were citizens. And this, although they may be prohibited from migrating to, or becoming citizens of the state. For treaties are to receive a liberal construction, and most beneficial for those for whom any stipulation is made; and it was evidently the intention of the framers to restore all individuals to the same condition they were in before the war, as far as existing circumstances would permit, notwithstanding any part which they may have taken, either actually or constructively, in the war. And this construction is further aided by the omission of the words, all others shall be deemed aliens, in the act of Oct. 1783, c. 16, declaring the rights of citizenship, etc. at which time the preliminary articles of peace were generally known; and it was also probably known that the definitive treaty was precisely the same with them.

6. British subjects, born since the separation, are aliens; but such of them as were born before the definitive treaty took place, seem to be entitled to the benefits thereof, so far as they had, or might be presumed to have, any interest in lands in the United States: all others appear to be aliens in the strictest sense,[24] except as their cases have been remedied by the late Treaty of Amity, Navigation, and commerce, with Great Britain, of which it now remains to say a few words.

7. By the treaty of London, 19th Nov. 1794, Art. 2, it is stipulated, "That all settlers or traders within the precincts or jurisdiction of the British posts within the boundary lines of the United States, shall continue to enjoy unmolested all their property of every kind and shall be protected therein. They shall be at full liberty to remain there, or to remove with all, or any part of their effects; and it shall also be free to them to sell their lands, houses, or effects, or to retain the property thereof at their discretion. Such of them as shall continue to reside within the said boundary lines, shall not be compelled to become citizens of the United States, or to take any oath of allegiance to the government thereof; but they shall be at full liberty to do so if they think proper, and they shall make and declare their election within one year after such evacuation. And all persons who shall continue there, after the expiration of the said year, without having declared their intention to remain British subjects, shall be considered as having made their election to become citizens of the United States." – By the ninth article, it is further agreed,

"That British subjects who now[25] hold lands in the territories of the United States, and American citizens who now hold lands in the British dominions, shall continue to hold them, according to the nature and tenure of their respective estates and titles therein; and may grant, sell, or devise the same to whom they please, in like manner as if they were natives, and that neither they nor their heirs or assigns shall, so far as may respect the said lands, and the legal remedies incident thereto, be

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regarded as aliens." Under the operation of this treaty it would seem, that British subjects within the precincts or jurisdictions of the western posts, who held land there at the time of their evacuation, and shall elect to remain such within one year thereafter, cannot be regarded as aliens in respect to those lands, and that all British subjects, who actually held lands in any part of the United States, on the 17th day of Nov. 1794,[26] their heirs and assigns forever, although in all other respects aliens, shall not be considered as aliens in respect to such lands, and the legal remedies incident thereto. How far the words of this clause may revive the entails of such as were held by that tenure, or may authorize the transmission of them in that mode to latest posterity, malgre the acts of the state legislatures on the subject, may perhaps become an important subject of inquiry hereafter – at present it would be altogether premature.

Thus much for the rights of British subjects, whether *ante nati*, or strictly aliens, according to the common law. The following legislative interpretation of the treaty of 1794, by the British parliament, may aid us in the construction which ought to be given to that treaty as it relates to British subjects in the United States.

The statute 37 Geo. 3, c. 97. Sec. 24 and 25, after reciting "that by the ninth article of the said treaty, it was agreed that British subjects who then held lands in the territories of the said United States, and American citizens who then held lands in the dominions of his majesty, should continue to hold them according to the nature and tenure of their respective states and titles therein, and might grant, sell, or devise the same to whom they should please, in like manner as if they were natives, and that neither they nor their assigns should, so far as might respect the said lands and the legal remedies incident thereto, be regarded as aliens;" declares that "all lands, tenements, and hereditaments, in the kingdom of Great Britain, or the territories and dependencies thereto belonging, which on the said twenty-eighth day of Oct. 1795, (being the day of the exchange of the ratifications of the said treaty between his majesty and the said United States) were held by American citizens, shall be held and enjoyed, granted, sold, and devised, according to the stipulations and agreements contained in the said article; any law, custom, or usage, to the contrary notwithstanding. – Provided always, that nothing therein contained shall extend, or be construed to extend, to give any right, title or privilege, to any person,"not being a natural born subject of that realm, which such person would not have been entitled to, if that act had not been made, other than and except such rights, titles and privileges, as shall be necessary for the true and faithful performance of the stipulations in the said article contained, according to the true intent and meaning thereof, or to give to any person, not being either a natural born subject of that realm or a citizen of the said United States, any right, title, or privilege, to which such person would not have been entitled if that act had not been made." Upon this we may shortly remark,

1. That lands purchased by a British subject, within the United States after the 28th of October, 1795, are not within the provisions of the treaty.

2. That lands owned by British subjects on or before the said 28th day of October, 1705, can not be transferred, under the treaty to any person, other than a British subject, or a citizen of the United States.

3. That no right of suffrage, or other civil privilege whatsoever, is annexed to the possessor of such lands, being a British subject, in virtue of the said treaty – from hence we may infer,

That no such right of suffrage, can be enjoyed by any lessee, or tenant of any British subject, in virtue of his estate in such lands, although the estate of such lessee or tenant, should in quantity of interest be such, as if derived from a citizen of the United States would be a sufficient qualification

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to vest the right of suffrage; and that, upon this principle, *non det qui nan habet*.

NOTES

1. The children of the king's ambassadors born abroad were always held to be natural subjects. 7 Co. Calvin's Case.

2. 1 Blacks. Commentaries, 373. 47 Ann. c, 5., 4. Geo. 2. c. 21.

3. 7 Co. p. 28. Calvin's case.

4. Chap. 3.

5. A resolution of the general assembly, Dec. 18, 1T76, for enforcing the statute staple 27 Edw. 3. c. 17, against all the natives of Great Britain in this country who were partners with, or agents, storekeepers or clerks for any merchant in Great Britain, except such as had uniformly manifested a friendly disposition to the American cause, or were attached to this country by having wives and children here, ordered that all such persons should be required to depart, within a limited time; and that such as might thereafter be found in the commonwealth should be confined as enemies and prisoners of war.

6. Chap 9.

7. Nov. 27, 1777.

8. Chap. 55.

9. Chap. 14.

10. Wars make aliens enemies. 7 Co. 25. But the act of the same session before mentioned, c. 55, expressly declares all others not excepted therein to be aliens.

11. 7. Co. 27.

12. Page's case 5. Co. 52. 2 Blacks. Com. 258. 259, etc.

13. 5 Co. 52.

14. Chap. 55.

15. Plow. 485, 486.

16. Ibid 8, 486.

17. Vez. 545.

18. Plow. 551.

19. Oct. 1781, c. 16.

20. 1773, c. 55, May session.

21. May, 1779, c. 55.

22. Oct. 1783, c. 17.

23. 1784, c. 53.

24. A regular consequence of this would seem to be, that upon the death of any *ante-natus* subject of Great Britain, holding lands in this part of the United States, before the separation, and continuing to hold such lands in virtue of the treaty of peace, such lands would escheat to the commonwealth, unless such *ante-natus* had some heir, who was either a citizen of the United States, or, if a British subject, who was also born before the separation. For it has been contended, that under the equity of the treaty of peace, giving it the most liberal construction, all the rights of British subjects in the United States, which were before that time actually vested, and had not since the separation been divested, were protected; and that where such rights relate to lands, the persons having such right, if not already citizens, had their whole lives to become citizens, which if they neglected to do, their lands at their death would be equally subject to escheat, as those of any alien naturalized, and dying without any other heirs, except aliens.

25. The British act of parliament for carrying this treaty into effect, fixes the 28th of October 1795, the day of the exchange

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of the ratifications as the period of its commencement, vide Stat. 37 Geo. 3, c. 97, passed July 4, 1797. – Query, if the same day is to be regarded as the period of commencement in the United States.

26. See the preceding note.

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NOTE D

The Manner of Obtaining Grants of Land, under the Commonwealth of Virginia

HERE it may be proper to notice the mode of obtaining grants of land from the commonwealth of Virginia.

The rights upon which such grants might be obtained, at the time of opening the commonwealth's land office were noticed before. Appendix note A. It only remains to mention the mode of proceeding in order to complete such right, by obtaining a patent for the land.

By the act of May, 1779, c. 13, any person may acquire title to so much waste and unappropriated lands as he may desire to purchase on paying the consideration of forty pounds (paper money, but now fixed at two dollars in specie) for every hundred acres, and so in proportion; and obtaining a certificate thereof from the auditor of public accounts; which being lodged in the land office the register grants a printed warrant under his hand, and the seal of his office, specifying the quantity of land, and authorizing any surveyor duly qualified to lay off and survey the same; which warrants shall be always good and valid until executed by an actual survey, or exchanged as the act directs. The person having the land warrant must lodge it with the chief surveyor of the county, wherein the lands, or the greater part of them lie; and the party shall direct the location so specially and precisely, as that others may be able with certainty to locate other warrants on the adjacent residuum; the location must bear date the day on which it is made, and must be entered in the surveyor's book, in which no blank leaves or spaces must be left. If several persons apply to locate lands at the same time, they shall be preferred according to the priority of the dates of their warrants; but if all are dated on the same day, the surveyor must settle the priority by lot. Every surveyor must at the time of making entries for persons not inhabitants of the county, appoint a time for surveying their land, and give notice thereof in writing to the persons making the entry: – the chain-carriers must be sworn by the surveyor, and the surveyor must see that his survey is bounded by marked trees, except where a water-course or ancient marked line shall be the boundary; and shall make the breadth of each survey at least one third of its length in every part, unless where it may be restrained on both sides, by mountains unfit for cultivation, by water courses, or the bounds of land before appropriated. – A fair plat and certificate of such survey must within three months be delivered to the party, with the quantity of land, and its boundaries, whether natural or artificial, and the name of the persons, whose former line is made a boundary, therein expressed. The plat and certificate of such survey, together with the warrant on which the lands were surveyed, are to be returned to the land-office, within twelve months, at farthest, (which time by a great variety of subsequent acts, has been enlarged from time to time,) and on failing so to do, or if the breadth of the plat be not one third of its length, except in the cases before mentioned, any other person may enter a caveat in the land office against issuing a grant, expressing therein for what cause the grant should not issue: or if any person obtains a survey of lands to which another has by law a better right, the latter may in like manner enter a caveat, to prevent the former obtaining a grant till the title can be determined. The proceedings upon these caveats, will he noticed in the third volume. The defendant within three months, and the plaintiff, or person entering the caveat, within six months, after a judgment in his favor, must deliver a copy thereof into the land office, or the land may be caveated again by any other person, for that cause; upon which subsequent caveat the same proceedings shall be had, as upon the original. Due returns in all these matters being made into the land-office, the register, within not less than six, nor more than nine months, shall make out a grant, in the form prescribed by the act, in which no reservation, or condition whatsoever is expressed. This grant is endorsed by the register, and then signed by the governor, and sealed with the seal of the commonwealth, and

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when recorded, is delivered to the grantee, or his order. Such, generally, are the requisites for obtaining a grant of land from the commonwealth of Virginia. It will readily occur to every reflecting mind, that they are neither calculated to promote population, nor to secure the proprietors of land in the peaceable possession of their purchases; nor even to procure for the state an adequate compensation for the lands granted. The consideration of forty pounds per hundred acres, at the time it was fixed, was not more in value than two dollars, the present price. This is exactly the hundredth part of the price at which the lands belonging to the United States are to he sold, at the lowest rate. So that on one side of the Ohio a man may take up lands from Virginia at two cents per acre, whilst lands of equal quality and situation on the opposite side of the river command the price of two dollars. Such a waste of the public treasure, uniformly persisted in for near twenty years, bespeaks infatuation in the advisers of such destructive measures. Population, also, must be greatly retarded by grants of principalities, and seigniories, in extent, to persons who propose to themselves no other object in obtaining them, than to dispose of them to some other speculator, who in his turn consigns the patent to another of the same fraternity.

Patents for lands in Virginia, land-warrants, military rights to land, certificates of survey, nay, even bonds to procure, survey, and patent lands, have, for the space of the last ten or twelve years, become a species of mercantile paper, passing from hand to hand, sometimes in a depreciated, and sometimes in an opposite state, and contributed to swell the vast influx of paper money that has deluged the United States for some years past. The evil has not rested here; emissaries have been dispatched to every part of Europe with bales of these patents; fictitious plats, and maps of the country, have been offered to the public eye; rivers and streams have been made to flow where nature has denied water; mountains have been sunk into meadows, and rocks as barren as the sandy deserts of Zaara, have been -represented as possessing the fertility of the banks of the Nile. Thousands of ignorant and innocent persons have been defrauded, and, with their families, plunged into irretrievable ruin by these nefarious practices. The facility of acquiring patents for such a vast extent of territory, was greatly promoted by an act passed in June, 1788, of which, as there is scarcely a copy of it remaining in print, I shall subjoin a copy.

"An act to authorize the Governor to issue certain grants,

PASSED THE THIRTIETH JUNE, 1788.

"Whereas sundry surveys have been made in different parts of this commonwealth, which include in the general courses thereof, sundry smaller tracts of junior claimants, and which, in the certificates granted by the surveyors of the respective counties are reserved to such claimants; and the governor or chief magistrate is not, authorized by law to issue grants upon such certificates of surveys.

"For remedy whereof, Be it enacted by the general assembly, that it shall, and may be lawful for the governor to issue grants, with reservations of claims to lands, included within such surveys. Any thing in any law to the contrary notwithstanding."

The ostensible reason for making this act, was, that at. every person was at liberty to locate his warrants wherever he pleased, locations were not made adjacent to each other, so that considerable tracts of unlocated lands were sometimes interspersed with small parcels which had been taken up and patented, and those who entered for the intermediate unappropriated lands, were sometimes obliged to go quite round the others, so as to include them within the general courses of their patents. This could never have happened if the law had either required the locations to be made adjacent to each other, or had limited the quantity of land to be granted in any one patent, to any reasonable number of acres. But the secret reason for proposing the law, which was made in consequence of a petition from some individuals, appears to be this: Some rapacious land-mongers, not satisfied

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with getting their lands for almost nothing, but the expense of surveying, and wishing to grasp as much as possible at once, without even the expense of an actual survey, had made their entries by referring to some well known natural boundary, as from the mouth of one river to it's head, or where another river, or water course, united it's stream with the former, thence up the second river, to another well known point, from thence by a straight line of five, ten, or fifteen miles, to another water course, and down the same, to another well known point, and from thence by a straight line to the beginning, including all the lands within these limits, with a reservation of prior claims, of which there might be an hundred or five hundred, founded upon prior patents. In some entries the courses referred to a straight line to be drawn from the top of one mountain, to the top of another, and from thence to a third, and so on. As none of these entries were made according to law which required, that every location should be so especially ami precisely made, as that others might be enabled to locate other warrants on the adjacent residuum, it was necessary for the purposes of these speculators, to procure that act to be passed, for which a plausible reason might be assigned, whilst the true object was kept out of sight. By these means, patents were easily obtained for millions of acres, without the trouble, in many instances, of an actual survey, or, with the trouble of surveying one or two lines at most. The patentees thus possessed an immense extent of territory to appearance, whilst perhaps in reality there was not a single acre of arable land within their bounds, which was not comprehended in the reservation of prior claims. And even if there should happen to be any good land remaining, innumerable other surveys, and endless law-suits, could alone determine the spot, which the inclusive patentee was entitled to;. whereas every patent ought to carry upon the face of it all the evidence necessary to the complete knowledge of the thing thereby granted. But how can this be the case where there is an indeterminate exception of prior rights, which are not specifically described, and where, even the names of the persons whose rights are thus excepted do not appear? These things, whenever the country comes to be settled (if that event, under such unfavorable circumstances, should ever take place) must produce endless contention, and controversies between those who may be unfortunate enough to derive their titles from such an impure source. In 1795, the legislature seems to have discovered the pernicious tendency of the last mentioned act, and enacted, "that the register of the land office be restrained from receiving into his office, any plat and certificate of survey, which evidently comprehended the rights of others, and shall bear date after the first day of January, 1796, notwithstanding any deductions or reservations; and that all such surveys thereafter shall be deemed illegal and void." 1795. c. 9. Unfortunately the remedy is too late to prevent the evils of which the former act was the fruitful parent. The act of 1796. c. 47, declares all entries for lands, whatsoever, absolutely null and void, unless the lands be surveyed within two years from the first day of November, 1796.

For a more intimate acquaintance with this subject, the student must consult the acts of May, 1779, c. 12, and 13. Oct. 1T83, c. 32, Edi. 1785, Edi. 1794, c. 86, and the numerous acts referred to in the appendix to this volume, Note A, the contents of which it is impossible to abridge.

Grants of land for the United States may be obtained for lands lying in the territory north-west of the river Ohio, and above the mouth of Kentucky river, in the manner prescribed by L. U. S. 4 Cong. c. 50.

The act directs that the ungranted lands be laid out by north and south lines, and by others crossing them at right angles, so as to form townships of six miles square, except where the line of the late Indian purchase, or of tracts before surveyed, or patented, or the course of navigable rivers may render it impracticable. The townships, alternately, are to be subdivided into sections, by parallel lines, containing 640 acres each, as near as may be, and the sections numbered; all salt springs, and four sections at the center of every township are to be reserved for the future disposal of congress.

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Whenever seven ranges of townships shall be surveyed pursuant to the directions of the act, the sections of 640 acres shall be offered for sale at public vendue, and the remaining townships in tracts of one quarter of a township lying in the corners thereof, and excluding the four central sections and other reservations, shall be sold in like manner, with a proviso that no part of the lands shall be sold for less than two dollars per acre.[1] The purchaser at the time of the sale must deposit a twentieth part of the price, which is to be forfeited if one half the price, including the deposit, be not paid in thirty days; and upon such payment being made, he is to have one year's credit for the remainder; but on failure of payment the sale is to be void, and the money paid, forfeited to the United States, and the lands again disposed of. But on complying with the terms of the sale, the purchaser is to receive a patent for the land, from the president of the United States, which patent is to be countersigned by the secretary of state, and recorded in his office. This act has been amended. – 6 Cong. c. 55.

It would be an insult to the meanest capacity to suppose it incapable of discriminating between this regular system, and that which we have just before noticed. The effects will be correspondent. The United States will obtain as much for one acre of their land, as Virginia gets for an hundred. Whoever wants to set down in peaceable possession of his lands; to improve them, and to transmit them to his posterity will turn his eyes to the northwest of the Ohio for an establishment. Those who wish only to deceive and defraud others, who buy, merely to sell; who regard not in what miseries or perplexities they may involve ignorant persons, and foreigners, will, until the bubble bursts, continue to traffic in parchment, without inquiring into, or regarding the consequences, further than they are likely to affect some future speculation.

Another mischief not yet mentioned is the probability that the same lands may be patented by a number of different persons, whose locations may interfere with each other, by being made in a desert, where their several boundaries may cross each other an hundred times, without being noticed by the parties making the entries, or regarded by those employed to survey them. This in a country where there are no settlements, or but very few, and those remote from each other, is an inconvenience scarcely to have been avoided,-but by the most exact regulations.

By the act of 1797, c. 10. which recites, that many persons possessing lands in this commonwealth have been harassed and vexed by the location of warrants on the same, as if they were still waste and unappropriated, although the present possessors thereof, and those under whom they claim have held the same quietly and peaceably under the former government, and paid quit rents and taxes for more than thirty years; and it being unreasonable to presume, that persons who have been thus long possessed under those circumstances, should not have obtained patents for their lands, which may have been casually lost; it is therefore enacted, that no entry, or location on any lands in this commonwealth, which have been settled thirty years prior to the date of such entry or location, and upon which quit-rents, or taxes can be proved to have been paid at any time within the said thirty years shall be deemed valid; and any title which the commonwealth may be supposed to have is thereby relinquished. But that act shall not extend to any case of an entry or location regularly made according to law, previous to the passing thereof, [*viz.* January 24, 1798,] nor be construed to affect the right of the commonwealth to lands, forfeited by non-payment of taxes: or to alter or change the construction of the act for limitation of real actions.

NOTES

1. A map of the whole territory, as surveyed pursuant to this act, may be found in the Atlas to Carey's edition of Outline's Geography.

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NOTE E

Of Slaves, Considered as Property, in Virginia

IN considering the various acts which relate to slaves as property, it may be of use to premise some few observations, on the nature, properties, qualities, and incidents, appertaining to the objects of real and personal estates, respectively, and as distinguishing the one from the other.

The primary object of real property is land; whatever is permanently annexed to, or connected with it, or arises out of it, or issues from it, are considered as secondary objects of the same nature; because whilst they remain in such a state of connection with it, they are regarded as apart of the land itself; but when severed from it, they cease to be considered as the objects of real property.

The primary, and almost universal objects of personal property are all things of a moveable and transitory nature; which may attend the person of the owner wherever he goes.

Hence there is in the nature of these primary objects, a permanent and irreconcilable difference, depending upon their several properties and qualities. This difference consists in the immoveable and permanent, nature of land; and in the moveable and perishable properties and qualities, of such things as are neither annexed to, nor connected with it, or inseparable from it.

This difference being founded in the nature of the objects themselves, the one fixed, immoveable and perpetual, the other moveable and perishable, must ever remain unchanged, as the properties and qualities upon which the difference is founded. But the incidents to real and personal property, respectively, being merely creatures of the *juris positiv*i [positive law], or civil institutions of different countries, there is no such irreconcilable difference between them, but that the same positive rules of law may be applied indifferently, to both, according to the will of the legislature, as good policy may require.

Thus an estate in lands, if limited for any number of years, even a thousand, is regarded as a chattel; whilst an estate in the precarious life of a villein might be an inheritance in fee simple, and as such, considered as a real estate. Co. Litt. 307. These instances demonstrate that the incidents to real and personal property, respectively, are merely creatures of the *juris positiv*i, or ordinary rules of law concerning them; and may be altered and changed to suit the circumstances, convenience, interest and advantages of society. – Thus in England it might be for the benefit of commerce to consider a lease for a thousand years, in lands, as a mere chattel; and in Virginia it might have been equally for the advantage of agriculture to consider the slave who cultivated the land as real estate. And probably the rule of law might be applied with as little difficulty in the one case, as in the other.

This rule of positive law, whereby a slave whose breath is in his nostrils, or who may run away, and escape from his master forever, might "be regarded as real estate, was not unknown to the ancient common law of England. For a man might have an estate in fee, or in tail, or for life, or for years in a villein. Co. Litt. 307. And of an estate of inheritance in a villein, a woman might have been endowed, and a man tenant by the curtesy, Ibid. 307 and 124. And in this latter case the property in the villein should descend to the heir and not go to the executor. Ibid. 183. But if he had only an estate for years, and not an inheritance in the villein, the executor and not the heir should have him. Ibid. 117, 124. A villein also might have been annexed to lands, so as to descend and pass with them, by deed or devise, in which case he was called a villein regardant. Litt. s.181. Of these rules of the ancient law the legislature cannot be presumed to have been uninformed.

Having promised these few observations, I shall now proceed to consider the several acts which, relate to slaves, step by step; and thereby endeavor to discover their operation and effect from time

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to time.

1. First, as affecting the slaves themselves as objects of property generally.

2. Secondly, as affecting the rights of the heir at common law.

3. Thirdly, as affecting the right of widows.

4. Fourthly, as affecting the rights of husbands.

5. Fifthly, as affecting the rights of executors and administrators.

6. Sixthly, as affecting the rights of creditors.

1. The first act which relates to this subject is that of 1705, c. 3, declaring slaves in Virginia to be real estate. The first and second sections of which are as follows:

"For the better settling and preservation of estates within this dominion." Be it enacted, etc. that from and after the passing of this act all negro, mulatto and Indian slaves in all courts of judicature, and other places, within this dominion shall be held, taken, and adjudged to be real estate, and not chattels, and shall descend unto the heirs and widows of persons departing this life according to the manner and custom of lands of inheritance held in fee simple.

The effect of this declaration, if there had been no other clause in the act, I apprehend must have been as follows.

1. That so far as might respect the slaves themselves, as objects of property, a man might have the same estate in them, as he might have had in a villein by the common law, *viz.* an estate of inheritance, or for life, or for years.

2. That the slaves would have vested, immediately, in the heir at common law, in the same manner as lands in fee simple; that is to say, subject to the dower of the wife, or the curtesy of the husband; and to the debt of the creditor by bond wherein the heir was bound,[1] I presume: and consequently that the sole right of action to recover such as might be out of possession at the death of the ancestor vested exclusively in the heir.

3. That the wife would have been entitled to dower in all such slaves, wherein the husband had such an estate of inheritance, as that she might have been endowed thereof, if the same had been lands.

4. That the husband might have been tenant by the curtesy, of such of the slaves of the wife, wherein she had an estate of inheritance, as were reduced into possession, at any time during the coverture.

5. That the executor or administrator had neither any interest in, or power over the slaves of his testator or intestate, unless the same were given by the express directions of his will.

6. That the slaves were not liable to the debt of a simple contract creditor; but that the heir might have been sued upon the bond of his ancestor, wherein the heir was bound, and that the slaves which descended to him should be deemed real assets, in his hands, for the payment of the debts of his ancestor.

Such is the construction which I apprehend must have been unavoidably adopted, had there been no other clause in this act. Let us now consider those clauses which follow, and see how far they necessarily control, or change this construction.

sect. 3. Expressly, except slaves imported for sale, and remaining unsold in the hands of any merchant or factor, his executors, Sec. on these the act had no operation, and therefore this clause

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cannot affect the construction of it.

sect. 4. All such slaves shall be liable to the payment of debts, and may be taken by execution for that end, "as other chattels or personal estate may be."

sect. 5. No slave shall be liable to be escheated for want of lawful heirs, but all slaves shall, in that case, be accounted and go as chattels, and other personal estate.

sect. 6. That no sale or alienation of a slave is obliged to be recorded, as is by law required to be done upon other real estate; but the same may be made in the same manner as might have been done before the passing of that act.

sect. 7. Possession of a slave shall not give the owner a vote in elections. This clause cannot influence the construction.

sect. 8 and 9. Slaves may be recovered by action personal, or where the nature of the case shall require it, by writ de flartitianc facienda, or of dower, which are in their nature real actions: these two clauses therefore may be considered as balancing each other, and furnishing no rule to control the former construction made upon the act.

sect. 10. The slaves of a person dying intestate, leaving several children, shall in that case, (except the widow's dower which is to be first set apart) be inventoried and appraised, and the value thereof equally divided among all the children, and be paid by the heir to whom they shall descend, by virtue of that act,

sect. 11. A widow seized of slaves in right of dower, and transporting them, or any of them out of the colony without consent of the heir, forfeits all her dower in her husband's estate, to him.

On these several clauses we may observe,

1. That the analogy between slaves and villeins, is somewhat diminished by the fourth section, which makes them liable to the payment of debts, and to be taken in execution for them; which villeins do not appear to be subject to, as mentioned in the preceding note.

2. The heir though entitled to have the slaves, is accountable under the tenth section, to the younger children for their proportions of the appraised value; hence as well as under the fourth section, it becomes a doubt whether he is liable to an action as heir, in virtue of the descent of slaves, only.

3. The widow's right of dower remains unimpeached by any of these clauses, though a forfeiture thereof, both in slaves and lands,, might be incurred under the eleventh section, by sending, or permitting them to be sent, out of the colony.

4. That the right of the husband to the slaves of his wife is not affected by any thing contained in either of these clauses.

5. That the right of executors over the slaves of their testator, where there is no specific devise in the will relating thereto, is rendered doubtful, where there may be an heir, by the fourth section; which doubt, both in respect to executors and administrators, is still further increased by the act of the same session, for distribution of intestate's estates, c. 7, and by a subsequent act of 1711, c. 2, (Edi. 1733.) directing the manner of granting probate and administrations, and other subsequent acts, which will be noticed in the sequel.

6. That slaves are liable for the simple contract debts of persons deceased, as well as for their bond debts; and might be taken in execution for the same "as other chattels, or personal estate may be."

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Here we may inquire, against whom must a creditor have brought a suit for a simple contract debt, so as to entitle him to levy an execution upon the slaves of his debtor deceased?

The answer seems to be, the heir not being responsible for the simple contract debt of his ancestor, by the common law, even though lands might have descended to him, and this act not having given any action against him as heir, on account of slaves descending to him from his ancestor, and he being moreover chargeable to the younger children, whenever there were such, for their respective proportions of the appraised value, there seems to be no ground to conclude that the action could be maintained against him. On the other hand, the executor being the representative of his testator so far as relates to debts and contracts (except such wherein the heir is named, and bound by the obligation of his ancestor) and the right of action either for, or against executors in any case where they might have sued or been sued before this act, not being taken away, it might be presumed that the creditor (unless he meant to charge lands, in the hands of the heir) must still bring his action against the executor, as before the passing of this act.

But inasmuch as the law gives the slaves to the heir, by descent, (that is to say, immediately upon the death of his ancestor: for that seems to be the construction of the words, according to the manner and custom of lands of inheritance, held in fee simple,) and yet the common law gives an action against the executor, only, for the simple contract debt of his testator, this construction, if maintained, would probably introduce some irreconcilable contradictions between the second and fourth sections of the act; or, should the attempt to reconcile them be made, it might be productive of infinite inconvenience and perplexity.

1. For, first; if it be supposed that the creditor must pursue his action against the heir to whom slaves had descended, the nonage of the heir, by causing the parol to demur until he was of age, might, in addition to the inconvenience before stated, interpose a temporary bar against the creditor's claim, in three cases out of four that should happen; and on the other hand this circumstance, *viz.* the frequent nonage, (and even infancy of the heir, in its strictest sense) would, in all such cases, render the heir the most unfit person that could be found to contest the justice of any claim which might be offered against his ancestor's estate; and for this reason probably, among others, the common law would not subject the heir to a suit for any unliquidated claim or demand against his ancestor, nor even for his solemn contracts under seal, unless they respected the. lands descended to him; or he was therein particularly named, and real assets actually descended to him. And even then, the law allowed him to attain his full age, that he might be able to defend himself without the aid of a guardian.

2. Secondly, if it were supposed that the creditor must first establish his debt by a judgment against the executor, and that upon that judgment, in case *nulla bow* were returned upon an execution, issued against the chattels of the testator in the hands of the executor, a *scire facias* [to make known] might issue against the heir, to show cause why the creditor might not have his execution levied upon the slaves descended to the heir, this would produce an inconvenient circuity of proceeding, and might also open a door for fraud upon the heir by collusion between the creditor and the executor; the latter of whom, not being responsible for the debt, might either make no defense, or only a colorable defense against any claim, however unrighteous.

3. Thirdly; if it were supposed that the creditor upon any judgment obtained against any executor might, without any *scire facias* or other warning to the heir, levy his execution upon the slaves in his possession, this might not only be productive of the same inconveniences, last mentioned, but even greater, of the same nature, for the heir having no warning, nor any means of showing cause why the executor alone should be charged, either on account of assets in his hands, or other ground

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of liability, might be exposed to still greater injury, and hardship: besides, that the levying an execution upon the property of him who was no party to the suit, might occasion frequent breaches of the peace.

4. Fourthly; if it were supposed that the executor might possess himself of the slaves of his testator, and keep them in his possession until he had paid all his debts, and then deliver them over to the heir, this construction would admit of several answers, and objections, as,

1. First; slaves, being altogether unknown to the common law, could riot be deemed personal assets under that law, any more than lands or villeins, in which the testator had an estate of inheritance; both which were known to that law, and yet the executor had no right to either, nor could be made liable by reason of either: and the reason seems to be much stronger in the case of slaves, which are altogether unknown to that law, as objects of property. Consequently, executors could be no more chargeable by the common law for the value of their testator's slaves, than they could for the value of dogs, or other animals, of no value at the common law: and not being chargeable by reason thereof, they could have no right, by the common law, to possess themselves thereof; for there being no liability, nor any trust; (in respect to slaves) reposed in them by the common law, so neither could they have any interest in, or authority over them, by that law.

2. Secondly; there was not at the time of passing this act, any act of the colonial legislature, (nor had there ever been such an act as far as I can discover) by which executors or administrators were authorized to possess themselves of their testator's slaves, or to dispose thereof, or were made liable for the debts of their testator, for the value thereof. The first act, which I can find, that gives an executor any authority whatsoever over the slaves of his testator, and which will be particularly noticed hereafter, passed in the year 1711, about six years after this act.

3. Thirdly; if it be contended that the usage of the colony gave to the executor such an authority, it may be answered, that such an usage, even were it of greater authority, could not prevail against the express words of an act of assembly, declaring that slaves "shall descend to the heirs and widows of persons departing this life, according to the manner and custom of land of inheritance held in fee simple;" which is altogether incompatible with such an interest and authority in the executor as this supposition seems to require.

4. If it be contended that an act of the same session (c. 7.) entitled an act for the distribution of intestates' estates, gives such an authority under the construction of the seventh section, which "that a due regard may be had to creditors, provides, that no distribution of the goods of any person dying intestate shall be made until nine months after the intestate's death," it may be observed, that slaves are not within the purview of that act: that the distribution of the personal estate therein directed, is not reconcilable to the manner in which slaves must descend; and that the words of the act are, "no such distribution as aforesaid, of the goods of any person dying intestate shall be made, until nine months, etc." and, therefore, that part of the act which relates to giving security to the administrator to refund, has no relation whatsoever to the heir, who might possess himself of the slaves descended to him, without the assent of the administrator, (executors not being mentioned in that clause) and without giving any security to refund, as those entitled to distribution must do, before they were entitled to receive any part of the personal estate of the deceased.

In what manner the difficulties and inconveniences which may have occurred in the construction of this act were explained, or obviated; or, what was the ordinary practice in cases arising under it, it is impossible, at this distance of time, to say. I shall therefore desist from any attempt of that nature, and proceed to consider two intermediate acts which passed between the year 1705 and the year

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1727.

II. Secondly, then; we are to consider the operation and effect of the act of 1711, c. 2. (Edition of 1733) entitled "an act directing the manner of granting probate of wills and administration of intestates estates."

The tenth and twelfth sections of that act prescribe the oaths to be taken, and the condition of the bonds to be given by executors and administrators, respectively; and these require that they shall respectively make "a true and perfect inventory of all and singular the goods, chattels, and credits of the deceased. And the fifteenth and sixteenth sections, require them, respectively, to exhibit upon oath, at the next court after qualifying," a true and perfect inventory of all and every part of the estates, whereof the executors or administration has been to them committed; and the court shall cause appraisements of all decedents' estates to be made in money, as soon as possible.

If the act had concluded here, I think, we might have ventured to pronounce, that it had no relation whatsoever to the act of 1705, declaring slaves to be real estate, and to descend to the heirs and widows of persons departing this life, as lands of inheritance in fee simple, for the reasons already mentioned under the former head. But the seventeenth and eighteenth sections require more particular notice, being in the following words.

sect. 17. "And for preventing all disputes that may arise concerning the right to crops upon the ground, it is hereby enacted and declared, that where any person shall die intestate whilst his crop of Indian corn, wheat or other grain, or tobacco is on the ground, unfinished; or dying testate, shall not have otherwise directed, all and every servant and slave employed in the said crop, at the time of such decease, shall be continued on the plantations, and employed in the crop, or crops, respectively, until the five and twentieth day of December then next ensuing; and that then the said crop shall be deemed and taken to be assets in the hands of the. executors or administrators, to be valued by appraisers, any law, custom, or usage to the contrary notwithstanding. And the slaves employed in the said crop, as aforesaid, shall, after the said five and twentieth day of December be delivered to such person or persons, to whom the same is declared to belong, by an act, entitled an act, declaring slaves to be real estate."

sect. 18. "Provided always, and it is the true intent and meaning of this act, that no executor or administrator shall be answerable for the price of any negro or other servant, or slave, which shall happen to die before the said twenty-fifth day of December, although such negro, or other servant or slave shall be in the inventory of the deceased person's estate."

No other clause in the act has any mention of, or particular relation to slaves. In the construction of it, we may venture to say,

1. That nothing therein contained can be construed to repeal that declaration in the act of 1705, c. 3. that slaves, in all courts of judicature and elsewhere, shall be held, taken, and adjudged to be real estate and not chattels.

2. That the interest of the heir, is so far only affected, as to postpone his possession of slaves actually employed in a crop (but no others) until they may be presumed to have finished it, (*viz.* at Christmas,) when they shall be delivered up to him.

3. That the right of dower is affected, only in the same manner as the right of the heir.

4. That the possession of the tenant by the curtsey may be prolonged thereby, for the same period as the possession of the heir may be postponed, but his right is no otherwise affected.

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5. That the executor (where the testator shall not have otherwise directed) has thereby an authority to possess himself of the slaves employed in the crop, until the crops may be finished, that is, until the ensuing Christmas; without recompense for their labor, and without being answerable for such as may happen to die before that time; but that he has no further authority nor any interest in the slaves themselves, although the law gives him an interest in their labor during that period. –

6. That the interest of creditors is no further affected by this act, than as it removes all doubts concerning the crops growing, whether they should go to the executor, or to the heir.

This act probably laid the foundation for the practice which seems to have since prevailed, for the executor to possess himself of all the slaves of his testator; in which his example was probably followed by the administrator; the executor, indeed, might be authorized by the will, in many cases; but the administrator could have no such warrant, and the law does not authorize him, to retain the slaves for any other purpose, or in any other manner, or for any longer period. – We shall therefore proceed to the next act to be found in our code, that any way relates to this subject.

I. The act of 1727, c. 4. declares that the act declaring slaves to be real estate had been found by experience very beneficial to the colony, yet, that mischiefs had arisen from the various constructions, and contrary judgments and opinions given upon it, whereby many people had been involved in lawsuits and controversies, which were still like to increase; for remedy whereof, and that the said act may be fully and clearly explained, and amended.

sect. 2. Declares that the same shall thereafter be construed, and the true intent and meaning thereof is thereby declared to be, in the several cases therein after mentioned, as the same is therein after expressed, and declared, and not otherwise; that is to say,

sect. 3. Whenever any person shall, by bargain and sale, or gift, either with, or without deed, or by his last will and testament in writing or by any nuncupative will, bargain, sell, give, dispose or bequeath any slave, the same shall transfer the absolute property of such slave to the person to whom the same shall be sold, given or bequeathed in the same manner as if such slave were a chattel; and no remainder of any slave shall or may be limited by any deed, or the last will and testament in writing of any person whatsoever, otherwise than the remainder of a chattel personal by the rules of the common law can or may be limited, except in the manner therein after mentioned. – The ninth section confirms all former judgments of the general court, or any county court. And the tenth section further provides,

That where any person had theretofore by deed executed in his lifetime; or by his last will and testament in writing, disposed of any slave for the life or lives of any person or persons whatsoever, and had thereupon limited any remainder, the same shall be good and effectual in law, to transfer the absolute property of such slave to the person or persons to whom such remainder had been limited, and no otherwise. The three following sections providing for the manner in which slaves might be annexed to, and descend, pass and go with lands, as a part of the freehold, will be noticed below.

sect. 4. And where any slave has been, or shall be conveyed, given, or bequeathed, or has, or shall descend to any feme covert, the absolute right, property and interest of such slave is thereby vested, and shall accrue to, and be vested in, the husband of such feme-covert; and where any feme sole, is or shall be possessed of any slave, as of her own property, the same shall accrue to, and be absolutely vested in the husband of such feme, when she shall marry.

sect. 5. Infants above the age of eighteen years may bequeath any slave whereof they may be

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possessed, by will in writing.

sect. 6. Declares that slaves shall not be liable to forfeiture except in such cases, where lands would be liable thereto.

sect. 7. And that no executor or administrator has, or shall have, any powder to sell or dispose of any slave or slaves, of his testator, or intestate, except for the payment of his just debts; and then only, where there is not sufficient of the personal estate to satisfy and pay such debts; and, in that case, it shall and may be lawful for the executor or administrator to sell and dispose of such slave or slaves, as shall be sufficient to raise so much money as the personal estate falls short of the payment of the debts.

sect. 8. A mother dying intestate and leaving slaves other than of her dower, the heir shall be accountable to the younger children for their proportion of the value.

sect. 9 and 10. Have been noticed above. sect. 11. And whereas the true design of the said act, and the policy thereof was, and is to preserve slaves for the use and benefit of such persons to whom lands and tenements shall descend, be given, or devised for the better improvement of the same, which cannot be done according to the custom of the colony, without slaves, and therefore it may be very advantageous to estates to establish a method for settling slaves and their increase, so as they may go and descend with lands and tenements: to which end,

sect. 12. It is further enacted that any person may by deed or will annex slaves and their increase to lands and tenements in fee tail, or for life or lives; and thereupon, the slaves so annexed shall descend, pass and go, as a part of the freehold and inheritance, in possession, reversion, and remainder, with such lands and tenements; And any slaves settled, conveyed or devised with the same limitations, and in the same deed or will with lands, shall be considered as annexed to, and shall descend, pass and go therewith, from time to time, as before mentioned.

sect. 13. Authorizes any tenant in tail of lands to annex slaves to his estate therein, which shall descend under the like limitations, as if such settlement had been made when the estate was first created.

sect. 14 and 15. Provide that any slaves so annexed as aforesaid, and their increase shall, notwithstanding, "be liable to be taken in execution, and sold, for the satisfying and paying the just debts of the tenant in tail for the time being; and such sale shall be good and effectual against him, or her, and his other issue, and all other persons whatsoever, claiming under such settlement."

sect. 16. "Provided, nevertheless; that if any person shall hereafter be possessed of any slave or slaves in right of his wife, which shall be so annexed to lands as aforesaid, such slave or slaves shall not be liable to be taken in execution, for the satisfying any debt of such husband so as to bar the wife of any right which she may claim under any settlement made in pursuance of this act, after his death.

sect. 17, 18, and 19. Give to widows and younger children a remedy, by bill in equity, for their dower, or proportionable part of the value of slaves, against the heir, notwithstanding his nonage.

sect. 20 and 21. After reciting, that doubts had arisen whether slaves were comprehended under the provisions contained in the act of 1705, c. 7. for distribution of intestates' estates, provide, that any widow not satisfied with the provision made for her by her husband's will, may within nine months after his death renounce the same: And after such declaration, may demand and recover her dower of all the slaves whereof her husband died possessed, which she shall enjoy during her natural life;

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and after her death, or other determination of her estate, they shall go to the person in whom the property thereof would have vested, in case the dower had not been demanded: And moreover, such widow shall have such share of the personal estate of her husband, as by the said act is directed; but if such declaration be not made within the time limited, she shall be forever barred to claim any other part of her husband's estate, than shall be given or bequeathed by such last will. In considering this act, I shall proceed, as before, to examine,

1. It's operation and effect as it relates to slaves themselves, as the objects of property. And here we may observe that an important distinction seems to have been established between such as are not annexed to lands and tenements, held in fee, tail, or for life, and such as are so annexed, and held: of these in their respective order.

1. Slaves not annexed to lands and tenements in fee, tail, or for life, after the commencement of that act, seem to have been put upon the same footing with chattels, by the third, fourth and fifth clauses of the act, in the several cases therein mentioned.

2. By the seventh clause, they are rendered a kind of special unsete, which may not be touched until all personal assets are completely exhausted; on this subject more will be said hereafter under the head of executors; observing by the way, that the strong negative expressions in the beginning of this clause, and the restrictive terms used in the latter part of it, amount to a legislative confirmation of the construction made of the acts of 1705, and 1711, that the executor had no interest in the slaves of his testator, although the latter of these acts gave him a special authority over them, for a limited time, to wit, until the next Christmas.

3. The twenty-first section seems to prove that the legislature did not consider slaves as comprehended under the act of 1705, c. 7. for distribution of intestates' estates.

4. In all other cases, slaves not annexed to lands seem to have been left upon the same footing as before the making of that act.

5. Slaves annexed to lands seem to have been perfectly assimilated, (as property,) to villeins regardant; with one material distinction from them, that they were still liable to be taken in execution for the owner's debt, as before the making of that act: of this more will be said hereafter.

2. The interest of the heir, in slaves not annexed to lands, seems to be rendered somewhat doubtful, by the authority which the law gives to the executor or administrator, to sell such as may be sufficient to raise so much money as the personal estate falls short of the payment of just debts. It seems to be questionable, also, whether the slaves annexed to the lands of a tenant in tail, although clearly liable to be taken in execution for his debts, during his lifetime, would be liable, after his decease, to be sold by his executors or administrators, by virtue of the fifteenth section; which declares, "that they shall be liable to be taken in execution and sold for the satisfying and paying the just debts of the tenant in tail for the time being:" which latter words seem to restrain such liability to executions issued, and levied, during the life of such tenant in tail.

3. A distinction is clearly established by the twenty-first section, between the widow's right of dower in slaves, and her right to a distributive share of the personal estate: The law being express, that she shall be endowed of all the slaves whereof her husband died possessed; but she may be entitled to a greater or less proportion of his personal estate, according to his circumstances; for the whole may go, perhaps, to pay debts; or, according to the number of children, that he may leave. Whereas the law seems to be clear and express, that she shall be endowed of the whole of his slaves whereof he died possessed.

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And this I apprehend upon very good reason, for dower being both a legal and an equitable right, founded upon a valuable consideration in law, namely, the marriage, and often upon a further valuable consideration, in fact, namely, the portion of the wife, it seems impossible to assign any good reason, why the claim of a woman, whose whole property has probably vested in her husband, and which may constitute the whole of the property which he leaves, should be postponed to the claims of other creditors, founded upon considerations neither more strictly legal, nor equitable. This construction which I have given to the law, has, I believe, been generally rejected; though I cannot but think that it has been rejected without reason. For, in addition to what I have just advanced, it may be urged, that the construction which I give to the act may be reconciled to the justice due to legal creditors, as well as with justice to the widow, who is in a moral light, a creditor of an higher grade, and certainly may be regarded as a creditor for a valuable consideration, both at law, and in equity. For, as the right of dower does not extend beyond the life of the widow, the slaves which survive her might, after her death, and after satisfying her just claims, be applied to the payment of ordinary creditors, for their just debts; whereas if the ordinary creditor's claim be preferred to that of the widow, the latter will be forever barred, and precluded from any satisfaction for her claims, however just and equitable.

4. The seventh section, by a kind of negative, pregnant, or side wind, gives to executors and administrators an authority (in case of a deficiency of assets) over the slaves of their testator, beyond what was either given, or could be implied, under any former act, for reasons already mentioned: whether this authority should have been exercised within the executor's year, as we may call it, is left to conjecture. And how far this authority was coupled with an interest in the executor or administrator, may merit further inquiry.

It may be also worthy of inquiry, whether the executor or administrator had power to retain the slaves in his hands, beyond the following Christmas: or must then deliver them up; yet retaining a power over them, so far as to sell and dispose of such as might be necessary to supply any deficiency of the personal estate, for payment of debts.

5. The right of the husband to the slaves of his wife, not annexed to lands, is made absolute, if he reduces them into possession during the coverture: and if he survives her, he may recover them as her administrator: but if they be not reduced into his possession, during the coverture, and the wife survives him, they shall belong to her, or her representatives, as other choses in action.

But if slaves annexed to lands in tail, held by his wife, he could only be tenant by the curtesy, although reduced into possession during the coverture: for the twelfth and thirteenth sections are express, that they shall pass and go in possession, reversion, and remainder, with the lands, as part of the freehold; and the seventeenth section will not permit them to be taken in execution for hit debts, even during the marriage.

6. The rights of ordinary creditors, as was before observed, seem to be postponed to the widow's right of dower, by the twenty-first section; and perhaps they may be narrowed, in the case of slaves annexed to lands, after the death of the tenant for life, for the time being, on the other hand, the authority given to executors and administrators to sell slaves, in case of a deficiency of the personal estate, may be regarded as an important provision in favor of creditors.

IV. About three years after the making of the preceding act, another act (1730, c. 8. Edition of 1733) entitled, an act to prevent losses to executors and administrators by the sale of negroes, goods, and chattels, etc. passed, reciting, that it frequently happens, either through the ignorance or partiality of appraisers, that estates of persons deceased have been valued at much less than the true worth;

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and yet by construction of the act of 1711, c. 3, directing the manner of granting probate and administrations, it is held that executors and administrators are only answerable and accountable for such appraised value, to the great injury of creditors and orphans; yet, on the other hand, it had sometimes happened that slaves, goods, and Chattels, being taken in execution, to satisfy the debts of a dead person, had been sold for less than the appraisement; and the executor or administrator must, in that Case, abide the loss: for prevention whereof, it is enacted, that the estates of deceased persons shall be appraised by order of the court, upon oath; and such appraisement may be given in evidence, in any action or suit, which may be brought against such executor or administrator, to prove the value of the estate; but shall not be binding, either upon the executor, administrator, creditor, or other person whatsoever, where it shall appear by any other legal proof, that the goods and chattels were really worth, or were bona fide sold far more, or less, than the appraisement. It is observable that although slaves are mentioned in the preamble, they are not mentioned in the enacting clause of this act, here recited.

Sections 10, and 11. To remove doubts concerning the act respecting slaves finishing the crops growing at the time of the owner's death, declare, that where any person shall die between the first day of March and the twenty-fifth of December, the servants and slaves of which he died possessed, shall be continued and employed upon the several plantations held and occupied by the deceased person, until Christmas following; and the crops made shall be deemed assets after the charge of clothing and feeding the servants and slaves so employed therein being deducted.

This act is but of little importance, except as it shows the usage and practice which had been ordinarily observed by executors and administrators, and the frequent doubts and difficulties which occurred in the construction of the former acts.

The act of 1744, c. 6. (Sessions acts) directs the appointment of appraisers to value the slaves, and personal estate, by the court admitting any will to record.

V. We come now to the period of the general revisal of the laws made in the year 1748, at which session three very important acts, all connected with this subject, and in some measure framed upon similar principles, were passed by the general assembly; but, two of them were disallowed by the crown, though the third received the sanction of the royal assent. To this circumstance may be ascribed the difficulties which have existed since that period in the construction of the several acts concerning slaves.

The act of 1748, c. 3, (edition of 1752) after reciting that the before mentioned acts of 1705, c. 3, and 1727, c. 4, declaring slaves to be real estate, and the act of 1705, c. 7, for distribution of intestates' estates, had been found inconvenient, repeals the two former entirely, and declares, that for the future, all slaves whatsoever, shall be held, deemed, and taken to be chattels personal.

The succeeding chapter, 1748, c. 3, for the distribution of intestates' estates, enacts, "that after debts, funeral and other just expenses, first paid and allowed, the surplus of all and singular the goods, chattels, and personal estate, other than slaves of every person dying intestate shall be distributed, as therein after directed."

Sect. 5, declares, that when any person dies intestate, his widow shall have one full and equal third part of all his slaves, and that she shall hold them and their increase during her natural life, and after her death, the said slaves and their increase, which shall be then living, shall be appraised, and shall descend to, and be vested in, the heir at law of the intestate, but he shall be answerable to the other children, or their legal representatives, for their proportionable value thereof: and the other remaining slaves of the intestate shall be immediately vested in his heir, but he shall be answerable

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in the same manner to the younger children for their proportions.

Sec. 11, gives to any widow, dissatisfied with the provision made for her by the will of her husband, the same right of renunciation, and the same right to demand and recover the third part of all the slaves whereof her husband died in possession, to hold for her natural life, as was given by the act of 1727, c. 4. Sec. 21, before-mentioned.

Sec. 13, enacts, that no distribution of the goods of any intestate shall be made till nine months after his death; and every person claiming any share or part therein, shall give bond with sufficient sureties, in the court where such distribution shall be made, that if any just debt owing by the intestate shall thereafter appear, be sued for, or recovered, he will refund to the administrator his proportionable part thereof, and of all costs and charges occasioned thereby, to enable the administrator to pay the same.

These two acts were refused the royal assent; but they may afford some clue to the exposition of the third (1748, c. 5. Edi, 1752, but numbered c. 3, in the edition of 1769) directing the manner of granting probate of wills, and administration of intestates' estates. As this act may be considered as inseparably connected, in the opinion of the legislature, with that which declared slaves to be no longer real estate, but chattels personal, the general rules which it contains relative to chattels were probably intended to extend to slaves, in which the executors (by virtue of the declaration contained in the former act) would have acquired an interest, instead, perhaps, of a bare authority under the act of 1727, c. 4. Sec. 7, yet it is remarkable, that Sect. 29, of the act of 1748, is in the same words with that of 1727, Sec. 7, except, that it requires that the sale of a slave, made by an executor, or administrator, in case the personal estate should fall short, shall be made at public auction. So that slaves, even by that act, are regarded as special assets, not to be resorted to, until the other personal assets are exhausted, nor to be sold or disposed of by the executor or administrator, in any other manner, than at public auction. And upon this ground it has been held (though perhaps erroneously) that an executor under the act of 1727, had a bare authority only, and not an interest, in the slaves of the testator, and, as that authority was not absolute, but conditional, only, in case of a deficiency of personal assets, it must be strictly pursued; and, therefore, that the sale of a slave by an executor, by private contract, was voidable by the heir, according to the rule, *caveat emptor* [buyer beware].

For the act of 1727, having authorized the sale by the executor, without directing the mode of settling, left him at liberty to sell in any manner that he chose; but, when the act of 1748, added, that the sale should be made at public auction, we must presume the legislature meant to prevent in future the frauds and mischiefs, which probably had ensued upon private sales. And this directory part of the law must be regarded as a general notice to all purchasers, not to purchase by private contract.

As the decision in this case was acquiesced in, without an appeal, I have ventured to mention it in this place.

And here I will venture to mention another point, which arose collaterally in the same case, though no decision was made upon it. That is, whether an executor, even in case of a deficiency of the personal assets of his testator to pay his debts, was authorized to sell any of his slaves "to raise so much money as the personal estate fell short of the payment of his just debts," without first making up the accounts of his executorship, and settling the same with the court. For, if the construction be just, that the executor had a bare authority only, and not any interest in the slaves under these acts, it would seem reasonable that the heir should have had legal notice of the necessity of resorting to the slaves to make up the deficiency of personal assets; and this legal notice, perhaps, could be given

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in no other mode, equally satisfactory, and reconcilable to the principles of law.

The refusal of the royal assent to the two former acts, imposes some restraint upon the construction of this act, to which it would not have been liable, if the act declaring slaves to be personal estate had passed. For the legislative will being one and entire, can only be collected from those acts which are perfect; the imperfect will of a part of the legislature, consequently, cannot be admitted to control the former perfect will of the whole. The act of 1727, therefore, remaining unrepealed, all cases within the purview of it, which are not provided for by this last act, but which would have been provided for if the act declaring slaves to be personal estate had received the royal assent, (without which it was no law, but merely the imperfect will of a part of the legislature,) must remain and receive the same construction, I apprehend, as if the general assembly had never passed the act.

The thirtieth and thirty-first sections, are nearly a repetition of the act of 1730, c. 8. s. 10 and 11, authorizing the slaves of any person deceased to be continued and employed upon the plantation, and declaring the crops made, after feeding and clothing all above ten years of age, assets in the hands of the executor, or administrator, and that the slaves shall then be delivered up to the party or parties having a legal right to demand them.

The two former of these acts being frustrated, and the latter containing little more than what had been before enacted, it seems not to have made any considerable change in slaves, as a distinct species of property, though such change was evidently intended by the colonial assembly.

VI. We are now arrived at the period of the revolution when the act of October, 1776, c. 26, declaring tenants of lands or slaves, in tail, to hold the same in fee simple, may be considered as repealing, in effect, those clauses in the act of 1727, c. 4, which authorized the annexing slaves to lands in fee tail, though, perhaps, it had no effect to prevent such annexation to lands, granted or bequeathed for life only, with remainder over in fee, or without any remainder over.

The principal effect of this act may be considered to relate to the husbands of tenants in tail, of lands to which slaves were annexed, who would immediately have an absolute estate in such slaves, independent of the former right of the wife, by virtue of the settlement thereof in her favor, instead of the possibility of being tenant by the curtesy only, of such slaves as a part of the freehold. And this seems to have been further confirmed by the act of May 1783, c. 27. Edi. 1785.

VII. The last period that remains to be noticed, is that of the revisal in the year 1792, when all slaves were once more declared by the legislature to be personal estate. Edi. 1794, c. 103. Sec. 43, yet they are still considered as a kind of special assets, it being provided by an act of the succeeding session, (Edi. 1794, c. 170,) that executors and administrators shall not sell the slaves of their testators or intestates, unless the other part of the personal estate; regard being had to the privilege of specific legacies, shall not be sufficient for paying the debts and expenses; and in that case, such part only of the slaves shall be sold, as shall be sufficient to satisfy the debts and expenses, and the residue of the slaves shall be reserved in kind for the legatees or distributees of their testators or intestates respectively.

The act concerning wills, etc. (Edi. 1794, c. 92. Sec. 29,) whilst it considers slaves as personal estates in other respects, gives to the widows of persons dying intestate, a life estate only in the third part of the surplus of the slaves of their husbands, after funeral debts and just expenses paid. And c. 103 s. 44 and 45, still imposes the forfeiture of all her dower in her husband's estate, if any widow removes, or permits their removal, out of the commonwealth. It may be worthy of remark, however, that the twenty-fifth section of the act concerning wills, makes a distinction between the portion of the husband's slaves, which are to be allotted to the widow of any person dying testate, who

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renounces all benefit under his will, and that which the succeeding section allows to the widows of persons dying intestate. For the words of the twenty-fifth section are, that upon such renunciation the widow shall be entitled to one third part of the slaves whereof her husband died possessed, which she shall hold during her life; and, moreover, shall be entitled to such share of his personal property, as if he had died intestate, to hold as her absolute property. Whereas the widows of persons, dying intestate, are only entitled to the same portion of the slaves for life, after payment of debts, as of the personal estate in absolute property. No judicial interpretation of these clauses has yet been made, as far as I have been informed.

And, by the act concerning executions, (Ibid. c. 157. s. 17 and 18,) no slave can be taken in execution for a debt under ten pounds, or two thousand pounds of tobacco, if other sufficient goods be shown. And the names of slaves taken in execution and sold, must be certified on the back of the execution. And the law is the same in regard to distresses made for any public tax, fine, or forfeiture, etc. Ibid. c. 80. J. 20.

The act of 1758, c. 1, declares, that all gifts of slaves must be made by will or deed, duly proved by two witnesses, or acknowledged by the donor and recorded: but the act of 1787, c. 22, confirmed by that of 1792, (Edi. 1794, c. 103, s. 48,) declares that this shall not extend to such gifts of slaves, as have at any time come into the donee's possession, and remained with him, or some person claiming under him; but this shall not affect any bona fide purchaser for a valuable consideration, or creditor of the donor, until after three years' possession under such gift.

Slaves may be emancipated by will or deed, but may nevertheless be taken in execution, to satisfy any debt contracted by the person emancipating them, before such emancipation is made. L. V. 1782, c. 21. Widows renouncing all benefit under their husbands' wills, shall also be endowed of any slaves which he may have emancipated by his will. L. V. 1795, c. ll – Edi. 1794, c. 103, s. 36 and 37.

Having given this abstract of the several acts relating to slaves, which have been passed in Virginia, during a period of near a century, and having endeavored to interpret the same, from time to time, according to the best light which I have possessed on the subject, formerly, I shall now proceed to mention some decisions, which may serve to convict me of numberless errors in the interpretation which I had ventured to make.

1. And, first, as to the right of executors. In the case of Walden's executors against Payne, 2 Wash. 7. Judge Lyons delivered the opinion of the court of appeals, as follows:

The principal point, made in this cause, on the part of the appellants is, that slaves are real estate, and can only be considered as assets, in the hands of the executors, *sub modo* [to a degree].

Slaves from their nature are chattels. They were originally so, and the law made them real estate only in particular cases, such as descents, etc. But in most other instances, and especially in the payment of debts, they were declared to be personal estate. It is true the law has protected slaves from distress, or sale, where there is a sufficiency of other personal assets to pay debts or levies, and in this respect they differ from other chattels; but this qualified exemption does not change their nature,,or give to them the qualities of real property. Slaves, therefore, being clearly assets, in tho hands of an executor, and liable to the payment of debts, the executor had a right to demand security of the legatees before he delivered them up, and a court of equity would not have compelled him to part with the possession, without such security had been given, upon the principle of making him do equity who would have it. – An executor who does not oppose an order of court for a division, or disclose to the court the fact that there are debts subsisting against the estate, is considered as

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consenting to such order; which should be construed according to the reason and justice of the case, and that it was intended only to compel a division of the estate, which should remain, after satisfying all legal demands against it. If an executor having knowledge of such a demand chooses to deliver the slaves to the legatees without taking security to refund, it is at his peril; for being a trustee for creditors, he ought to take care to keep enough in his hands to satisfy them, and it is no answer to their demand against him to say that they may pursue the legatees. They are under no obligation to follow the estate, though they may do so, if they please.

In the case of Burnley vs. Lambert, 1 Wash, 308. The plaintiff who had married one of the legatees of John Jones, had received from the executors upon a division of the estate, certain slaves devised to her, which were afterwards taken in execution upon a judgment against the executors of Jones, and purchased by the defendant, at a coroner's sale, made by virtue thereof. And from a judgment for the plaintiff in that case, the defendant appealed, and in that case Pendleton, president of the court of appeals, delivered the opinion of the court: that after the assent of the executor, the legal property is completely vested in the legatee, and cannot at law be divested by the creditors. The creditors, however, have a double remedy, first, against the executors at law; in which case the executors have their remedy, in equity, against the legatees to compel them to refund; or, secondly, the creditors may in equity pursue the estate in the hands of the legatees and in either case, all the legatees must be made parties, that the charge may not fall upon one, but may be equally borne by the whole. And the seizure by the coroner was accordingly adjudged to be unlawful, and the judgment of the district court was affirmed.

2. As to the rights of the husband to the slaves of his wife.

In the case of Sneed against Drummond, in the court of appeals, November, 1786, the presiding judge[2] delivered the opinion of the court to be, that slaves, in all cases where the right of the husband to the slaves of his wife was concerned, since the passing of the act of 1727, were to be considered as personal estate. That case has been lately reported in the second, volume of Mr. Call's Reports, 491.

The case of Dade, vs. Alexander, is the next in order of time; and in that case it was decided, that if a feme sole be entitled to slaves in remainder or reversion, and afterwards marries, and dies before the determination of the particular estate, the right vests in the husband. 1 Wash. 30.

In the case of Wallace against Talliaferro, 2 Call, 490. The court decided, that where a man devised slaves to his daughter, then married, and made the husband one of his executors, who, qualified as such, and died before any distribution was made, and without doing any act, testifying his election to hold the slaves, in right of his wife, and not as executor, the right of the slaves survived to the wife (they not having been reduced into his possession as husband, in the same manner as if they had been chattels.

These cases, I presume, relate to slaves not annexed to lands, and entailed therewith.

3. Thirdly: as to devises of slaves.

In the case of Dade against Alexander, beforementioned. 1. Wash. 30. The court of appeals decided, that money directed by will to be laid out in the purchase of slaves, and to be annexed to lands, devised in tail by the same will, was to be considered as slaves: and the slaves purchased therewith will pass with the land in tail.

Query: If in this case the husband would not have been tenant by the curtesy, only, before the act declaring tenants in tail of lands, and slaves to hold the same in fee simple, instead of having the

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absolute right thereto, as at present?

In the case of Shelton against Shelton, 1 Wash. 60, the court said that slaves purchased after the making of a will, would pass by a devise of all his slaves, in the same manner as chattels.

And in the case of Cole against Claiborne, it was decided, that the reversion in the dower slaves of the widow, will pass under the words of a general devise of all the rest and residue of the testator's negroes and personal estate. 1 Wash. 262.

In the case of Dunn and wife, against Bray, 1 Call. 343, the court held that a devise of a slave to the testator's son, and his heirs forever, but if he die without issue, then to another son; that this limitation was good, and the contingency not too remote.

And in Pleasants against Pleasants, where the testator in the year 1771, devised that his slaves should be free when they arrive at the age of thirty years, and the laws of the land will admit them to be free, the court held that those who were living when the act of 1782, authorizing emancipations of slaves passed, and were of the age of thirty years, or had since attained that age, were entitled to the benefit of the devise, if still held by the testator's legatees, or in their families, without change, through the intervention of creditors, or purchasers, the contingency having actually happened.

4. As to gifts of slaves.

In the case of Turner against Turner, 1 Wash. 139, it was decided that a parol gift of slaves (though accompanied by actual delivery of possession, as I understand the case to have been) made antecedent to the act of 1787, c. 22, was void, under the act of 1758, c. 1, to prevent fraudulent gifts of slaves; and that the act of 1787, was prospective, only, and not retrospective.

From the preceding abstract of the various laws relating to slaves as property, it is difficult to assign to them any determinate place, either under the head of real, or personal property. The exceptions contained in the acts declaring them to be real estate, sufficiently demonstrate that the legislature were aware of the difficulty of imparting to them all the properties of real estate: and the provisions still retained in the act which declares them to be, now, personal estate, equally show the aversion of the legislature to restore to them, completely, all the properties and incidents of personal chattels. Thus we see, that when declared to be real estate, they were subject to be taken in execution for debt, even when annexed to lands, and entailed; that they were not liable to escheat; might be transferred without deed, and be recovered by action personal; that the heir at law was made accountable to the younger children, for their proportions of the value; that the estate of a feme covert therein vested, absolutely, in the husband: that an infant of eighteen years might dispose of them by his will; and that no remainder thereof could be created, other than of a chattel personal, by the rules of the common law.

Now, when they are declared to be personal estate; the widow's right thereto is limited for her life, only, instead of being absolute, as in the case of chattels; to remove them out of the state amounts to a forfeiture of her whole dower in lands, as well as slaves; the executor cannot sell them, even now, until there is an actual deficiency of the personal estate; and a gift of them without deed unless accompanied with the possession, is void; and they cannot be taken in execution or distrained if other sufficient property can be had. Some of these provisions do not seem to be founded in reciprocal justice. A man marries a woman possessed of slaves in her own right; they become his, absolutely, immediately upon the marriage, and the next moment may be taken in execution to satisfy his debts, previously contracted: if he dies in the lifetime of his wife, she shall have the use, only for her life, of one third part of her own slaves, if he die not indebted, but she may be deprived

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of the whole by a creditor, whose debt was perhaps desperate, until her marriage with the debtor. Nor must she presume to remove them out of the state, under penalty of forfeiting them, and her dower, if she have any. It seems difficult to reconcile these provisions to the principles of mutual and reciprocal justice.

NOTES

1. Villeins do not appear to have been liable to be taken in execution for the debt of their lords; nor would an heir at common law have been liable for the debt of his ancestor, I apprehend, merely on account of his having a villein in gross by descent. But if the lands to which a villein was regardant had been taken in execution upon a suit brought against the heir, on the obligation of his ancestor, the villein must have gone with the land. It is not therefore from any analogy between slaves and villeins, that I have ventured upon this conjectural construction, but from the former liability of slaves to be taken in execution, and sold as chattels; and the analogy which the act seems to create between them and lands descending in fee simple; which latter were clearly liable in the hands of the heir to be taken in execution for the bond debt of his ancestor, unless by mispleading he made the debt his own personally, see Plowden, 439, 440.

2. Mr. Wythe, the presiding judge on that occasion, intimated his dissent from the opinion of the court, but did not give his reasons at large.

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NOTE F

Concerning Usury

INTEREST is the compensation which a borrower pays to the lender, for the profit which he has an opportunity of making by the use of the lender's money.[1] Part of that profit naturally belongs to the borrower, who runs the risk and takes the trouble of employing it; and part to the lender who affords him the opportunity of making this profit. The proportion which the usual market rate of interest ought to bear to the ordinary clear profit necessarily varies as profit rises or falls.[2] Double interest, is in Great Britain reckoned what the merchants call a good moderate reasonable profit, by which is probably meant no more than a common, usual profit. In a country where the ordinary rate of profit is eight or ten per cent, it may be reasonable that one half of it should go to interest, wherever business is carried on with borrowed money. The stock is at the risk of the borrower, who as it were insures it to the lender; and four or five per cent may in the greater part of trades be both a sufficient profit upon the risk of this insurance and a sufficient recompense for the trouble of employing the stock. But the proportion between interest and clear profit might not be the same where the ordinary rate of profit was either a good deal lower, or a good deal higher; if it were a good deal lower, one half of it perhaps could not be afforded for interest; and more might be afforded, if it be a good deal higher. For wherever a great deal can be made by use of money, a great deal will commonly be given for the use of it; and wherever little can be made by it, less will commonly be given for it.[3] The interest which the borrower can afford to pay, is in proportion to the clear profit only.[4] In countries where interest is permitted, the law, in order to prevent the extortion of usury, generally fixes the highest rate which can be taken without incurring a penalty. This rate ought always to be somewhat above the lowest price commonly paid for the use of money upon undoubted security. If it be fixed lower, the creditor will not lend his money for less than the use of it, and the debtor must pay him for the risk he runs in accepting the full value. Neither ought it to be much above the lowest market rate.[5] If the legal interest of Great Britain, where money is lent to government at three per cent, and to private people upon good security at four, and four and a half, were fixed so high as eight or ten per cent, the greater part of the money, which was to be lent, would be lent to prodigals and projectors, who alone would be willing to give this high interest. Sober people would give for the use of money no more than a part of what they are likely to make by the use of it, and consequently would not venture into the competition. A great part of the capital of the country would thus be kept out of the hands which are most likely to make an advantageous use of it. Where the legal interest on the contrary is fixed a very little above the lowest market rate, sober people are universally preferred as borrowers, to prodigals and projectors.

The ordinary market price of land depends every where upon the ordinary market rate of interest. The superior security, and some other advantages of land, will generally dispose a person to be content with a smaller revenue from land, than from lending out money at interest. But these advantages will compensate for a certain difference only; and if the rent of land, should fall short of the interest of money by a greater difference, nobody would buy land, which would soon reduce its ordinary price.[6]

New colonies must for some time be more under-stocked in proportion to the extent of territory, and more under-peopled in proportion to the extent of stock, than the greater part of other countries. They have more land, than they have stock to cultivate. Such land too is frequently purchased at a price below die value even of its natural produce. Stock employed in the purchase and improvement of such lands must yield a very large profit, and consequently afford to pay a very large interest. As the colony increases, the profits of stock gradually diminish. When the most fertile and best situated

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lands have been all occupied, less profit can be made by the cultivation of what is inferior both in soil and situation, and less interest can be afforded.[7]

Such are the principles by which the rate of interest ought to be governed, according to the opinion of the author of the treatise on the wealth of nations. Let us see how far they have been regarded in Virginia.

To those who proposed to themselves the acquisition of large estates in lands, the use of money must have appeared extremely valuable at the first settlement of the colony: but the immense quantity of land, which might be procured, at a very trifling expense, would keep down the' value of all uncultivated lands, whatever advantages of soil or situation they might possess. It, therefore, became another object of importance to cultivate those, which were most likely to yield an immediate profit. For this, laborers were required; but laborers who receive daily, or annual wages, could not be had. Instead of the farmers' paying a recompense at the end of the week, or year, for work already performed, and the product of which he had, perhaps, also already received, it was necessary to advance the wages of seven years, before a single day's work was performed by the laborer; and this, even at the risk of losing the whole sum advanced. – As this was the only alternative between losing what had been already expended in the purchase of lands, the planters found themselves obliged upon these hard terms, to cultivate their lands, by purchasing slaves. The only means by which this could be effected was borrowing of money, which, from the necessity of having it under these circumstances, would, therefore, command a high rate of interest. Adequate returns were not made from the annual profit of the lands, to repay the principal; but the borrower conceived that the increasing value of his lands, and the increasing number of his slaves (where he purchased females as well as males) more than compensated the deficiency of his annual returns from the land, by a kind of compound interest. – Money could not be borrowed for these purposes, but from the merchants in the mother country, or their agents here, and bills of exchange were substituted for the actual specie. As the African ships were owned in England these bills answered all the purposes of specie to the purchasers of slaves. They were accordingly accounted as ready money, and the damages in case of protest being very high, those damages became, in time, the measure of interest for money lent in that manner. As the re-payment was usually expected to be made in the same manner as the loan itself, when the debtor was called upon to pay one creditor, he often applied to another person, who gave him a bill for the amount of the loan, and took the borrower's own bill, with a responsible endorser, as a security for the sum thus lent. The borrower having no funds in the hands of the person on whom he drew, his bill was sure to return, protested, and consequently the lender became entitled to receive a higher interest thereon, under the name of damages. For the security of the lender, the law gave an action of debt, jointly, or separately, against the drawer, and every endorser, of which, in proportion to the lender's caution, there were often several. The bill, if protested, had the force of a judgment against the executors and administrators of all the parties thereto. There was supposed to be no limitation to the time, in which a suit thereon might be brought. A bill, in the hands of an importunate creditor was frequently renewed, and the interest and damages were every time added to the principal. – These damages in the year 1666, were fixed at fifteen per cent, on the amount of the bill – before that period they were thirty per cent. In 1750, they were fixed at ten per cent, per annum. The rate of interest on bonds was fixed at six per cent, in 1730. In 1748, it was reduced to five per cent, and all contracts for a higher rate of interest were declared void. Thus at one, and the same time, there were different rates of interest fixed by law. Actual loans of money seem to have been generally earned on by bills of exchange. – Where a bond was taken for a debt before contracted, or upon a sale of lands on credit, the interest was not to exceed five per cent. But if an adventurous planter wanted to make a purchase of slaves for ready

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money, or was pushed for the payment of a debt to a creditor in England, he drew a bill of exchange. Tobacco being substituted in many instances as a circulating medium of colonial trade, the want of specie was not felt in these transactions, and when paper money was issued for very small sums, it was felt still less, except when the debtor was obliged to pay ready money. Hence the rate of interest, in ordinary transactions, rarely exceeded the legal limits of five per cent, but where a projector proposed to himself an extraordinary advantage by the command of specie, or sterling money, or was pushed to support his credit, he hesitated not to give double that interest, and the law in favor of bills of exchange sanctioned the transaction.

Paper money can only serve as a substitute for specie to a certain extent, and can never be said to represent it, but when the government exchange it for specie without reserve, whenever it is required. The paper money emitted in this country before the war, was for internal commerce considered equal to specie; but for foreign commerce it was altogether useless. The capacity of holding lands in Virginia enjoyed by the merchants of Great Britain, in some degree supplied the want of specie to make good the balance of trade that continually accumulated against the colony. This kept down the rate of interest in some measure, by substituting land for money in payment of debts. But when the separation between Great Britain and the colonies took place, and trade was diverted into other channels, the paper money which had been greatly augmented in quantity, and which was not only unfit for foreign commerce, but for want of adequate funds to redeem it, had become a mere ideal currency, soon fell into such discredit that no man would keep it by him a day, if he could meet with any thing to purchase. The rapidity of circulation which it acquired from this circumstance so long as the laws made it a legal tender, though the effect of distrust, in some degree supplied the absence of a valuable circulating medium: it daily depreciated; but the man who received it in the morning, hoped to get rid of it before night: the total absence of specie at the same time, supported it as a medium of exchange in this daily traffic, much longer than its own credit. On the other hand those who foresaw an advantage from a purchase to be made on credit, did not hesitate to allow for that credit, a rate of interest equal to five, ten, or twenty per cent, per month, in the expectation of selling what they purchased, at a still greater advance before the day of payment arrived. But when this advantage was generally understood the vendor to guard against the effects of a rapid depreciation, fixed the value of his debt in tobacco, which was supposed to bear a more stable relation to the value of specie. These tobacco contracts, contrived at first to evade the penalties denounced against those who demanded more for their commodities in paper than in specie, and afterwards recurred to, merely to prevent the seller's being injured by the depreciation of paper, became after the abolition of paper money, and the consequent introduction of specie, a most violent engine of extortion; the creditor availing himself of the rise or fall of that article, to demand a new bond from his debtor, for money, when the price of tobacco had risen, and again for tobacco, when the price was low, and expected to rise. Although by these means a debt was in two or three years doubled, trebled, and even quadrupled, yet these shifts appear not to have been deemed usurious: at least I have not heard of any decision to that effect. The enormity of the evil begun to work its own cure, when new sources of speculation successively presented to avaricious minds the means of gratification. The liquidated debts of the state, and of the United States, were thrown into circulation as a vendible commodity, which the necessity of the possessors induced them to part with, and the hopes of speculators prompted them to purchase at a vast discount. The land offices in the various states, where principalities in extent might be acquired for a few dollars in specie; the prospect, now rendered certain by the adoption of the constitution of the United States, that the debts of the Union would appreciate as fast as they had depreciated: the golden hopes inspired by the establishment of banks; the impulse given to trade by an European war, which had not begun to exercise its spoliations on our commerce; the advanced price of our produce arising

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from the additional demand for provisions created by that war; for a time seemed to inundate the United States with wealth, which among a certain class of men increased with such rapidity, as to give to the use of money an almost unlimited advantage; hence the laws which restrain immoderate interest have been universally disregarded, and the most enormous usury has been openly practiced without the smallest apprehension of the consequences. Five per cent a month it is said has been frequently given. Half that rate for a week, and even one per cent a day, has on some occasions been offered and accepted. It is easy to perceive that no honest commerce could long support such a defalcation from its profits. Accordingly numerous bankruptcies have taken place, particularly in those parts of the United States where there was the greatest quantity of money in circulation. – Our foreign commerce having no longer the same immunity as some years ago, the United States have ceased to be the Entrepot of the produce of the colonies of the belligerent powers, and a general deficit may be expected, among the commercial part of the nation, unless some favorable change should happen very shortly in our external relations and connections. The produce of our lands will fall accordingly, and the lands themselves will sink still lower in value.

Were it possible for the laws to restrain this evil, nothing would be more worthy of the attention of a wise legislature than to purge a state from the corruption which the projects, the rapacity, and the frauds of avaricious speculators, swindlers, land-jobbers, and usurers infallibly produce. Money as the means of assisting honest industry can not be procured on any terms which would not consume the borrowers gains, though fourfold as great as any honest occupation ever produced. The farmer, the mechanic, the retail shop-keeper, can neither of them procure the credit necessary for their subsistence. The use of money is confined only to the hands of those who are sure to abuse it. – A moderate interest is the life of commercial credit. The manufacturer gives a credit to the merchant, the merchant to the shopkeeper, the shopkeeper to the farmer, and the mechanic of small capital; the farmer in his turn can give credit for his crops to the merchant; who can thus enlarge his capital, and afford to lessen his profits. The rate of interest in these cases is supposed to be such, as to make a moderate compensation for the use of money, without lessening the gains of the. profit. But where the rate of interest bears no proportion either to the profits of land, or of manufactures, or of merchandise, but merely to the hopes and expectations of projectors and speculators, and the avarice of usurers, the culture of land attention to manufactures, and the pursuit of an honest commerce will be equally neglected, and the state must suffer a pecuniary palsy until the cause of the disease be removed.

In the country below the mountains in Virginia, very little of the best land remains to be cleared, and the far greater part of them have been cultivated, without improvement, till they are not more productive than fresh lands of far inferior quality. This circumstance, together with the great abundance and low price of lands in other parts of this and the neighboring states, occasions there being very few purchasers of land in the middle and lower country. The tracts are generally large, and the proportion that is cultivated small. It would probably be a very high estimate should we suppose the generality of farmers to make ten per cent, per annum upon the whole value of their lands and slaves. I incline to believe that very few exceed eight per cent, and out of this, the clothing and provisions of their slaves and horses employed in making the crop, ought to be deducted. A nett profit of five per cent, is probably more than remains to one in twenty, for the support of himself and his family. If he wants money to increase his stock, even the legal interest is probably equal to his additional profit; but the interest usurers demand, and speculators pay, without scruple, will amount to fourfold, perhaps, tenfold his profits. Agriculture then can hope for no aid while interest remains unchecked; on the contrary every man who can find a purchaser will sell his lands, and turn money lender, until the total neglect of agriculture shall in its turn make the money lenders bankrupts. Nor

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is it in this view alone that exorbitant interest must injure agriculture. A farmer ought to be able to get credit with the merchant, at least, for his tools, his farming utensils, and the clothing of his servants, upon the faith of payment from his ensuing crop. If the use of money will command five per cent, per month, what storekeeper can afford to lie out of his money six or eight months, without a proportionate advance on his goods, and what farmer can purchase at such an advance? If the ordinary profits of trade be twenty per cent, per annum, when credit can be got at five per cent, what must those profits be when sixty per cent is counted upon as the product of money. Who could deal with a shopkeeper who should advance his gains ten or twelvefold? Trade then must suffer equally with agriculture. Is the mechanic better off? He must be supported both by the farmer and merchant. Labor and industry of every kind, must, therefore, be brought to a stand, or these ruinous practices must fail} and since labor is the only true source of wealth, it must accordingly eschew that fate. – It will, however, be sometime before this happens. The speculators in lands will be buoyed up for a time' by the prospect of their lands rising in value. But vast tracts of unsettled lands are of little more value than the parchment which conveys them. – Population first creates a value in land; "without that, it is of less value than the waters of the Ocean; these at least serve for an high way. Uncultivated deserts whatever they may promise, yield, only to population and industry. – Very few land-jobbers have had any other object in view than selling their lands in the gross, to some dupe, or other speculator. The settling and cultivating the lands form no part of their plan. It is not till they are ruined, or till projectors of a different character shall become purchasers, that these lands will ever acquire more than a nominal value, or yield any real profit. Hence it is easy to foresee that this source of exorbitant usury must have an end. Bank-paper, and every other species of paper credit have aided in blowing up the bubble, and when it bursts will fall with it. The artificial demand for this circulating paper occasioned by these immense speculations, being lopped off with them, the quantity of this kind of currency will again be regulated by the demands of productive commerce, instead of unproductive speculation.

Nor is excessive usury more inimical to every species of honest industry, than it is to the moral conduct of men. The heart that is once corroded by avarice, becomes callous to generosity and friendship, obdurate against the cries of distress, regardless of justice, and insensible of every impulse, or passion, except only the insatiable thirst of amassing.

We have said, that in 1730, the rate of interest was limited in Virginia to six per cent – in 1748, it was reduced to five; the act of 1786, confirmed this standard. In 1796, it was again raised to six per cent, the obvious, or at least, ostensible reason for which, was, that the public pay interest at that rate. These acts are nearly a transcript of the British statutes.

VERY few cases have hitherto been decided in our courts on the subject of the acts for restraining usury. I shall notice some of those which have been reported, and one, which I believe has not. It was as follows:

In June, 1789, the chancellor referred the following case for the opinion of the judges of the general court, upon it.

A bond for 1000 pounds of tobacco was executed when that commodity was worth eighteen shillings per 100 pounds. Another executed for the payment of 18£, when tobacco was worth thirty-six shillings, and given in discharge of the former. And whether this latter bond was usurious was the question referred to the court, for their opinion.

One of the judges who was prevented by indisposition from attending at the term, when it was expected that the judges would have delivered their opinions, had prepared to deliver his own to the

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following effect.

The act concerning usury declares," That no person shall upon any contract, take directly or indirectly, for loan of any money, wares or merchandise, or other commodity above the value of five pounds for the forbearance of one hundred pounds per year, and after that rate for a greater or lesser sum, or for a longer or shorter time; and all bonds, contracts, covenants, conveyances or assurances, to be made for payment, or delivery of any money or goods, so to be lent, on which a higher interest is reserved, or taken, shall be utterly void."

Although the question referred to the court falls immediately under this clause of the act, yet as the succeeding clause may serve further to elucidate the intention of the legislature, it will be proper to consider it likewise. – It is as follows:

"If any person shall by any ways, or means of any corrupt bargain, loan, exchange, shift, covin, device, or deceit, take, accept, or receive for the loan of, or giving day of payment for money, wares, merchandise, or other commodity, above the rate of five pounds for one hundred pounds for one year, every person so offending shall forfeit double the value of the money, wares, merchandise, or commodity so lent, exchanged, or shifted; one moiety to the use of the commonwealth, and the other to the informer. – And,

"Any borrower of money, or goods, may exhibit a bill in chancery against the lender, and compel him to discover upon oath, the money or thing really lent, and all bargains, contracts, or shifts, which shall have passed between them, relative to such loan, or the repayment thereof, and the interest, or consideration for the same; and if thereupon it shall appear that more than lawful interest was reserved, the lender shall be obliged to accept his principal money without interest, or other consideration, and pay costs, but shall be discharged of all other penalties of the act."

In order to answer the question propounded by the chancellor for the opinion of this court; *viz.* whether the bond given for 18£ was usurious, it may be proper to inquire; first; whether this bond be taken, contrary to the express words of the statute, and, secondly whether it be an evasion out of it.

As to the first point, whether this bond was taken contrary to the express words of the statute; I am inclined to think that the case stated by the chancellor is too naked, for us satisfactorily to give an opinion upon that point. Tobacco being in this country both a vendible commodity, and very frequently a medium of exchange, also, contracts respecting it may be fair, or usurious, according to the relation they bear to these several and distinct properties. If, for example, a planter should engage to sell his crop to a merchant at eighteen shillings by the hundred, and give his bond to the merchant for the delivery thereof accordingly, in consideration of having received the purchase money, or part thereof, and fail in his contract; and then in order to avoid a suit, and indemnify the merchant for his failure, he were to give the merchant his bond for as much money as the tobacco was fairly worth at the time, this transaction, simply, and unconnected with any other circumstances, would not, I conceive, be usurious. Whether the transactions between the parties in the case referred to this court by the chancellor originated in this way, or in any other that might be considered as standing upon as fair ground does not appear, at least not sufficiently, for me to give an opinion upon the first point. I shall, therefore, proceed to the second.

2. Then is this bond given for the sum of eighteen pounds, when tobacco was worth thirty-six shillings per 100 pounds, in discharge of a former bond, given for 1000 pounds of tobacco, when that commodity was worth only 18£ per 100 wt. or 91 in the whole, a shift or evasion to avoid the statute? In which case it will fall under the statute, though not expressly within the words of the

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enacting clause.

As our statute is nearly a transcript from the English statutes the decisions in England will aid us in the true construction of it.

To make a contract usurious within the statute, there must be a reward for forbearance, or giving day of payment; and whatever shift may be used, it will be usury. 2 Vezey, 142.

And, in England, where annuities are frequently granted in consideration of a present sum paid, if the bargain be really for the purchase of annuity, though at ever such an under price, it seems agreed not to be usury. But if upon inquiry it shall appear that the annuity is a mere device to pay the principal with usurious interest, in order to evade the statute, this will bring it within the statute. – 2 Vezey, ibid.

A bargain on a mere contingency where the reward is for the risk, and not for forbearance, has been solemnly adjudged not to be within the statute. Spencers Exors. vs. Janson. 2 Vez. 125. 1. Wilson 286. 1 Atk. 501.

So a bottomry bond, being a contract founded on a risk really run, has been adjudged not within the statute. 2 Vez. 142, 143.

In like manner a contract to receive double in the event of the borrower's outliving another person, and nothing, in case it should happen otherwise, has been determined not to be within the statute* 1 Atk. 301.

But in these cases it depends upon the risk really run, and not merely upon a colorable risk, to evade the statute; as, in the case of a bond given if one ship out of twenty, bound from one place to another in time of peace, and in a fair season of the year, should arrive safe. 2 Vez. 143.

In like manner, where the chance was that a young man in perfect health did not live six months, the hazard was merely colorable, and the loan was adjudged to be usurious. Mason vs. Abby, Carthew's Rep. 67. Comb. 125. 3 Salk. 390. 2 Blacks. Rep. 863, and Cowper, 777,

A power of redemption to the borrower, without interest, within n certain time has also been held to be not within the statute, though more than legal interest be reserved after that time is past; as if one lend 100£ to another for two years, and the borrower agree to pay 30£ for the loan of it: but if he pay the principal at a year's end, he shall pay nothing for interest; this has been held not to be usury;'

for the party has his election, and may discharge himself by the payment of the principal only, if he pleases, 3 Wils. 395. Yet in this case, if it were privately agreed between the parties that the borrower, notwithstanding this stipulation should not repay the money until the first year was past, this case would also fall within the intent to evade the statute.

In these cases, respectively, if there be a fair and bona fide sale of the annuity, and not a colorable one in consequence of a negotiation for a loan; or, a fair and bona fide risk of the principal, upon a probable (or rather not improbable) contingency; or a fair and bona fide election given to the borrower, whereby he may discharge himself of the debt, within a reasonable time, without paying any interest; or in any other case, where either the principal or interest may be fairly and bona fide put in hazard, the contract, although more than legal interest may be eventually reserved thereon is not deemed usurious, or within the statutes: but if the sale, or the risk be merely colorable, in order to evade the statute, the bare intention to evade it seems to bring the case expressly within it's meaning.

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. And the subsequent acts of the parties may be evidence of such intention, and turn that into an usurious transaction, which was not such upon the face of the original contract.

For if a man sets out with borrowing money, and afterwards turns the loan into the shape of an annuity, this is a shift and evasion to avoid the statute; and yet any man may purchase an annuity on as low terms as he can. 1 Atk. 851.

And the same point was resolved in a qui tam action, where the original communication was for a loan, but the contract was for an annuity. Cowp. Rep. 770. Richards vs. Brown.

It is likewise lawful for a man to sell his goods at as high a price as he can get for them; yet if the sale of goods be merely a colorable mode of obtaining more than the real value of the goods, and legal interest thereon, such a bargain has been adjudged to be usurious. Douglas's Rep. 708. Howe, et al. vs. Waller. 5 Ba. Abr. 408. s. 9.

If one delivers wares of the value of 100£ and no more, and takes a bond with condition for the re-delivery of them within a month, or to pay 120£ for them, at the end of the year; this obligation has been adjudged to be void. 5 Ba. Abr. 408. s. 8.

And, it seems to be agreed, that the reducing a former debt to a speciality, and giving day of payment thereafter, converts the former debt into a loan. For it is not so much the form of a transaction as the essence of it, which must determine it's nature. Now the essence of a loan, is the giving a day of payment, in consideration of interest, to be paid for the forbearance. 12 Mod. 385.

We have the concurrent authority of judge Burnett, lord Hardwicke, and lord Mansfield in favor of the utility of these statutes, and that they ought to be so construed, that where a door is left open by the parties, to evade them, the court should if possible get at it. 2 Vez. 142. Douglas, 710. Hardwicke's cases, 235.

It therefore becomes this court maturely to weigh the case referred to them; for as the decision may open a wide door to those who study shifts, evasions, and cunning devices in order to elude the effects of these statutes, on the other hand, the decision in this case may perhaps affect the interest of many innocent creditors.

Whatever may have been the foundation of the debt originally due from the obligors to the obligee, the original value of it as stated in the case referred to us, appears not to have exceeded 91. current money: at least, this was the actual value at the time the first bond was given. That bond being given as a security for the debt, and interest accruing thereon of course, it is to be regarded, upon the principles of the case in 12 Mod. 385, as the evidence of a loan, the real value of which was 91. only, at that time, and for the forbearance of which interest was stipulated to be paid.

At law the obligee could recover nothing more than the specific thing lent, whether money or tobacco, with interest thereon. In conscience, he was entitled to nothing else, but that or the value at the time of the lending.

For the value of a loan is not to be estimated by the rise or fall in the price of any fluctuating commodity, but according to that standard which the laws of the land have established for the regulation of transactions of that nature; and that standard is the value of the precious metals, as fixed by law.

At a subsequent day, the lender in consideration that the borrower would give another bond for double the value of the original loan, and interest upon the value so doubled, agrees to give a further day of forbearance. What other consideration appears to have moved the lender to grant this further

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day? I am at a loss to divine it.

Upon comparing this case with the authorities before cited I am therefore unavoidably led to conclude that this last transaction must be deemed a shift, or device, to elude the statute, and consequently an unconscionable, and usurious bargain within the meaning of it, unless it can be shown to be a fair bargain for the actual purchase of one thousand pounds of tobacco, the consideration for which the bond is supposed to be given.

To constitute a sale of any commodity, there must be a possession in the vendor, or his agents. Had the obligee possession of the tobacco? No, it was merely a chose in action. Did the obligor want to purchase tobacco? No, he had not wherewithal to pay what he already owed the obligee. Is there a single feature of a purchaser, in this case? None that I can discover. The debtor being called upon to pay, and unable to make payment, in order to obtain further time, enters into a new, and essentially different contract from the former, by which he actually doubles the value of his original debt.

If a man sets out with borrowing, says lord Hardwicke, though he afterwards actually purchase an annuity, it is an evasion to avoid the statute. 1 Atk. 351. Cowper 770, S. P.

In the present case the parties set out with a loan; it is scarcely possible, as was said by lord Mansfield, to wink so hard as not to see that the latter bond was not a contract for the purchase of tobacco: consequently, to my understanding it appears to be a shift with a view to the obtaining a greater interest for the forbearance of a loan than the statute allows, and as such usurious. And that we ought to certify our opinion to the chancellor, accordingly.[8]

In the case of McIntire vs. Warder, it was said by the president of the court of appeals, that the court will never presume a contract to be usurious unless it be proved; especially where such presumption would be at variance with the degree of a court, which it is not to be supposed would sanction such a contract: and that as the residence of the creditor usually fixes the place of the contract, they would presume a contract with a person residing in Pennsylvania to be made there, especially where the debt is stipulated to be paid in Pennsylvania money, rather than interpret a contract to be usurious upon which more than legal interest in Virginia was reserved, although not more than the laws of Pennsylvania allow. But if the interest were increased merely to procure a further indulgence, it would be usurious in the case of Gibson vs. Friscor, where the defendant being indebted to the plaintiff, in 445£ sterling, and about to remove to Kentucky, assigned to the plaintiff bonds, which were afterwards paid, to a greater amount than the value of the original debt, and interest, at a value agreed on between the parties, and moreover gave a new bond, for the balance, which according to a statement then made between the parties, appeared to be still due to the plaintiff, the district court of Dumfries decided that this last bond was usurious; and the court of appeals, *dissentiente*, Lyons, Judge, affirmed the judgment. 1 Call's Rep. 62.

And in that case the court held, that it is sufficient if the verdict finds facts, amounting to usury; although the jury does not find the corrupt agreement in technical words. Ibid.

And in this case it seems to have been agreed by the majority of the judges, that a corrupt forbearance of money, then due, is as much within the statute as an original loan.

In order to constitute usury, there must be a borrowing, and a lending with intent to exact an exorbitant interest; that is to say, both parties must consent to the usurious agreement. And therefore a bill of exchange drawn upon an obscure person in Scotland, if there be no agreement that it shall be protested, although the payee may expect it, will not render the transaction usurious. And this,

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although the drawee was known to the payee, (whose brother he was) and not to the drawer, who had no former correspondence with him. Price vs. Campbell, 2 Call 110. In this case the court seem to have regarded the original transaction between the parties as a purchase, and not as a loan. But if the negotiation had been for a loan, I humbly conceive that the circumstances above mentioned must have been deemed sufficient evidence of a corrupt agreement between the parties, to secure a greater interest to the lender than the law allows, by the bill's being returned protested.

An agreement to set the profits of the thing mortgaged, against the interest of the money lent, or due by the mortgage, where it greatly exceeded the legal interest, was held to be so far usurious and void. Robertson vs. Campbell, 2 Call 430. The same point seems also to have been before decided in like manner, in the high court of chancery, between Woodson and Woodson. Wythe's Rep. fol. 55.

NOTES

1. Smith's Wealth of Nations, 52.

2. Ibid. 90.

3. Ibid. 98.

4. Smith's Wealth of Nations, W. 4 Ibid 355.

5. Ibid. 353.

6. Ibid. 351.

7. Smith's Wealth of Nations, p. 93.

8. Adams vs. Pickett and Currie. – The Editor is not acquainted with the decision of the chancellor, in this case he has some reason to believe that no opinion upon it was given by the judges of the general court, officially. 1 Wash. Hep. 368.

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APPENDIX
to Vol. 4

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NOTE A

Summary View of the Judicial Courts of the Commonwealth

REMEDIAL justice, the object of the establishment of judicial courts, has frequently been supposed, by those who are unacquainted with the laws of Virginia, to be more tardy in this commonwealth than in most other places. This opinion, perhaps, is not so well founded as strangers may imagine: in no country of equal population are there so many courts of judicature, whose sessions are frequent, and whose jurisdiction is competent to afford relief in all cases: in no country, where the ordinary modes of proceeding at common law have been adopted, have so many regulations to prevent delays been introduced by legislative authority, and countenanced 'by the practice of the courts. A stranger to our jurisprudence would probably be surprised to hear, that exclusive of the court of appeals, high court of chancery and general court, there are nineteen superior courts of record, which hold pleas in all cases criminal and civil, where the debt is equal to one hundred dollars in value, or the action is founded on a tort; and which hold their sessions twice a year in the different districts of the commonwealth, and sit from ten to fifteen days at each session. That there is likewise a court of record in every county, which sits monthly; and has unlimited jurisdiction in all cases arising within the county, (both in law and equity) above the value of ten dollars: besides eight corporation courts, possessing like jurisdiction within their respective limits; amounting, in the whole, to one hundred and twenty courts of record: in addition to these, the federal courts have concurrent jurisdiction in civil cases, where either party is not a citizen of the state. In England, where there are more than six times as many people, there are but four superior courts of record; and the jurisdiction of their inferior courts is so limited, that it seems wonderful that justice should even be tolerably administered in that kingdom.

That our judiciary system is capable of improvement cannot be denied; but improvements in that branch of civil polity must be the result of experience. The endeavors of the legislature have not been wanting for this purpose, and it is highly probable that a few years may enable them to improve a system, which (it were the height of injustice to deny) has undergone a considerable change for the better since the revolution. The establishment of superior courts which sit regularly in various parts of the country; and possess appellate jurisdiction in civil cases to a certain amount, has already produced very beneficial effects in correcting the proceedings of the inferior courts, which are now much more regular than formerly. Suitors who apprehend delay or partiality in the county courts, have an opportunity of prosecuting their claims where the value is equal to one hundred dollars, in the superior courts. If the plaintiff is delayed by an appeal from the judgment, he gains by the delay an additional security for his debt and an ample interest for his money, if the judgment is affirmed. Suits at common law for the recovery of a liquidated debt can seldom be spun out by any artifices on the part of the defendant more than two or three terms after he is arrested. Litigated claims, indeed, are not unfrequently depending much longer; but this happens because the plaintiff is at one time unprepared to go to trial, as well as the defendant at another. Where the cause of action arises out of the state, or has been occasioned by long and mutual dealings, or is founded on a special contract, it very frequently happens that neither party can procure the necessary documents for his claim, or defense, or the attendance of his witnesses. In old countries, people are generally stationary: A witness to a transaction in London, York, or Bristol, may be found in the same place, probably, as long as he lives. In America the spirit of migration and change is so prevalent, that the witnesses to any transaction of three or four years standing, are generally dispersed, perhaps, to the remotest parts of the United States, of Europe, or even of the Indies. Under such circumstances, delay is indispensably necessary to justice.

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Our laws, it is true, in many instances, afford a remedy in these cases, by suffering the parties to take the depositions of such witnesses as are out of the state, or may be about to leave it; but this provision is often ineffectual by the sudden removal of the witness, or his departure without notice. Other causes arising oftentimes from unforeseen accidents, occasion delays in litigated actions. The death of either party, or the unwillingness of persons to take upon them the administration of his estate, are not unfrequently the causes of great procrastination. These inconveniences are beyond the reach of the laws. – They must, however, be taken into the account as theyfrequently contribute more than any other causes to the delays in our courts. Upon the whole, we may pronounce that the administration of justice stands upon as respectable a footing in Virginia, as in any state in the Union, and perhaps in any other country. For, although it will not be contended that the judiciary system is as complete as it might be, nor the talents of the judges equal to those of a nation renowned for its able and upright judges, yet the expense of litigation in that country often amounts to a denial of right, where the parties are above the rank of paupers, but yet too poor to incur the enormous expense which attends the prosecution of any contested claim there; whereas, in Virginia the cheapness of the law is perhaps one great cause of the multitude of suits, and the delays which attend their decision.

These few observations being premised, I shall now proceed to mention the judicial courts in this commonwealth.

The establishment of courts being a branch of the royal prerogative in England, their first institution in the colony of Virginia must have proceeded immediately or mediately from that source.[1] We find that courts had been established in each county;[2] and that superior courts in which the governor and council presided, were held at James city before the year 1661, under the name of quarterly courts, the stile of which was changed to that of the general court by an act of that session. The jurisdiction of the county courts extended to all causes of whatever value or nature they might be, not touching life or member: of the latter the general court has exclusive jurisdiction, as also, concurrent original jurisdiction with the county courts, in suits above the value of sixteen pounds sterling or sixteen hundred pounds of tobacco. An appeal la^r from the county court to the general court, in all cases; and it seems that a further appeal lay from thence to the general assembly. The governor and one of the council, or two of the council by commission from the governor, made the circuit of the county courts, in which the justices of the peace, of whom eight were required to be in every county were the ordinary judges.[3] The succeeding year the title of an act occurs repealing the act for itinerary judges,[4] so that the system, which required the attendance of the governor or two of the council, at the county courts, was soon changed. From that period to the present, the constitution of the county courts has undergone no material alteration.

King Charles the second by letters patent of the 28th year of his reign, among other things declared and granted that the governor and council of Virginia or any five of them, whereof the governor or his deputy always to be one, should have full power and authority to hear and determine all treasons, felonies and other offenses committed within the government, so as they should proceed, as near as may be, according to the laws and statutes of the kingdom of England. The jurisdiction of this court, as defined by a subsequent act,[5] extended to all causes, matters and things, whatsoever, relating to, or concerning any person or persons, ecclesiastical or civil; or to any person or thing of what nature soever the same may be, whether brought before them by original process or appeal from any other court or any other ways and means whatsoever: but no original process could be sued out of the general court where the debt or thing demanded was under 100 £ sterling, or 2000 pounds of tobacco, except where the justices of the county court, or the vestry of a parish had incurred a

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specific fine of less value. The same act declared that the general court and county courts were the only courts of record in Virginia, and that no other courts whatsoever, should be deemed such. The general court held two terms annually, beginning the fifteenth days of April and October, which continued eighteen days, and two intermediate courts of oyer and terminer were held in June and December. The county courts were held monthly on days prescribed by law. Appeals lay from the judgment of the general court, to the queen or king in council. Both the general court and the county courts were invested with chancery as well as common law jurisdiction;[6] they were likewise courts of probate for deeds and wills, and the latter possessed the concurrent right of granting administration of intestates estates, and the care of orphans and their estates within their counties respectively.

When the revolution took place it was thought proper to transfer the chancery jurisdiction of the general court to another court. Its jurisdiction in ecclesiastical cases seems to have been either abolished, or become obsolete, except in the cases which have been transferred to the cognizance of the high court of chancery. These are confined to incestuous marriages only, in which cases the court of chancery is authorized to annul the marriage. A court of appeals and a court of maritime jurisdiction was likewise established; but the latter was discontinued soon after the adoption of the constitution of the United States.[7] That instrument laid the foundation of the federal courts. About the same time the general court was new organised, and district courts were established in various parts of the commonwealth. Of all these several courts we shall now say something, beginning with the inferior, and state courts, and proceeding to the superior, and finally to the federal courts, whose jurisdiction will be found, in some instances, separate from, in others concurrent with, and in some few paramount to, that of the state courts.

1. Corporation courts, or those courts which by charterer act of assembly have been established in the towns of Norfolk, Williamsburg, Richmond and some others, are courts of limited jurisdiction the extent of which in a great measure depends upon the act of their incorporation; but by a general law from which the city of Williamsburg and the borough of Norfolk are excepted, they shall have jurisdiction only in suits between their respective inhabitants, or between inhabitants and persons not inhabitants of this commonwealth. And in either case, only where the contract is made, or the cause of action accrues, within the corporation; in which cases their jurisdiction is not limited to any particular sum, but is co-extensive with that of the county courts.[8] They have likewise the same jurisdiction in criminal cases arising within their limits, as the county courts possess beyond those limits in the counties respectively. The manner of chusing their magistrates depends upon the acts of their incorporation. But no magistrate of a corporation can at the same time act as a justice of the county courts.[9] These courts so far as they have been yet established,[10] are all courts of record and have concurrent jurisdiction with the district and county courts, in testamentary causes and others of a similar nature, as also in all cases relative to guardians and their wards, idiots, lunatics, and their estates, and the probate of deeds, concerning lands, and slaves, within their respective limits.[11]

2. The county courts were established in every county of the commonwealth, for the trial of suits and for the probate of deeds and wills, and granting letters of administration of intestate's estates within their respective counties. They have cognizance of all civil suits both at common law and in chancery, where the claim amounts to ten dollars or more,[12] and of all pleas of the commonwealth except such criminal causes where the judgment on conviction, did, before the commencement of the act for amending the penal laws, extend to life or member; and except the prosecution of causes to outlawry against any person whatever. The justices of the peace of the several counties are judges of those courts[13] and they are appointed by the governor with the advice of the council of state on

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recommendation of the county courts.[14] Their sessions are held monthly; but four out of the twelve are denominated quarterly sessions, and with some exceptions, are held in the months of March, May, August and November, and continue six days, unless the business be sooner ended.[15] At their quarterly sessions a grand jury is sworn to make presentments of all breaches of the penal laws of the commonwealth,[16] and such presentments as have been before made, and all other prosecutions in behalf of the commonwealth, as well as civil suits at common law and in chancery, where the claim exceeds twenty dollars or 800 lbs. of tobacco are to be tried at the quarterly sessions. At the remaining eight sessions petitions for small debts, or for trover and conversion, or the detention of any thing not exceeding twenty dollars or eight hundred pounds of tobacco, are to be tried.[17] Deeds and wills maybe proved, administrations of intestate's estates granted, poor orphans may be directed to be bound out by the overseers of the poor;[18] and guardians and committees of infants, idiots, lunatics and their estates, be appointed; justices, sheriffs and coroners, and officers of the militia, when necessary, may be recommended to the executive; and surveyors of highways, and constables appointed.[19] Injunctions in chancery may likewise be granted or dissolved and all chancery causes therein depending, tried, in like manner as at the quarterly sessions:[20] and if any defendant in any suit in chancery resides within the county, and any other defendant within another county, or in any other country, the process in the former case may be directed to such other county;[21] and in the latter the court may appoint a day for the defendant to appear, which if he fails to do after due publication thereof, the court may proceed to make a decree against him as if he had appeared.[22] An appeal lies from judgment on the common law side of these courts to the district courts, where a freehold or franchise is in dispute, or the debt or thing demanded is of the value of one hundred dollars, or three thousand pounds of tobacco; and a writ of error or supersedeas, lies from those courts to the judgment of the county courts, and in similar cases, where the judgment amounts to thirty three dollars and one third, or one thousand pounds of tobacco.[23] An appeal from a decree on the chancery side lies to the high court of chancery where the debtor claim amounts to thirty three dollars and one third, or where lands or slaves are the subject of the decree.[24] Four of the justices (whose number is indeterminate and various in the several counties) constitute a court. They are likewise justices of oyer and terminer for the trial of slaves[25] and may convene and hold separate courts for the examination of free persons charged before any one of them with any criminal offense, preparatory to their being indicted for the same in the district or county court, according to the nature of the offense;[26] the consideration of which more properly belongs to that part of the commentaries which treats of crimes and misdemeanors.

3 & 4. The district courts and the general court, are next in order to be considered; the former being a modification of the latter, are in strictness only so many different branches of the same stock. In deducting the history of the first we must begin with the latter. The constitution of the commonwealth requires that judges of the general court should be appointed by joint ballot of both houses and be commissioned by the governor. That they shall have fixed and adequate salaries, and hold their offices during good behavior. In October 1777[27] the general court was organized as a principal court of common law, of general jurisdiction, to consist of five judges, to be chosen and commissioned as the constitution directs, any three of whom might constitute a court, for the trial of all actions and suits at common law, real, personal or mixed, where the debt or claim was of the value of ten pounds current money or more; or where the action was brought against the justices of an inferior court, or the vestry of a parish; as also petitions for lapsed lands, and appeals, writs of error and *supersedeas* from, or to the judgment of any inferior court. It had also full power to hear and determine all treasons, murders, felonies and other crimes and misdemeanors, which should be brought before it. This court was to hold two sessions of twenty four days each, beginning on the

first day of March and the tenth of October yearly. In the succeeding year[28] an act passed for enabling the judges to hold two additional sessions in June and December for the trial of criminals only. The backwardness of the county courts in doing business soon occasioned a vast accumulation of suits in the general court. In the year 1787, it was computed that the suits then depending therein could not be tried in less than five years, and they still continued to accumulate. This inconvenience had been foreseen and felt some years before that period. Other inconveniences were experienced from the great distance from whence criminals were often brought to be tried, as well as from the immense expense of jurors and witnesses who were obliged to attend from remote parts of the commonwealth. To remedy these inconveniences an act passed in October 1784[29] for the establishment of courts of assize, upon the plan of those courts, and the courts of *nisi prius* in England. Seventeen districts were appointed (nearly the same as at present) where the courts were to be held. The judges of the court of appeals, consisting at that time of the judges of the high court of chancery, the general court, and court of admiralty were to allot the districts among themselves and two of them were to attend as judges of the courts of assize. The writs were to be issued by the clerks of assize and be returned to the general court and the issue there made up. After which the record was to be sent out to the assize courts, and after verdict to be again returned to the general court, in order to have the judgment there entered up; and execution was to be finally sued out of, and be returned to, that court. This scheme appeared to be complicated to some, and pregnant with great inconveniences to others. The act was accordingly suspended the next year[30] and repealed two years afterwards without any experiment being made of its effect. In 1787, an act passed for establishing district courts.[31] The judges of the court of appeals were required to attend as judges of the district courts; but that court by a solemn act declared the law which required the judges of the high court of chancery, and the court of admiralty to take upon them the character of judges at common law, not only in civil but in criminal cases, was unconstitutional. They therefore declined carrying the act into execution. The legislature being immediately convened by proclamation from the governor, suspended the act till the next session and then repealed it, so far as it related to the judges of the court of appeals. By that and several subsequent acts, all which were consolidated in 1792, the general court and district courts were organized and reduced to their present form, of which we shall now give a sketch.[32]

The judges of the general court, whose number now consists often, allot among themselves the duty of attending the several district courts, two to each court. To effect this, the state is arranged into five circuits, in four of which there are four districts, and in the fifth three, making in the whole nineteen,[33] in each of which a superior court is held, possessing the same jurisdiction within the district, both in criminal and civil cases, as the general court formerly possessed throughout the state, with some small variations, which will be noticed in their proper places. These courts hold two sessions yearly, the circuits beginning in April and September, and ending in May and October. The judges have no separate commissions, but act by virtue of their commissions as judges of the general court; which proves the district courts to be only branches of that court, as otherwise they could have no constitutional authority therein. One judge is sufficient to constitute a court in all cases, except in criminal cases, extending to life or member, and even in these, if the accused shall petition to be tried, one judge constitutes a court.

The terms vary from ten to fifteen days, in proportion to the population of the districts, and the number of suitors. An appeal lies to these courts from the county courts, and from them to the court of appeals. Their original jurisdiction is limited to suits where the debt or claim amounts to one hundred dollars or upwards, nor will an appeal lie to them for a less sum. But writs of error and *supersedeas* are grantable where the judgment of the inferior court is for any sum not under ten

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pounds. Special actions on the case, and actions of trespass, either of a personal or mixed nature, may likewise be brought therein; but, in these, if the plaintiff does not obtain a verdict for five pounds, he recovers no more costs than damages, unless the trespass is malicious, or the title or bounds of land is brought in question. It has been held, that if any offense is committed within any district, process may be awarded from that court to any part of the state to apprehend the offender;[34] but in civil actions, except where there are two or more parties jointly, or jointly and severally bound in any contract or obligation, one of whom resides within the district, it is held that process cannot be awarded to any county without the district, yet, in the case of a writ of right for lands lying in one district, it has also been held, that if the tenant resides within another district, *atestatum praecipe* may be awarded to such other district, after the defendant has been returned no inhabitant of the county where the land lies. And by a parity of reasoning it would seem, that in actions of trespass *quare clausum fregit,* a similar remedy ought to be given; otherwise there might be a great defect of justice where the trespasser resides in one district, and the lands lie in another, because these actions must always be laid in the county where the lands lie: there is, however, no provision for this case in the law. The consequence, perhaps, may be, that the suit must be brought in the general court, where the party grieved is entitled to his remedy, if he cannot obtain it in any other court. The district courts, with the consent of the accused party, may adjourn any question of law, in a criminal case, to the general court for decision, and may also adjourn thither any new or difficult question in civil cases. The venue likewise may, upon good cause shown to the general court, be changed from one district to another, and any suit depending in a district court, in which any judge of the general court shall be interested, unless good cause to the contrary be shown, shall be removed to the general court for trial at that bar.[35]

The general court continues to sit at the seat of government in Richmond, and holds two sessions, the one in June, the other in November, yearly. It has not original jurisdiction in civil suits, in any case where a remedy can be had in any other tribunal, nor has it jurisdiction in any other case whatever, where a remedy can be had in any other court, except those which are particularly enumerated in the constitution, or in the act constituting it, or in some other statute. On the other hand, it's jurisdiction is general over all causes, matters, and things at common law, as well criminal as civil, unless there be some other tribunal to which cognizance of the case belongs. And this is founded upon this principle, that there ought to be no right without it's remedy. Therefore, where a person grieved cannot obtain a remedy in any other court, he shall obtain it in the general court, if the cause of action arises by the common law. This provision may supply all the *casus omissus* of the district and county court jurisdictions. Of these, the following are the most obvious. 1st. Where, in an action of trespass *quare clausum fregit,* the defendant resides in a different district from that where the lands lie. In this case, no action lies in the county or district courts, for the action must be brought in the county or district where the lands lie. If, in the county court, the defendant be returned "no inhabitant," the suit abates; if, in the district court, a *capias ad respondendum* (which is the process in this case) be sued out against the defendant in any other district than that in which he resides, before a *non est inventus* has been returned in his district, upon a *capias* issued against him in the same suit, the writ is void. – In this case then it would seem that a competent remedy can be had, only in the general court. 2dly. In a writ of right, where the tenant of the fee resides in one district, and the lands lie in another, it may admit of some doubt, (though in the case before alluded to the doubt was overruled) whether process could be awarded 'to another district. 3dly. In all cases where a person is aggrieved by the judgment of the inferior courts, where the debt or thing recovered or claimed is under the value of ten pounds, it is perhaps reasonable to infer, that a writ of error lies to the general court; and 4thly. Where any person is aggrieved by the judgment of a single

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magistrate, it is no less reasonable to suppose, that a writ of false judgment ought to lie from some court; for otherwise, great oppression and injustice might be exercised towards poor persons, (suits and controversies to a small amount being most generally between, or against them.) And, as no other court is invested with jurisdiction in these cases, and as those proceedings are founded upon the common law, it would seem that the general court, as the supreme court of common law jurisdiction, should have the power of administering the remedy. But the judgment of the magistrate is expressly declared to be final, and so perhaps is that of the court, upon petitions for small debts, etc. a subject which may deserve the attention of the legislature.

The express jurisdiction of the general court seems to be at present confined to cases of impeachment, except where a judge of that court is impeached; indictments or informations against the clerks of courts for breach of good behavior in office, and against counsel and attornies guilty of mal-practice in the general courts, whose licenses may thereupon be suspended or wholly vacated. High treasons, misprisons of treasons, and other offenses against the commonwealth committed by any citizen of the commonwealth, and all felonies committed by citizen against citizen, out of the state (except piracies and felonies on the high seas, the cognizance of which belongs to the court of admiralty of the United States) are also to be tried in the general court. These with some other cases chiefly of a fiscal nature, particularly enumerated in the act concerning the general court, together with those before noticed, seem to be the only cases now cognizable in the general court, as contradistinguished from the district courts. Deeds for lands in any part of the commonwealth may there be proved, and the court has moreover cognizance of testamentary and other causes of a similar nature throughout the commonwealth. A mandamus also lies from that court to the district courts. It has power moreover, as was before observed, to change the venue from one district to another, or to direct a trial to be had at its own bar. Three judges constitute a court, and the terms are limited to sixteen days. An appeal lies from this court to the court of appeals, where the matter in dispute is of the value of one hundred and fifty dollars, or is a freehold or franchise. This system is susceptible of many improvements.

The principal inconveniences which have hitherto manifested themselves are the want of concert in the opinions of the judges, who being allotted, two and two together, have not an opportunity, by consulting together, to establish that uniformity which is much to be desired in judicial decisions. This produces a want of confidence in the judges, and want of respect for their opinion in the suitors; hence no question of any importance arises in which there is not an appeal: this in time must clog the administration of justice so far as to require the court of appeals to sit constantly throughout the year, nor will the whole year suffice, if appeals are allowed, as of course, in all cases, whether there be, or not, any error supposed to exist in the judgment of the court from which the appeal is made. Another inconvenience which has more than once produced great mischief, is that two judges are necessary to constitute a criminal court, unless the prisoner shall petition to be tried., It has frequently happened, (and the same thing must continue to happen very frequently) that one of the judges, by sickness or other incapacity, has been unable to attend the court where there were criminals of the most atrocious kind to be tried; these from a consciousness of their guilt are sure not to petition to be tried, unless the witnesses against them happen to be absent. If the same thing should happen at the next court, the prisoner, whatever be his offense, has a right to be bailed; and if there be not a court to try him at the third term he shall be discharged. Some of the most atrocious offenders that were ever brought to the bar of a court, have escaped the punishment due to their crimes from these circumstances. Oftentimes it has happened that the witnesses who were present at the first term, could never attend, or be compelled to attend, again; many other circumstances concur to give an atrocious offender a certainty of escaping, where there is not a full court at the first

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term. To remedy this inconvenience it would surely be better whenever one judge only should constitute the court, to allow a bill of exception in behalf of the prisoner, which might be adjourned to the general court for decision.

It would be more difficult to remedy the want of uniformity in the opinions of the judges; but even this inconvenience might in time be lessened, if not wholly removed, by transferring to the general court all causes whatsoever now cognizable in the district court of Richmond, and requiring the attendance of a greater number of judges than are now necessary to constitute that court. By these means a more uniform practice, and probably more uniform opinions, would prevail in the district courts, which would gradually conform to the precedents established in the general court: whereas, at present, little respect is paid to any former precedent, either by the bench, or the bar.

5. The high court of chancery is a court of equity, possessing general jurisdiction over all persons and all cases in chancery, where the matter in dispute is of the value of thirty-three dollars, and one third. The jurisdiction of this court depends upon the import of this word "chancery" which conveys no definite meaning. Our acquaintance with the constitution, jurisdiction and powers, of the high court of chancery in England, affords a clue to our inquiries, which is not altogether without difficulty in the unravelling. " The jurisdiction of this court," said the late lord chancellor Hardwicke, when at the bar " as it is a court of equity, is perhaps of all others the most difficult to be traced, both as to it's foundation, and the time when it hadit's original. But I think there have been very great opinions, and I am apt to believe a strict search into antiquity might enable one to show, that this jurisdiction has also taken it's rise from the great seal. For the chancery being, upon the division of the king's courts, the *officina justitiae* from which all original writs issued, and where the subject was to come for remedy in all cases; the chancellor was applied to in all cases, for proper writs, where the subject wanted a remedy for his right, or redress for a wrong that had been done him. But in the execution of his authority, he was confined by the rules of the common law, and could award no writs but such as the common law warranted, therefore, when such a case came before him as was matter of trust, fraud, or accident, (which are the subjects of an equity jurisdiction) the chancellor could award no writ proper for the plaintiff's case, because the common law afforded no remedy. Upon this it is not improbable, that the chancellors, who were most commonly churchmen, men of conscience, when they found those cases grew numerous, in order to prevent the suitors being ruined, against right and conscience, and that no man might go away from the king's court without some relief, summoned the parties before them, and partly by their authority, and partly by their admonitions, laid it upon the conscience of the wrongdoer, to do right.[36] This extraordinary court or court of equity proceeds by the rules of equity and conscience, and moderates the rigor of the common law, considering the intention rather than the words of the law. It gives relict for and against infants, notwithstanding their minority,[37] and for and against married women notwithstanding their coverture. In some cases a woman may sue her husband for maintenance, she may sue him when he is beyond sea, etc. and be compelled to answer without her husband. All frauds and deceits for which there is no redress at common law, all breaches of trust and confidence, and accidents, as to relieve obligors, mortgagors, etc. against penalties and forfeitures, where the intent was to pay the debt, are here remedied; for in chancery a forfeiture shall not bind, where a thing may be done after a compensation made for it.[38]

It will give relief against the extremity of unreasonable, engagements entered into without consideration; oblige creditors that are unreasonable to compound with an unfortunate debtor:[39] and make executors give security, and pay interest, for money which is to lie long in their hands.[40] Here executors may sue one another, or one executor alone be sued without the rest: order may be made

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for the performance of a will: it may be decreed who shall have the tuition of a child.[41] It may confirm titles to lands though one has lost his writings, render conveyances defective through mistake, etc. good and perfect, but not defects in a voluntary conveyance, except where intended as a provision for younger children.[42] This court may likewise grant injunctions to stay proceedings at law, or to stay executions upon unrighteous judgments, against the defendants in a court of law. Or to stay waste, or to quiet the possession of lands. It may likewise set aside a verdict at law, and award a new trial, where injustice has been done on a former trial. 1. Equity cases abridged, 377. Such are the general objects of the jurisdiction of the high court of chancery, in England, which may be regarded as the prototype of our own as a court of equity. How far the common law jurisdiction of the high court of chancery in England, is to be regarded as vested in the high court of chancery in Virginia, is a question of some nicety, inasmuch as the general court is declared to have general jurisdiction over all causes, matters, and things, at common law, as well criminal, as civil, except in such cases as by the constitution of the United States, or of the commonwealth, or any statute made by the congress of tho United States, or by the general assembly of the commonwealth, are or shall be vested in any other tribunal.[43]

The high court of chancery in Virginia, may award process, and make a decree against an absent debtor, or other absent defendant, although he never was within the limits of it's jurisdiction;[44] it has decreed conveyances for lands not lying within the state, to be made by persons served with process within it's limits.[45] It may issue writs of *ne exeat,* to prevent defendants from departing the state,[46] and writs of *habeas corpus* to deliver any person illegally detained in custody;[47] may grant relief to any person having a demand against the commonwealth which is disallowed by the auditor: and may upon petition grant relief in any other case where any person has an equitable claim against the state:[48] may require the opinion of the general court on any matter of law, may direct issues to be tried in that or any other court, according as justice and the convenience of the patties may require; may take cognizance of suits at law, properly cognizable in the general court, where a majority of the judges of that court are interested; may grant writs of certiorari for removing thither any suit in chancery, depending on any county or inferior court; may grant bills of review after decree made therein.[49] It has also appellate jurisdiction, and may reverse or affirm the decree of any county court or inferior court, where the matter in dispute amounts to thirty-three dollars and one third.[50] Lastly, this court has jurisdiction in all cases of incestuous marriages, and may annul the same, and punish the parties by fine, and if it see fit, may cause them to give security not to co-habit again.

The general court, as has been already mentioned, before the revolution possessed all the powers and jurisdiction of a high court of chancery: when the revolution took place it was thought proper to separate the court of equity from the court of law. The constitution accordingly requires, that judges in chancery shall be appointed by joint ballot of both houses of assembly, and be commissioned by the governor, and hold their office during good behavior.[51] When the court was first organized, three judges were appointed, but the number was reduced to one some years after.[52] An appeal lies from this court to the court of appeals, where the matter in controversy is of the value of one hundred and fifty dollars, and such appeal may now be made from an interlocutory decree.[53] The high court of chancery holds three sessions in the year, and sits at the capital in the city of Richmond. The terms begin in March, May, and September. The first continues eighteen days, and the two last twenty-four each. But the court is always considered as open, so as to grant injunctions, writs of *ne exeat, certiorari,* and other process usually granted in vacation. Such, until very lately, was the constitution and jurisdiction of the high court of chancery. By an act passed in the year 1801, c. 14, it was new organized, the state being divided into three districts. A court for the eastern district, consisting of the counties in general which lie below the falls of the great rivers, was

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established at Williamsburg. The counties lying between the eastern district and the blue ridge of mountains, constitute the middle district, and a court is held for the same at Richmond as heretofore. The counties westward of the middle district compose a third district, and a court is held for the same at Staunton, in Augusta county, one judge being appointed for each district: and the courts respectively, and the judges thereof in term time, as well as in vacation, are subject to the same rules and regulations, and have and may exercise the same jurisdiction and powers within their respective districts, in every respect, as the high court of chancery, or the judge thereof, formerly possessed.

6. The court of appeals is the supreme judicial court of the Commonwealth.[54] It has original cognizance in no case whatsoever, except where a judge of the general court may be impeached; but it has appellate jurisdiction from the district courts in all cases where the matter in controversy amounts to one hundred dollars, and from the general court and high court of chancery where it amounts to one hundred and fifty dollars, or is a freehold or franchise; and whether it reverses or affirms the judgment, certifies it's own judgment to the court from which the matter was removed, who are to enter it as their own, and award execution thereon accordingly. The judges of this court are, by the constitution, required to be appointed by joint ballot of both houses, and commissioned by the governor, and, as well as the judges of the high court of chancery and general court, hold their offices during good behavior. If they are impeached, they (and all others who maybe impeached, except the judges of the general court,) are to be tried in the general court. They are to have fixed and adequate salaries, and are incapable, as well as others, of holding any lucrative office, or of being elected members of either house of assembly. The first act for organizing the court of appeals declared it should be composed of the judges of the high court of chancery, general court, and court of admiralty: no commission was made out for them as judges of the court of appeals, nor were they balloted for as such. About ten years after, the legislature wishing to new model the courts, availed itself of this circumstance, and gave it an entire new constitution. There are now five judges, who are appointed and commissioned in the manner directed by the constitution.

This court sits twice a year in April and October. The duration of the terms is unlimited. The multiplicity of business renders them very long already; they will probably increase in duration yearly. If a majority of the judges of the court of appeals are interested in the determination of any suit therein depending, the same shall be entered of record, and the clerk shall thereupon issue writs of summons to the chancellor and the judges of the general court, requiring their attendance, if not disqualified, to attend at the next session of the court of appeals. And the remaining judges, who are not interested, if any such there be, together with such as attend by virtue of such summons, or any five of them, constitute a special court of appeal for the trial of such suit, and may proceed to hear and decide the same in like manner as the ordinary court. It now remains to say something of the federal courts.

By the constitution of the United States,[55] it is declared, that the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as congress may, from time to time, ordain and establish; the judges of which shall hold their office during good behavior, and receive a salary which shall not be diminished during their continuance in office. The judicial power extends to all cases in law and equity arising under the constitution, the laws of the United States, and treaties 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 those between two or more states; between citizens of different states; between citizens of the same state claiming lands under grants of different states; and between a state and foreign states. In the original frame of the constitution, the judicial power was still more

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extensive; but an amendment has been proposed and ratified, by which it is declared that 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. Amendments to the constitution of the United States, Art. 13.

The judicial courts of the United states, as organized by the act of 1 Cong. 1 Sess. c. 20, consisted, first, of a district court in each state, and in that part of Massachoosetts which is called the province of Maine, a single judgment being appointed for each district, who was by law required to reside within the same; these courts held four sessions in every year. Secondly, of a circuit court; which held two sessions annually in each district, and consisted of two judges of the supreme court who alternately rode the circuits, together with the judge of the district court, or any two of them. But for the convenience of the judges of the supreme court, on whom the duty was founded to fall very hard, a subsequent act[56] required the attendance of one of them only at each circuit court: and, thirdly, of a supreme court, consisting of a chief justice, and five associate justices, which held two sessions annually at the seat of government.

During the second session of the sixth congress a very extensive alteration in the system was proposed, and carried into effect by an act[57] passed on the thirteenth day of February 1801, which, among other provisions, divided the United States into twenty-two districts. The districts were again classed into six circuits, in each of which, (except the sixth, comprehending the districts of East Tennessee, West Tennessee, Kentucky and Ohio,) three judges, to be called circuit judges, one of whom was to be commissioned as chief judge, were authorized to be appointed, with an annual salary of two thousand dollars, each. In the sixth circuit, one circuit judge only was to be appointed, who together with the district judges of Kentucky and Tennessee was authorized to hold the circuit courts for that circuit; and whenever the office of district judge, in those districts, respectively, should become vacant, such vacancies were to be supplied by the appointment of two additional judges, for that circuit.

The appointments authorized by this act were made by the president for the time being, altho' not more than twenty days remained of the period for which he was elected, after passing the act, which had been carried thro' congress by small majorities, after a strenuous opposition. As soon as the question had been taken and carried in the house of representatives, a member gave notice, which was laid upon the table, that at the next session he should move for a repeal of the act. Some unpopular appointments of judges, made by the president were not calculated to reconcile the opponents of the act to its passage. The question whether a succeeding congress could repeal the law, and by so doing remove the newly appointed judges from office, soon became a popular topic of discussion, in many parts of the United States. And while many who disapproved the law, were satisfied that it could not constitutionally be repealed, so as to affect the judges who held commissions under it, others either doubted, or declared themselves convinced of the constitutionally, as well as expediency and sound policy of such a measure. Accordingly, very soon after the commencement of the first session of the seventh congress, a motion was made in the senate for the repeal of the act.

The debate was conducted with great ability in both houses successively, during a considerable portion of the session; the several speakers both in favor of the repeal, and against it, displaying a scope of talents and ingenuity in their arguments, which showed them equally prepared to maintain their opposite opinions. The bill passed the senate by a small majority only; but 'the majority in favor of the repeal was much greater in the house of representatives. It received the president's assent on the eighth day of March, 1802, and it's passage, as it respects the construction of the constitution of

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the United States, and of that principle (supposed to be a fundamental one,) which appeared both to require and to have secured the absolute independence of the judiciary department, may be deemed one of the most important events which have taken place in congress since the adoption of the constitution. The act of the 13th Feb. 1801, 6 Cong. 2 Sess. 4. As also, another passed the third day of March, 1801, for altering the times and places of holding certain courts, 6 Cong. 2 Sess. c. 62, were totally repealed, and all acts, and parts of acts, which were in force before the passage, thereof, and which by the same were either amended, explained, altered, or repealed, are thereby revived, and declared to be in as full and complete force as if those two acts had never been made. And by a subsequent act of the same session,[58] the districts of the United States (excepting the districts of Maine, Kentucky, and Tennessee,) are formed into six circuits, of which the districts of New Hampshire, Massachoosetts, and Rhode Island, constitute the first; Connecticut, New York, and Vermont the second; New Jersey and Pennsylvania the third; Maryland and Delaware the fourth; Virginia and N. Carolina the fifth; and S. Carolina and Georgia the sixth. The chief justice of the U. States, and the several associate justices of the supreme court, are assigned to these courts respectively; and together with the district judges respectively, are to hold two circuit courts annually, in each district, but if only one of them shall attend, the circuit court may be held by the judge so attending. And on every appointment hereafter made of a chief justice or associate justice of the supreme court, the judges shall allot themselves among the several courts, as they shall think (it and such allotment shall be entered upon record. And, if no allotment be made, the president may make the allotment; which he seems authorized to do in the first instance after making any appointment; and the allotment made in cither case is binding until another is made.

The district courts of the United States have, exclusively of the courts of the several states, cognizance of all crimes and offenses which shall be cognizable under the authority of the United States committed within their respective districts, or upon the high seas, where no other punishment is to be inflicted than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months: as also exclusive cognizance of all civil causes of admiralty and maritime jurisdiction,[59] and of all captures made within the waters of the United States, or within a marine league of the coasts or shores thereof[60] of all seizures made under the laws of impost, navigation or trade of the United States, where the seizures are made on waters navigable from the sea, by vessels often tons burden, within their respective districts, as well as upon the high seas: saving to the suitors in all cases the right of a common law remedy where the common law is competent to give it; and also exclusive cognizance of all seizures made on the land or other waters than those before mentioned, and of all suits for penalties and forfeitures incurred under the laws of the United States[61] (except in cases of penalties incurred by breach of the laws imposing duties on wine licenses, spirits distilled, or goods, sold at auction, where the distance is more than fifty miles from the place of holding a federal district court, which are also cognizable by the state courts:[62] as also cognizance concurrent, with the state courts of all causes where an alien sues for a tort only, in violation of the law of nations, or of any treaty of the United States; and of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to one hundred dollars. They have also jurisdiction, (exclusively of the state courts) of all suits against consuls or vice-consuls, except for offenses above the description above mentioned.[63] A writ of error lies from the circuit courts of the United States to these courts, where the matter in dispute is more than fifty dollars exclusive of costs.[64] The district courts for Virginia are now held alternately at Richmond and at Norfolk,[65] on the third Tuesday in December, March, June and September, yearly, in addition to which, the district judge has power to hold special courts at either of those places, or at any other place in the district, as the nature of the business may require.[66]

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The circuit courts of the United States, hold two sessions every year in each district:[67] that for Virginia, was formerly held alternately at Williamsburg and Charlottesville, but is now stationary at Richmond, and sits on the twenty-second days of May and November, yearly. The present chief justice of the United States is allotted to this circuit, and that of North-Carolina.[68] The circuit courts now consist of one judge of the supreme court of the United States, according to the allotment made by the act of 7 Cong. 1 Sess. c. 31, and the district judge of the district in which the court is held; but if one of the judges only attend, he may hold the court as was before mentioned. In addition to the stated sessions of these courts, the judges have power to appoint and hold special-sessions for the trial of criminals, at any other time and place within the district as convenience may require. These courts have original cognizance concurrent with the state courts, in all suits at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the value of five hundred dollars; and the United States are plaintiffs, or an alien is a party; or the suit is between a citizen of the state where the suit is brought, and n citizen of another state. They have also exclusive cognizance of all crimes and offenses cognizable, under the authority of the United States, except where the laws of the United States may otherwise direct, and concurrent jurisdiction with the district courts of the United States, of the crimes and offenses cognizable therein. But no person can be-arrested in one district, for trial in another, in any civil action, and no civil suit can he brought therein, against an inhabitant of the United States, unless he be an inhabitant of the district, or found therein at the time of serving the writ; nor can these courts take cognizance of any suit, brought by an assignee of a promissory note, or other chose in action, unless a suit might have been prosecuted therein if no assignment had been made, except in cases of foreign bills of exchange. Suits cognizable in these courts, if commenced in a state court against an alien, or a citizen of another state, or if the title of lands be concerned, and the value of the matter in dispute exceeds five hundred dollars, may on certain conditions be removed therein for trial. A writ of error in the nature of an appeal, where the matter in dispute exceeds two thousand dollars, lies from the supreme court of the United States to these courts.[69]

In all cases removed, by appeal or writ of error, from the district courts to the circuit courts, judgment shall be rendered in conformity to the opinion of the judges of the supreme court, presiding at the circuit courts. And in case of disagreement in opinion between the judges presiding in the circuit courts, in any other case, the point upon which the disagreement shall happen, shall, during the same term, upon request of either party, be stated under the direction of the judges, and certified under the seal of the court to the supreme court at their next session, and shall be there finally decided, and the decision shall be remitted to the circuit court and there entered of record, and have effect according to the nature of the judgment or order of the supreme court. But the cause may still proceed in the circuit court, if, in the opinion of the court, further proceedings can be had, without prejudice to the merits. It is further provided that imprisonments shall not be allowed, nor punishment in any case inflicted, where the judges of the circuit court are divided in opinion upon the question touching such punishment or imprisonment.[70]

The supreme court of the United States has jurisdiction exclusively, in all such suits or proceedings against ambassadors or other public ministers, or their domestics, or domestic servants, as a court of law can exercise consistently with the law of nations; and original, but not exclusive, jurisdiction, of all suits brought by ambassadors or other public ministers, or in which a consul or vice consul shall be a party.[71] This court has likewise power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus to any courts appointed or persons holding office under the United States. A writ of error lies from this court to the highest court of law or equity of a state, in which a decision in the suit can be had. In

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any suit where the validity of a treaty, or a statute of, or an authority exercised under, the United States is called in question, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where the construction of any clause in the constitution, or of a treaty, or statute of, or commission held under, the United States is drawn in question, and the decision is against the right, title, privity, or exemption set up, or claimed by either party under the same. But no other error can be assigned but such as immediately respects the abovementioned questions.[72]

All the courts of the United States have power to issue writs of *scire facias, habeas corpus,* and all other writs not especially provided for, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. The judges both of the supreme and district courts, have likewise power to issue writs of *habeas corpus,* where the prisoner is in custody under, or by color of the authority of the United States.[73]

The supreme court is hereafter to be holden at Washington, the present seat of government of the United States, on the first Monday in February annually, by any four of the justices thereof; but one or more may make any orders touching any suit preparatory to the trial or decision thereof; and if four justices do not attend within ten days, the court shall be continued over to the next stated session. It is moreover made the duty of the associate justice resident within the fourth circuit, to attend at the city of Washington on the first Monday in August annually, and he is authorized to make any orders touching any suit depending in the supreme court preparatory to the trial or decision thereof: and all writs and process may be returnable to the first Monday in August, as well as to the session to be held in February; and all actions, pleas and other proceedings in any cause civil or criminal shall be continued over to the ensuing February session:[74] so that there is now but one session of the supreme court in every year, for hearing and deciding causes therein depending, the session in August being merely preparatory.

The senate of the United States constitute a court for the trial of impeachments made by the house of representatives: when sitting for that purpose, they must be upon oath or affirmation. When the president of the United States is tried, the chief justice must preside, and no person can be convicted without the concurrence of two-thirds of the members present. But judgment in case of impeachment cannot extend further than to removal from office, and disqualification to hold any office of honor, trust, or profit, under the United States.[75] This court, although in some respects, it may be considered as the highest tribunal in the United States, possesses no authority in any civil case, nor in any criminal case whatsoever, except in the case of impeachments.

Although in this general view of the several judicial courts of the commonwealth, and of the United Slates, their jurisdiction in criminal cases has been incidentally mentioned, yet we shall have occasion to pay a more particular attention to that part of their respective constitutions, in the notes on the ensuing book of the commentaries.

NOTES

1. Having no copy of either of the charters of Virginia, except that of Charles the second, granted in the twenty-eighth year of his reign, I cannot be particular on this subject. –Nor is it, perhaps, material.

2. Beverley's History of Virginia, Pt. 1, Sec. 45. County courts were first established in 1622. See also H.V. Pt. 4, c. 6, throughout.

3. Pur is 1661, c. 19, 24, 25, 25, 31.

4. Edition of 1733, p. 28.

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5. 1705, c. 19. Edition of 1733.

6. 17XX, c. 4.

7. Ibid., 1788, c. 71.

8. 1794. c. 67.

9. Ibidem.

10. Williamsburg, Norfolk, Richmond, Petersburg, Fredericksburg, Alexandria, Winchester and Staunton, are the only corporations in which courts are established.

11. bid. c. 92. Ib. c. 95. Ib. c. 120. Ib. c. 90, 103.

12. The cognizance of all causes not exceeding ten dollars or four hundred pounds of tobacco, belongs to the justices of the peace, any one of whom may give judgment and award execution against the goods and chattels of debtors to that amount, but he cannot award execution against the body of the debtor. 1794. c. 67, amended by act of 3800. c. 38. Sess. Acts.

13. L. V. 1748, c. 4.1794. c. 67.

14. L. V.Edi. 1764, c. 67.

15. Ibidem c. 67.

16. C. V. Art. 15.

17. Ibidem c. 73.

18. Ibidem c. 95,120.

19. C. V. Art. 15.

20. Edi. 1794, c. 80, 81, 1-16,19. C. V. Art. 15.

21. L. V. 1797, c. 8. Sess Acts.

22. Ibidem. But in suits at common law if a def. be returned "no inhabitant" of the county, the suit abates as to him. And even if he be taken, yet if he be in fact an inhabitant of any other county, he cannot be held to bail unless a mm est iirsentiu has been returned upon a capias issued against him in the same suit in the county in which he resides, or, the cause of action arose within the county or corporation where the suit may be brought. L. V. 1794, c. 80. Sec. 13., c. 67. Sec. 23.

23. 1784. c. 78.

24. Ib. 6 67.

25. Ib. c. 167. Ib. c. 103.

26. Ib. c. 74.

27. c. 17.

28. 1778, c. 9.

29. c.40.

30. 1785, c. 12.

31. 1787, c. 16., c. 39.

32. 1794. c. 65, 66.

33. The districts are Suffolk, Petersburg, New London, Washington, and the Sweet Springs in Botetourt, for the southern division of the state; Williamsburg, Richmond, Charlottesville, and Staunton, for the middle; Northumberland, Fredericksburg, Dumfries, Winchester, Hardy and Monongalia, for the northern; and Accomack, for the eastern shore.

34. Upon a question referred to the general court, it has been held, that every indictment must allege, that the offense was

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committed within the jurisdiction of that district court where the indictment is brought.

35. In 1792, an act passed giving to these courts chancery jurisdiction. A case soon after arose in Dumfries district court, wherein a motion was made for an injunction to stay execution upon a judgment of that court, given at a preceding term. The case was adjourned to the general court for novelty and difficulty. That court certified their opinion, that the motion ought to be over-ruled; because, the powers and duties assigned to be performed by that clause of the act, could onl) be executed by those who may be constituted judges in chancery in the manner prescribed by the constitution of the commonwealth The clause was consequently not carried into effect. See the case of Kamper and Hawkins in the general court, Nov. 16,1793.

36. 1 Strange, 150.

37. V. L. 1794, c. 95. 172.17-J7, c, 98. Accordant.

38. 1 Danvers. 752 2 Ventris. 352.

39. It may be doubted whether the high court of chancery in Virginia, has such power as this, which is probably derived from the English Statutes concerning bankruptcy.

40. 2 Vent. 346. |iwej a to this, if the executor, when he qualified, gave sufficient security.

41. L. V. 1794, c 95. Accordant.

42. 2 Vent. 265.

43. V. L. 1794, c. 65. J. Wythe's Rep. 143.

44. *Ibid,* c.118.

45. V. L. 1794, c. 64.

46. Ibid. c. 167.

47. *Ibid.* c. 78,64.

48. V. L. 1794, c. 64.

49. V. L. c. 85.

50. *Ibid.* c. 104.

51. C. V. Art. 14.

52. V. L. Oct. 1777, c 15. 1788, c. 69. 17S4, c. 64.

53. V. L. 1797, c. 5.

54. 1794, c. 63.

55. Art. 3.

56. 2 Cong. c. 66.

57. 6 Cong. 2 Sess. c. 4.

58. L. U. S. 7 Cong. 1 Sess.c. 8. f ftid.7 Cong. Sess. 1. c. SI.

59. L. U. S. 1 Cong. 1 Sess. c. 20.

60. L. U. S. 3 Cong. c. 50.

61. *Ibid.*

62. L. U. S. 5 Cong. c. 48,49, 66.

63. L. U. S. 1 Cong. 1 Sess. c. 20.

64. L. U. S. 1 Cong. 1 Sess. c. 20.

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65. L. U. S. 7 Cong. 1 Sess. c. 31.

66. L. U. S. 1 Cong. 1 Sess. c. 20.

67. L. U. S. 1 Cong. 1 Sess. c. 20.

68. L. U. S. 1 Cong. 1 Sess. c. 20.

69. L. U. S. 1 Cong. 1 Sess. c. 20.

70. L. U. S. Cong. c. 31.

71. See the case of Joseph Ravara, consul from Genoa, reported in 2 Dallas' Reports, 29r.

72. L. U. S. 1 Cong 1 Sess. c. 20.

73. *Ibidem.*

74. L. U. S. 1 Cong 1 Sess. c. 31.

75. C. U. S. Art. l, s. 3.3.

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NOTE B

Of the Proceedings upon Petitions for Lapsed Lands, under the Former Government

IN all the patents for lands in Virginia granted under the authority of the crown of England, there was a condition that the same should be seated and planted in a particular manner, within three years from the date of the patent; and a farther condition, that the lands should be forfeited, in case the quit-rents reserved in the patent should not be paid for the like space of time. And, in case of failure in either instance, any other person who should first petition the governor of the colony for the same, setting forth in his petition in what county the land lay; to whom it was formerly granted; for what cause it had become forfeited, and in what county the grantee resided, and filing a copy thereof in the secretary's office, might thereupon obtain a writ, directed to the sheriff of the county where the grantee resided, summoning him to appear at the next general court, to show cause why the land so become forfeited, should not be granted to the party petitioning for the same; which, if he failed to do, by making sufficient proof that the land had been seated and planted, or the quit-rents duly paid, as the cause of forfeiture alleged might be, the general court adjudged the lands to be forfeited and revested in the crown; which being certified to the governor, and also that the prosecutor in that suit was the first petitioner for the same, and had pursued his petition with effect, he became thereby entitled to a patent for the lands, in the same manner, and under the same conditions, as the former grantee. L. V. 1710, c. 13. Edi. 1733. 1748, c. 1.

And where any person intended to take up unappropriated lands, it was requisite that the same should be surveyed, and the survey returned to the secretary's office by a sworn surveyor, duly commissioned, and the breadth of every tract so surveyed was required to be one-third, at least, in proportion to the length, except where the courses might be interrupted by rivers, creeks, or unpassable mountains and swamps, or by the bounds of other patented lands.[1] And if it happened, that the right of any other person was invaded by such survey, or if the same was not made according to law, the courses seem to have been, that the person disposed to contest the grant entered a caveat against issuing the same in the secretary's office, and thereupon a summons issued to the person for whom the survey was made, to appear at the next general court, and defend his right to the lands, upon which nearly the same proceedings were had as in the case of a petition for lapsed lands.

When the revolution took place, by an act passed in May 1799,[2] the reservation of royal mines, of quit-rents, and all other reservations and conditions in the patents from the crown, were declared null and void; and that all lands thereby granted, should thereafter be held in absolute and unconditional priperty to all intents and purposes whatsoever; and farther, that no petition for lapsed lands shall be admitted or received on account of any failure or forfeiture whatsoever, alleged to have been incurred after the 29th day of September, 1775. Thus did this act at once put an end to petitions for lapsed lands, but at the same time it established and regulated the proceedings upon caveats; of which, as regulated by law at this day, it now remains to say something.

Every person desiring to take up lands in Virginia, and having a land warrant for that purpose, is to lodge his warrant with the surveyor of the county where the lands, or the greater part of them lie, and to direct the location thereof so specially and precisely, "as that others maybe enabled with certainty to locate other warrants on the adjacent residuum," which location is to bear date on the day it is made, and the priority is to be given by the surveyor to the first applicant. The survey being made pursuant to the directions of the act, the party, within twelve months at farthest, (which period has been from time to time extended) is to return the plat and certificate of survey into the land

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office; and if he fails to make such return in due time, or if the breadth of the plat be not one-third of it's length, any other person may enter a caveat in the land office, against issuing any grant upon such location or survey; expressing for what cause the grant should not issue: or if any person obtains a survey of lands to which another has, by law, a better right, the latter may enter a caveat in like manner to prevent his obtaining a grant until the title can be determined; but the caveator must, in his caveat, express the nature of the right in which he claims the lands. He is then to take, from the register of the land office, a certified copy of his caveat, and within thirty days afterwards must deliver it to the clerk of the court of the district or county in which the land lies; he must, moreover, obtain from the surveyor of the county, or from the register of the land office, a certified copy of the survey and plat, which, within thirty days after entering the caveat, must be delivered to the clerk of the court where the suit is instituted; and, on failure in either of these instances, the caveat is void. The clerk, on receiving the same, is to enter a copy of the caveat in his books, and issue a summons reciting the cause for which the caveat is entered, and requiring the defendant to appear on the first day of the next court and defend his right; and on such process being returned executed, the court is to proceed to determine the cause in a summary way, without pleadings in writing, impaneling, and swearing a jury for the finding such facts as are not agreed by the parties.

A copy of the judgment, if in favor of the defendant, is to be delivered to the register of the land office, and thereupon die caveat is vacated; but, if not delivered within three months, a new caveat may for that cause be entered. But, if judgment be given in favor of the plaintiff, upon delivering the same into the land office, together with a plat and certificate of the survey, and also producing a legal certificate of new rights on his own account, he shall be entitled to a grant of the land; but on failure thereof for six months, after the judgment in his favor, any other person may enter a caveat, for that cause, against issuing a grant; upon which subsequent caveats the same proceedings are to be had, toties quoties, as upon the original. If judgment be given for the defendant, he is entitled to his costs, if for the plaintiff, the court in their discretion may award costs. The court may like wise rule the plaintiff to give security for costs, and, if he fails, dismiss his suit. If a summons upon a caveat be either not returned at all, or returned not executed, the caveat shall be dismissed with costs by the court, unless they shall be satisfied that it does not proceed from the neglect of the party entering the caveat. A practice having prevailed of entering friendly caveats, without any intention of prosecuting them, it is moreover necessary that the party entering a caveatshall file an affidavit with the register; that the same is really and bona fide with intention of procuring the lands, and not in trust for the benefit of the person against whom it is entered; and all caveats entered contrary to the directions of the act, are void. L. V. 1794, c. 86.

Such is the nature of this suit, and the proceedings therein. We may perceive, that it bears a distant resemblance to a proceeding of the same name in the spiritual courts in England, to stop the institution of a clerk to a benefice, or the probate of a will, etc. In the latter case, the caveat stands in force for three months, and is a caution (caveat) to the ordinary, that he do no wrong; so in this instance of which we have been speaking, it is a caution to the register not to issue an unlawful patent;[3] and the suit consequent thereupon between the parties, is for his final government in that respect.

It was difficult to assign to this note a proper place in the Commentaries. I have chosen to annex it to the chapter which treats of suits by which the right to lands is to be decided.

NOTES

1. IMS, C. 1.

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2. c. 13.

3. See Washington's Reports, Vol.1, page 40. 1 Call's Reports, 206.

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NOTE C

Of the Commencement and Process, in Civil Suits at Common Law

HAVING taken a view of the method in which an action is commenced in the courts of Westminster hall, and of the process usually sued out to compel an appearance, where the defendant fails to pay obedience to the original writ, or summons, it is now necessary that we should point out the method of proceeding in similar cases, in the courts of this commonwealth. And here it will be sufficient to remark by the way, that the process of real actions must be commenced by original, or by an. original writ, issuing out of that court to which it is made returnable, and in which the trial is meant to be had, and not out of the chancery, as in England, and that all subsequent proceedings are to be conformable to those in England, in similar cases, except that essoigns, views and vouchers are taken away, as are all other excuses for non-attendance of the defendant (except the want of summons) by the express provision of the act of 1748, c. 1.[1] In mixed actions also, such as that of waste, if the plaintiff wishes to avail himself of the treble damages given by our act, in conformity to the statutes of 52 Hen. III, c. 23, and G Ed. I, c. 5, he must commence his suit by original and not by *capias,* but in actions of trespass *quare clasum fregit* where damages only, and not the land itself are to be recovered, it is not necessary to begin the suit by original, but it may be commenced by *capias,* because there the wrong complained of is supposed to have been accompanied with force, which subjects the defendant to fine and imprisonment for the breach of the peace. In actions of ejectment also, which we may remember are merely a fictitious form of action, no original writ is required, but the real defendant comes in voluntarily, and is made a party defendant at his own request. Neither is a *capias* necessary in this action, for the supposed author of the trespass, having in his letter of notice disclaimed all title, and the object of the suit being merely to try the right of possession, the plaintiff will be entitled to judgment by default against him, unless he, or some other person for him, appears to defend the suit after notice thus acknowledged. But in personal actions, as we had before occasion to remark (3 Com. 274) the original writ is altogether disused in Virginia, and the suit is commenced by writ of capias instead of it.

These few observations being premised, we shall now proceed to consider the manner of commencing and prosecuting personal actions in our conrts; and herein we shall begin with,

1. The original writ or first process in the suit.

2. The mesne process, or that by which the defendant may be brought in, when not taken upon the first process.

3. Arrest and bail.

4. Proceedings in case of default by the defendant's not appearing.

5. Proceedings incase of the defendant's appearance.

The writ of *capias* or *capias ad respondium* (for there are several other writs of *capias,* as the writ of *capias utlegatum* which lies against a person outlawed, either in a civil suit or upon an indictment, at the suit of the commonwealth, and the writ of *capias ad satisfaciendítm* which lies after a judgment in any civil action, to take the defendant to satisfy the plaintiff for the same) is a writ issuing in the name of the commonwealth from the clerk's office of that court in w Inch the plaintiff purposes to prosecute his action, directed to the sheriff of the county in which the defendant resides, or is supposed most likely to be found, commanding him to take the body of A B, the defendant, and him safely to keep, so that he have him, before the court, to answer C D, of a plea of debt, covenant,

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trespass, or on the case etc. according to the nature of the plaintiff's action. This writ and all subsequent process, when issued from the county courts, must be executed three days before the return day; and in actions of debt, founded upon a bond or note for the payment of money, or tobacco,[2] covenant, and detinue, and in other actions where (for some special reasons, verified by affidavit) the plaintiff shall have obtained a judge's order to hold to bail the sheriff (if required to take bail) is bound literally to perform the precept thereof, by committing the defendant to close custody, unless he shall give bail or security for his appearance at the time appointed; which bail, if sufficient, the sheriff is bound to take when offered. The manner of doing this is by the defendant and his security entering into a joint bond to the high sheriff by his name of office,[3] in a penalty, generally double the debt, with condition for the defendant's appearance at the time required by law, which is the first day after the end of the next term of the court to which the writ is returnable; and thereupon the defendant is suffered to go at large. But in actions of trespass, and on the case, and all other personal actions, except those before-mentioned, unless there be a special order of the judge of the court to hold the defendant to bail, the sheriff cannot take bail, nor commit the defendant to custody for want of it: bat he may return his precept executed without doing either, provided he shall have given the defendant personal notice of the writ, the process in such cases being in fact no more than a summons; or he may take the engagement of an attorney practicing in the court endorsed upon the writ, to appear for the defendant, and if the attorney fails to appear accordingly, he forfeits eight dollars, (formerly to the plaintiff, because I apprehend he put him to the trouble of suing out a further process to compel the defendant who had not yet received personal notice of the writ to appear thereto, but *noiv,* for what reason it is hard to say) to the defendant. If the suit be instituted in an inferior court, the plaintiff must be careful to endorse upon the writ that "no bail is required" whenever the defendant is a resident of any other county unless a *non est inventus* has been returned in the county or corporation in which he resides, or unless the cause of action arose within the jurisdiction of the court to which the process is returnable; otherwise the writ may be avoided by a plea in abatement, which, as we shall hereafter see, must be put in before issue is joined, or judgment by default, etc. for so careful is the law of the personal liberty of the citizen, that it will not permit him to be arrested and held to bail or committed to prison for want of it, at a distance from his neighbors and friends who may be willing to become bound for his appearance; unless his own act or indiscretion shall have deprived him of all claim to such indulgence, by incurring the debt, or committing the trespass for which he is sued, within the jurisdiction of that tribunal before which he is to defend himself; and where it is presumable the witnesses to the transaction can most conveniently attend the trial. And if the defendant be not an inhabitant of the county to which the writ is directed and be not found therein, the sheriff instead of returning a *non est inventus,* or that die defendant is not found in his county, is bound to return the truth of the case[4] and where he returns that the defendant is "no inhabitant of the county" if the writ issues from the county court, it abates by the return, and the plaintiff can proceed no farther, but if he chooses to incur the expense, he may, I apprehend, sue out another *capias* in the nature of an original or new suit, until the defendant by coming into the county shall subject himself to be taken therein; but every such writ must be considered as the institution of a *new* action and not as a continuation of the first writ, in the ordinary forms of an *alias, or fluries capias*. But in this case if the suit be brought in the district court, the plaintiff may sue out a *testatum capias* to any other county within the same district to which the defendant shall have removed: and even if the defendant be an inhabitant of any other district a *testatum capias,* I apprehend, may issue to any county therein, provided the defendant residing therein shall, have been jointly, or jointly and severally bound with any other defendant residing within the jurisdiction of that district court to which the writ is returnable in any bond, covenant, or other 'special contract. For in this case to avoid circuity of action or multiplicity of suits

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the law permits the plaintiff to pursue his remedy completely in the court of any district where either of the defendants may reside.[5] So also in suits in equity brought in the county courts. If one or more of the defendants resides within the county (which gives the court jurisdiction of the cause) and others reside in another, or several other counties, the law now permits the plaintiff to pursue his suit against them all in one and the same court, and for that purpose will aid him with process directed to the sheriff of any other county in which such defendants may reside or be found, 1797, c. 8. But this is not permitted in actions at common law brought in the county courts, as has been already mentioned. And since the late division and new organization of the high court of chancery, where several defendants reside in different districts, the plaintiff may institute his suit in either district, and process may issue from the court thereof to the sheriff of any county in another district where any of the defendants reside. The sheriff cannot legally return a *"non est inventus"* upon any writ, unless he shall have actually been at the house or usual place of abode of the defendant, and shall have there left an attested copy of the writ; and if prevented from executing the same by any circumstance whatsoever, he must return the truth of the case.

There is another mode of commencing a suit where a debtor attempts to remove himself privately out of the county or corporation, or absconds or conceals himself so that the ordinary process of law cannot be sued out against him, which is by suing out a warrant of attachment. This is done upon complaint made to a justice of the peace, who is in such case authorized to grant such warrant; and being a special remedy adapted to the emergency of the case, it may be issued and even executed on a Sunday, provided the debtor be actually moving or absconding on that day; which is a proceeding not authorized in any other civil case, except upon escapes out of prison, or custody. This warrant may be levied upon any personal property of the party absconding, wherever found; or it may be served upon any person indebted to, or having any effects of, the party absconding in his possession, who is then called a garnishee, and is thereupon compellable to appear at the-next court, and answer upon oath what he is indebted to, or what effects he has in his hands of the party absconding. And if the party absconding shall not replevy the attachment, which he may do by giving sufficient security to the sheriff for his appearance, or by putting in bail to the action, if ruled thereto by the court, the plaintiff shall have judgment for the whole debt, and the goods attached shall be sold; and in case there be a garnishee, and judgment be rendered against him, the plaintiff shall have execution against him for the amount thereof; and in both cases he may have execution against the defendant's estate, or his person, if he can be found, for any balance that may remain due. But before any person can be entitled to this extraordinary course of proceeding, he must enter into bond with security in double the sum to be attached, payable to the defendant, with condition to satisfy all costs, and also all damages which may be recovered against him for suing out the attachment, in case he shall be cast in his suit. This bond is to be taken by the justice issuing the attachment, and is to be returned to the next court of the county or corporation, otherwise the attachment is void;[6] and the defendant will be entitled to such damages, as he can prove that he has sustained by the plaintiff's vexatious proceeding.

The proceedings in this last case are evidently borrowed from those upon foreign attachments, which, by the custom of London and some other 'places, may be sued out by a creditor and levied in the hands of a third person who is indebted to his debtor. A similar remedy, through the intervention of our chancery courts, is given against all persons absent from the state, who may have any effects in the hands of any person within the commonwealth. Of this we shall make mention more at large hereafter in speaking of the mode of proceeding in these courts. If the sheriff return that the defendant is not found, the plaintiff may sue out an *alias capias,* or *pluries capias,* the nature of which have been sufficiently explained elsewhere, until the defendant shall be arrested; or if he

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still .continues to avoid the service of the process upon him personally, the plaintiff at his election may sue out an attachment against the estate of the defendant, upon which the sheriff ought to take sufficient of the defendant's property into his hands, to satisfy the plaintiff his debt- and costs; but the practice seems to be, (though very unwarrantable I apprehend) to levy the attachment upon some trifling article, as a knife, a spoon, or some other portable thing, without regard to the amount of the debt, or the comparative value of the property taken to satisfy it. But the plaintiff by this conduct is liable to loose his debt, if his debtor thinks it not worth while; as it frequently happens, to replevy the goods attached by giving bail to the action, and in the mean time disposes of his effects, or removes himself with them to some other place. The sheriff indeed by such conduct makes himself liable, I presume, for the amount of the debt, if the plaintiff can "prove that other property could have been had, whereupon he might have levied the attachment, and that the sheriff wilfully neglected to do it; but this is often difficult, though according with the truth of the case. The process of attachment is therefore rarely to be resorted to, except where the defendant is well Known to be a man of considerable substance. Whenever the writ of attachment is returned executed, whether it be levied on goods to the value of the debt, or to the value of six pence only, if the defendant does not appear and give bail, if ruled so to do, the plaintiff may proceed to file his declaration, and to enter judgment against him for his default; the goods attached remaining in the sheriff's hands until final judgment be entered, and then being sold as if taken in execution; and if there be not enough to satisfy the judgment, the plaintiff may sue out an execution for the remainder.

But if the defendant be not taken upon the first, or second, or third writ, the *alias,* or *pluries capias* the plaintiff upon the return of the latter, instead of the process of outlawry, (the last resort in England,) may apply to the court to order a proclamation to issue, warning the defendant to appear at a certain day, or that judgment will then be rendered against him: this proclamation must be published on three successive court days, at the door of the court-house, of the county to which the *pluries* was directed, and three times in the Virginia gazette, and then if the defendant fails to appear, the plaintiff may proceed to judgment as in other cases of default.[7] Such are the different modes in which personal actions are usually commenced in our courts of law, and the ordinary, and extraordinary methods which our law furnishes to compel the defendant to appear, and answer the complaint of his adversary.

We must now say a few words, concerning, 3. Arrest and bail.

If the defendant in any action of debt (except actions of debt upon penal statutes, or, upon bonds with collateral conditions,) covenant or detinue, wherein bail is required by law, and regularly demanded by endorsing the true species of action, and that bail is to be required, upon the writ; or in any other case, where there is the order of a judge of the court from which the process issues, to take bail, be arrested, the sheriff at his peril must take bail, (the nature and manner of doing which, has been already explained) for the appearance of the defendant to answer the plaintiff's action; and he is moreover to return a copy of the bail-bond, with the names of the bail which he has taken, endorsed upon the writ: and if he fails in either of these particulars, the plaintiff may proceed against him for his neglect. This is done not by commencing a special action on the case against him, (as is the course in England) but by making him a. party to the suit, with the other defendant, in case the latter do not appear, and enter his appearance in the clerk's office, on the first rule day; that is, on the next day after the end of the term, to which the writ is returnable, and put in special bail if the same be required. So also, if the bail which the sheriff may have taken for the defendant's appearance, shall appear to the plaintiff or his attorney to be insufficient, he may except thereto, either on the first or second rule day, or at the next court after that to which the writ is returnable,

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and may proceed against the sheriff as in the former case, and if bail be adjudged insufficient by the court, the sheriff will be liable in the same manner as if he had not taken bail, or had failed to return a copy of the bail-bond; that is, he may be made a party to the suit; since the office-judgment entered on the part of the plaintiff against the defendant, for want of appearance should at the same time be entered against him also, for his neglect; by which means he is rendered finally liable to the same judgment as the defendant himself.

On the other hand he is admitted to defend the suit, in the same manner as the defendant himself, if he had appeared and put in bail, might have done. And if at any time before final judgment, the defendant is permitted to appear without bail, or puts in bail to the action, the proceedings against the sheriff are immediately set aside. If judgment be finally rendered against him, he may apply to the court to award an attachment, in the. nature of an execution, against the defendant's estate, which shall thereupon be seized, by the coroner, or succeeding sheriff, and sold in the same manner as goods taken upon *scire facias;* but if he neglects to make this application he seems liable to the same execution as the defendant himself. If the sheriff takes bail and complies with the other directions of the law, by returning the names of the bail endorsed on the writ, and a copy of the bail-bond; and no exception is made either to the bail bond, or to the sufficiency of the bail, by the plaintiff; if the defendant does not appear and put in bail to the action, or special bail, as it is called with us, (the nature of which has been explained already) the plaintiff, instead of taking an assignment of the bail-bond and bringing an action upon it, as in England, may at once, (as in the former case against the sheriff) make the appearance-bail a party to the suit, and if the defendant neglects to put in bail to the action, until final judgment, the bail for his appearance will be liable to the same judgment and execution as the defendant himself. But here again, the law permits the same indulgence to the bail, as, in the former instance to the sheriff, by authorizing the court, on motion of the bail, to award an attachment against the defendant's estate as in the case of the sheriff: but if this precaution be neglected, one and the same execution will issue against the defendant and bail, in the same manner as if they had been originally parties to the suit.[8] But in that case also, the law affords the bail a summary remedy by judgment, on ten days previous notice, against the principal, his heirs or executors, for the full amount of whatever he may have paid, on account of such judgment.[9]

These summary proceedings against the sheriff,[10] on the one hand, and against the bail for the defendant's appearance on the other, have been found to answer the purpose of justice much better in this country, than that circuity of action which the laws of England required. It must be confessed however, that the plaintiff is often very greatly delayed by these proceedings, for as the sheriff or the bail have the same liberty of defense, as the defendant himself would have had, if he had appeared to defend the suit, it generally happens that, either to give him an opportunity of coming in and exonerating the sheriff, or the appearance bail, at some future stage of the proceedings, by putting in special bail before final judgment, or for the sake of procrastination, the suit is spun out in the same manner as if the defendant had some solid defense to make.

The proceedings against the sheriff, or the bail, as the case may happen, are regularly set aside if the defendant appears, and surrenders himself in custody, or puts in special bail, or is admitted to appear, without bail at any time before final judgment: it is therefore not unusual for the appearance bail or sheriff, against whom a plaintiff has proceeded in the manner here spoken of, to enter himself special bail, or bail to the action; the nature of whose undertaking for the defendant we may remember is, that the defendant shall satisfy the judgment of the court, by paying the debt, or render his body in execution, or that the bail will do it for him. The judgment, therefore, is now to be rendered against the defendant alone, and not against him and the sheriff, or the bail for his

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appearance, as in the former case. And, before the special bail can be charged with the debt, the plaintiff must first sue out a *capias ad satisfaciendum* against the body of the defendant, upon which, if he be taken, the special bail is thereby discharged; but, if the writ be returned with a *non est inventus,* (or that the body of the defendant is not found) the plaintiff may now proceed to charge the bail, by suing out a *scire facias,* or warning him to show cause, if any he can, why he should not pay the debt according to the stipulations of his recognizance, the defendant having now failed to satisfy the debt, or to render his body in execution. And, if the defendant be not surrendered either to the sheriff or before the court, before the appearance day of the first *scire facias* which shall be returned executed, or of the second on which the return of *nihil* shall be made, the bail can never afterwards discharge himself but by paying the debt. Where the surrender is made to the sheriff, the bail must give notice thereof to the creditor, that, if he chooses it, he may charge the defendant in custody, otherwise he seems, by such neglect, to be liable to a special action on the case, at the suit of the plaintiff, who will be thereby entitled to recover such damages as he can prove he has sustained from the want of notice.[11] Although the law permits the bail to discharge himself by the actual surrender of the defendant, at any time before the appearance day of the first writ of *scire facias* executed, or the second returned *nihil,* yet it is by no means adviseable for the bail to postpone the surrender a moment after the return of a *non est inventus* upon a writ of *capias ad satisfaciendum,* for it has been solemnly adjudged, that if the principal die after the *capias ad satisfaciendum* is so returned, and before the return of the *scire facias,* the bail shall nevertheless be charged; for, after such a return made, the bail can only discharge himself by an actual surrender of the body.[12]

4. Where the defendant fails to appear, which he is bound to do at the rules in the clerk's office, on the first day after the end of the term to which the writ is returnable, that being the day of appearance, it is usual for the plaintiff to enter a rule commonly called a conditional order, or conditional judgment against him for his default, which is done in the rule book kept by the clerk of the court for that purpose. The terms of this conditional order are, that unless he, the defendant, shall appear at the rules in the clerk's office on the next rule day, (which in the district courts is always one month after,) and put in special bail, if required so to do, judgment will then be entered up against him for want of an appearance. And it is at this time that the before-mentioned proceedings against the bail, or against the sheriff, as the case may be, ought to take place, in case the defendant does not appear.[13] Yet, if the plaintiff be not then prepared with his exceptions to the sufficiency of the bail, he is allowed to object thereto at the second rule day, or at the succeeding term of the court, but at no time after. This conditional order, or judgment by default, if not complied with at the next rule day, (and the judgment set aside by the defendant's appearing and putting in sufficient bail to the action, if bail be required,) is then confirmed; and thereupon judgment is to be entered up for the debt, or other specific thing demanded, unless the plaintiff chooses to have a writ of inquiry to ascertain such damages as he may conceive himself to be moreover entitled to. Or, if the action sounds merely in damages, or the demand be for an uncertain sum, a writ of inquiry is awarded the plaintiff, as of course.

The judgment thus entered at the rules in the office, if not set aside at the next term, is final where no writ of inquiry is necessary. It may however be set aside at the next term after it is entered, on motion of the defendant himself, 'on his appearing in court, and surrendering himself in custody, if required so to do by the plaintiff, or on giving bail to the action, if ruled thereto by the court: or by his appearance only, either in person or by his attorney, in ase the plaintiff is not entitled to demand bail: in all which cases he must immediately plead some issuable plea, (by which is meant a plea in bar of the plaintiff's action, and not a plea in abatement, or other dilatory plea)[14] otherwise the

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judgment will not be set aside for want of such plea.[15] But if this be neglected by the defendant, still the bail for his appearance, or the sheriff against whom the judgment has been entered in the office, may at the same term, on motion, be permitted to enter his appearance, and set aside the judgment against himself, and defend the suit in the same manner as the defendant himself might have done, after which the judgment against the defendant seems to be suspended, until the event of the suit between the plaintiff and the bail, or the sheriff, as the case may be, shall be known. The plea thus put in by the bail or sheriff, seems to be considered as the plea of the defendant himself, and the setting aside the judgment against the former, has been so far considered as a complete suspension of the judgment against the latter, that it has been held that, where judgment has been confirmed against the defendant and bail in the clerk's office, and the bail has afterwards been admitted to defend the suit, and then the bail dies, still the suit shall proceed upon the plea put in on his behalf, notwithstanding the abatement of the suit as to him.[16] And, in another case, the defendant against whom a judgment was confirmed in the office, was, after the death of the bail who had defended the suit, admitted to appear and plead thereto.[17] Whenever the defendant himself is admitted to set aside the office judgment, the bail, or sheriff against whom it was rendered, is thereby discharged. But when the judgment is set aside on the motion of the bail or sheriff who come in to defend the suit, they are still liable to the final judgment, unless bail to the action be given, or the defendant at some future stage of the proceedings, is permitted to appear without bail, which rarely happens, unless where the debt is of small amount, or the defendant is willing to confess the plaintiff's action, on condition that his bail or the sheriff may be exonerated.

In actions where no bail is required, it is the practice to permit the defendant to set aside the office judgment, and plead at any time before the jury are sworn on the writ of inquiry, where the plaintiff has found it necessary to have recourse to one, in order to ascertain the amount of the damages which he is entitled to recover.

The proceedings, in case the defendant appears on the first, or any succeeding rule day, will be considered in a subsequent note.[18]

NOTES

1. 1794, c. 76. Sec. 25.

2. Appearance bail is not required by law in actions of debt or bonds, with collateral conditions, and not for the payment of money, or tobacco. – 2 Wash. Rep. 183. And even in suits where bail may be required, if the true species of action be not endorsed on the writ, and the appearance bail is required, the sheriff is not bound to take bail, and he is not liable for neglect, if he omit taking bail. 1 Wash. Hep. 153, 1J4.

3. 2 Stamp, 3.W. L. V. 1734, c. 80, Sec. 11.

4. 1794, c. 67. Sec. 23. c. 80. Sec. 15.

5. I am well aware that there are highly respectable authorities against what is here advanced, that a *testatum capias* may issue to a county in a different district, from that in which a suit is brought against two or more joint obligors, etc, residing in different districts. But in the case of McCall against Turner, 1 Call's Hep. 133, in which this point was stirred in the court of appeals, no advantage had been taken by the defendant, who was arrested, of the irregular entry of an abatement of the suit as to Spiller, the other defendant, who was returned "no inhabitant." But notwithstanding what was said in that case by judges whose opinions I hold in great respect, yet, as the question was not brought regularly before the court, I shall presume to give my own reasons in support of the opinion which I have advanced.

The 24th section of the act reducing into one the several acts concerning district courts, Edi. 1794, c. 66, varies very considerably from the clause in the act of 1788, c. 67, which had been differently construed by the judges of the general court, some of whom supposed, that where there were two or more joint obligors, process might issue to any county in any other district, in the same manner as if they had resided in the same district; and of this opinion was the late judge Tazewell, who awarded a writ of *testatum capias,* from the district court of Accomack, to Powhatan county to arrest a defendant there, who

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was a co-obligor with one in Northampton county. When the committee of revisor was appointed (Edi. 1794, c. 67- Sec. 52.), one or more members of that committee, differing in opinion from judge Tazewell who was also a member thereof, it was agreed to submit the following note upon that clause to the legislature. "This clause having received various interpretations in the district courts, on the subject of joint, and joint and several obligations, and covenants, where the co-obligors reside in different districts, the committee submit to the general assembly the propriety of rendering the same more explicit, so as to remove all doubts whether a writ of *capias ad respondiatum* may, in such case, issue from the court of one district, to the court of a county in any other district or not." In consequence of which the clause was amended as it now stands, thus, provided nevertheless, that where two or more persons are or shall be jointly, or jointly and severally bound for the performance of any contract or for the payment of money or tobacco, a bond, covenant, or otherwise, it shall be lawful to prosecute such persons jointly, in whatever district either of them may reside, and process shall be issued and served accordingly, in any court, or district wherein the non-resident defendant or defendants may be found." The words in italics were added at this time, and appear to me to justify the interpretation that I have given them, in the fullest extent. The act of assembly which declares that where a defendant is returned "no inhabitant" the suit shall abate, relates altogether to the proceedings in the county courts, nor could such justification now operate to charge the bail, in such a case, for the judgment is already final against the defendant. On the other hand it was thought, that if the office-judgment were taken against the defendant and bail, only, this might be construed to admit his sufficiency, unless at the same time it were objected to, and a rule taken also against the sheriff; who would be discharged of course, if the sufficiency of the bail were established by the court; or otherwise, made liable to the same judgment as the defendant himself; to <lo which it was conceived to be most safe, as well as most regular, to proceed step by step, against the defendant, his bail and the sheriff, together. This practice he has been informed, is not general; yet he feels himself at a loss to recommend any substitute for it, where the sufficiency of the appearance-bail is doubtful.

6. 1794, c. 78.

7. 1794, c. 66, Sec. 41.

8. It was the practice in some courts in which the writer of these pages formerly practiced to enter the conditional order, where the sufficiency of the appearance-bail, was doubtful, not only against the defendant and sheriff but against the appearance-bail also. For if the office judgment were confirmed against the defendant and the sheriff only, without taking any step, at the same time, against the bail, it was thought it might operate a discontinuance as to bail; and that although the bail should afterwards justify, such justification might operate only to exonerate the sheriff; but would not cure the discontinuance (if it were one) as to the bail, against whom no step had been taken in the office.

9. 1794. c. 14S. Sec. 4.

10. It has been solemnly decided in the court of appeals that the proceedings against the sheriff in the cases before mentioned, must be against the high sheriff, and not against his deputy, by whom the writ was served. Armistead vs. Marks and Saunders. 1 Wash. Rep. 325. and White vs. Johnson. Ib. 159.

11. 1 Wash. Rep. 318. L. V. 1794, c. 67. Sec. 31. 2 Wash. 213.

12. 1 Strange 511. 2 Strange 717. 2 Loid Raym. 1452. 2 Wils. 65. See also 1 Burr, 317, 322.

13. L. V. Edi. 1794, c. 67. Sec. C6, 27.

14. It is a rule in the courts of Westminster Hall, that no plea in abatement, or other dilatory plea, can be pleaded after a general imparlance, *a fortiori*, I conceive, not after a judgment by default, nor even after a conditional order, as a preparative step to such a judgment. The late case of Hunt vs. Wilkinson, 2 Call 49, may seem to the contrary. But in that case, one judge, only, thought the plea admissible as a plea in abatement; another thought it inadmissible, upon the ground which I have taken j the other three considered it as a plea *fuis darsein continuance,* and admissible upon that ground. So that I do not consider the English authorities as at all shaken by that case.

15. It sometimes happens that the bail for the defendant's appearance comes into court, and enters himself special bail for the defendant, but does not put in any plea in this case, the ordinary course of proceeding, I apprehend, is to set aside the office judgment as to the bail only, leaving it to stand against the defendant himself. Perhaps the more regular course might be, to set aside the office judgment, (which is in it's nature a joint judgment), as to both, and then enter a judgment against the defendant only, for want of a plea.

16. Anonymous case, Jun 21st, 1793. In the general court.

17. Prentis w. Brareton, Nov. 18,1794. In the general court.

18. The practical observations contained in this, and the succeeding note, are in general founded upon the purview of the

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acts of 1794, c. 66. Sec. 21, C)'c. and c. 67. Sec. 9, etc. for which the student must consult these acts respectively.

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NOTE D

Of Appearance and Pleading

HAVING, in the note at the end of the preceding chapter, pointed out the manner in which a suit is commenced in our courts; the intermediate process between that and the time of the defendant's arrest, and the methods by which the plaintiff may either compel his personal appearance, or obtain judgment against him, or his bail, or the sheriff, according to the nature of the case, if the defendant still continues to stand out, or makes default; it will now be our business to show what proceedings are to be had in case he appears pursuant to the writ or stipulations of his bail-bond, given to the sheriff for his appearance.

5th. Then, where the defendant means to appear and contest the suit, he is to enter his appearance on the first rule day after the rising of the court, in the office of the clerk; this is done in a rule book kept for that special purpose. At this time he must file special bail, if required, and if he means to plead to the jurisdiction of the court, or to avail himself of any irregularity in the writ, or process, he ought to demand oyer of the writ, or other process, and of the return thereon made; for it seems to be held, that the writ of capias is not necessarily a part of the record in any suit, and, therefore, that the defendant who wishes to avail himself of any defect therein, or in the manner in which it has been issued, or executed, must demand oyer of it; whereupon it is spread at length upon the record, and the defendant may avail himself of any legal exception which he can make to it. Thus, if the writ be not endorsed, pursuant to the statutes which require the true cause of action to be endorsed upon every writ,[1] or if there be not three days between the teste, or, the execution, of a writ issuing from the county-court, and the return day thereof, the suit may for either of these causes be dismissed at the first calling, if the defendant appears and excepts to it; or if he fails to appear at the rules, so that an office-judgment is confirmed against him, yet it teems now to be settled, that he need not plead in abatement, but may take advantage of the irregularity by motion of the court, at any time during the term next after the judgment was confirmed against him in the office, but not after.[2] So if a summons, issued against a person, against whom a writ of capias ad respondendum, can not be regularly issued, be returned executed by leaving a copy thereof at the defendant's house within ten days,[3] before the return day; this irregularity, if it appear upon the face of the writ of summons (as if there be not t tt days -between the jteste and the return) or by the return itself, may, I apprehend, be taken advantage of in the same manner. But if, instead of a summons a capias be issued against a person so privileged, or if a defendant being a resident of one county,[4] be sued in the court of another county, or corporation, in which the cause of action did not arise, and before a non est inventus returned upon a writ issued against him for the same cause in his own county, and the writ be not endorsed that any bail is required, or if being a resident of one district, he be sued in the court of another district, before a non est inventus is rereturned,[5] upon a writ issued against him for the same cause in his own district, and he be not jointly, or jointly and severally, bound with another person, residing within the district where the suit is brought, in the same obligation, covenant, or contract; in all these cases, if the defendant means to avail himself of the irregularity, I apprehend it is necessary to appear, and plead the special matter in abatement; the truth of which plea he must verify by affidavit: for the irregularity in these cases does not appear either upon the face of the writ, only tiu return s tut, arises from a fact to which the court cannot be supposed to be privy, and of which they cannot judicially take notice, unless it be regularly shown to them; and this, I presume, can only be done by a plea in abatement. In this plea the defendant must allege, that on the day of the writ purchased, he was a governor, a member of the privy council, a judge of one of the superior courts, or a sheriff, and therefore not liable to be sued by capias; or that he was a resident in a different county, or in a different district, at the time of the writ purchased, and therefore not liable,

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in the former case, to be taken upon a writ on which there is not the endorsement, "no bail required" pursuant to the statutes; and in the other, not liable to be taken on any writ, whether endorsed or not. And here I apprehend this plea ought to conclude, without going on to allege negative matter, as that no "non est inventus" had been returned upon a writ issued against him in the same suit in his own county. 5 or that he was not bound with any other defendant residing within the disdrict where the suit is brought in the same bond, obligation, or covenant; for of these things the plaintiff must be presumed to be cognizant, and if the fact be that a non est inventus has been returned upon a capias issued against the defendant in his own county, in the same suit; or, if the defendant be, in fact, bound in the same obligation, covenant, or contract, with another defendant residing within the district; the plaintiff ought to reply this matter affirmatively; and if it.be found for him it will avoid the plea in abatement. So, if the cause of action arose within that county, or corporation, where the suit is brought, this matter must also be affirmed by the plaintiff in his replication, instead of the contrary being negatively alleged by the defendant in his plea. And in all these cases, if there be an issue joined upon the fact, and a verdict be found for the plaintiff, he shall have judgment for his debt or damages; but if there be a demurrer to the plea, the judgment (if for the plaintiff) is, that the defendant answer over, respondeat ouster, in the law latin phrase, to his action:[6] if the issue be found for the defendant or judgment be given for him upon the demurrer, the suit shall be abated, and he shall recover his costs. –

Where the defendant is an alien, or the citizen of any other state, (or the suit relates to lands claimed by the several parties under grants from different states), and the matter in controversy is of the value .of five hundred dollars or more, if he desires to remove the suit into the federal circuit court, he must now petition the court for that purpose,[7] (or, I presume, file his petition) and must give security to appear in the federal court, and answer the plaintiff's -suit, and thereupon the cause will be removed and the bail for his appearance are discharged: but.he must give bail to the action, in the federal court, if ruled thereto. If there be any other matter, proper to be pleaded in abatement, the defendant ought to take advantage of it at this stage of the proceedings; as if an action is brought against one executor, or one of the obligors in a joint bond, or one of the partners in a trading company, whereof there are more, the party who is sued alone may plead the special matter in abatement; which if he neglects to do at this time, he shall never have advantage of such a plea afterwards.[8] And it is a general rule, that nothing shall be taken advantage of for error, which might have been pleaded in abatement.[9] Here we may be permuted to express a doubt, whether, if an action be brought in a county court against two or more executors, or two or more joint obligors, or two or more partners in trade, or two or more joint defendants in any other action, and one of them be returned no inhabitant, whereby the writ abates as to him, the action can be continued against the other defendant, if disposed to take advantage of the abatement as to the first.

In the case of executors, who are all one person in the eye of the law,[10] the rule seems to be, that if the writ must abate as to one, it shall abate as to all. And as to joint obligors the law seems to be, that they must be sued jointly,[11] and in England, if one of the defendants in an action upon a joint obligation be not taken, the other may abate the writ. Yet, if he neglects to do so, and the plaintiff proceeds to outlawry against the defendant who is not taken, he who appeareth shall be chargeable with the whole.

The defendant having entered his appearance, it is incumbent on the plaintiff at the next rule day,[12] (which, we may remember, is always one month after the district courts, and in the county courts on the day appointed by the court at the preceeding quarter session) to file his declaration: which if he fails to do, the defendant may then enter a nrie for him to declare, and if, at the succeeding rule

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day, he still neglects to do so, he shall be non-suited, and pay to the defendant his full costs. – But this non-suit may, for good cause, be set aside, on motion, at the next court, but not afterwards. So, also, may any other office-judgment, whether for the plaintiff of the defendant; the proceedings in the office, being regarded as only in jfieri, and not final, until after the next term is ended; when they are final, in all cases against the plaintiff; they are also final, in his favor, in actions of debt, for money, or tobacco, if the amount be ascertained by the specialty[13] but in cases where the amount of the plaintiff's demand is not fixed by the specialty, there a jury must be impannelled to assess his damages. And in such cases it is every day's practice to permit the defendant to set aside the office-judgment at any time before the jury is sworn, upon giving bail, if bail be demandable, and pleading the general issue, so as not to delay the trial.[14]

These office-judgments are considered as the acts of the party and his attorney, and not of the court, and, therefore, in England, if they be set aside for any irregularity after a capias ad satisfariendum, or other execution, issued thereupon, it seems that the plaintiff and his attorney, are both liable to an action.[15] One month after the plaintiff has filed his declaration, he may give a rule to plead with the clerk, and if the defendant do not plead, accordingly, at the expiration thereof, the plaintiff may enter judgment for his debt, or damages and costs.[16] On the other hand, if the defendant pleads, he may give the plaintiff a rule to reply; which when he has done, he may then give the defendant another, to rejoin: and so on, until an issue is joined between them. Or, if either party neglects to plead, reply, or rejoin, when the rule for his doing so is expired, the other may either enter a judgment for his debt or demand, or a non suit, as the case may be. As soon as an issue is joined either upon the law, or fact, in dispute, the cause is then to be placed upon the court-docket, for trial in it's course. And those office-judgments, which are incomplete, and require an inquiry of damages to be made, before final judgment can be rendered thereupon, are, in like manner, to be placed upon the court-docket, for trial, in their respective order.[17]

NOTES

1. L. V. 1794, c. 66. Sec. 25. c. 67. Sec. 19.

2. L. V. 1794, c. 67. Sec 17. 1 Wash. Rep. 153,154.

3. L. V. 1794, c. 66. Sec. 23. c. 67. Sec. 18.

4. Ibidem, c. 67. Sec 23.

5. Ibidem, c. 66. Sec. 24.

6. 2 Wils. 368. And it seems that in this case the same jury, which pass upon the plea in abatement ought, at the same time, if they find for the plaintiff to assess his damages; and that no writ of inquiry can be awarded to supply the omission. 2 Wilson. Ibidem.

7. L. U. S. 1 Cong. 1 Sess. c. 20, Sec, 12.

8. Carthew, 281. System of Pleading 13.

9. System of Pleading, P. V. Introd.

10. Ibid. 2.

11. 5 Co. 112.

12. V. L. 1794, c. 66, Sec. 55, 36, 37.

13. See 1 Wash. Rep. 154.

14. 1 Strange, 509. 2 Wilson, 385.

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15. 2 Blacks. Rep. 846. 2Esp. 72.
16. L. V. 1794, c. 66, Sec. 36.
17. See the note at the end of Note C.

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NOTE E

Of Proceedings upon Motions for Judgments in a Summary Way

JUDGMENTS upon proceedings in a summary way, that is, without the ordinary forms of law, in civil .cases, and without the solemnity of a jury, having been much countenanced by our legislature of late years, it may not be Improper to consider them in a distinct view. Our bill of rights appears not to be very favorable to these kinds of proceedings, the eleventh article declaring, "That in controversies respecting property, and in suits between man and man, the ancient trial by jury, is preferable to any other, and ought to be held sacred." Upon this principle, it was formerly provided, that all issues, in fact, in the high court of chancery, should be tried by a jury;[1] but this being found inconvenient the act was repealed, October, 1783, c. 20, which declared that the mode of trial in the high court of chancery should thenceforward be the same, as had been theretofore used and practiced in Virginia, under the former government; and the practice has ever since conformed thereto. Yet the chancellor may still, if he pleases, direct a trial by jury at the bar of his own court, or in any other court, according to the circumstances of the case, and convenience of the parties; but he may nevertheless decide all matters of fact himself, if he thinks proper so to do. But the cases in which we mean to speak of the trial by jury and the ordinary process of the common law as being dispensed with in Virginia, are not confined to chancery causes, in which last, long established practice concurring with the recognition of the powers of a court of chancery, in our state constitution, may be supposed to authorize a deviation from the rules of the common law.

The cases in which the trial by jury, and the ordinary proceedings of the common law are dispensed with, maybe divided into four heads.

1. Those cases in which, by reason of the smallness of the demand, it has been thought expedient to admit of a more summary recovery.

2. Where the defendant being a public officer is called upon to answer for some supposed delinquency.

3. Those cases where the delinquency of the defendant or the equity of the plaintiff's demand, requires the most speedy aid to prevent him from suffering by the defendant's default.

4. Where the defendant has already received the utmost indulgence of the law.

As to the first class, – lst. by the act of 1710, c. 11, all demands not exceeding 20 s. sterling, or 200 lbs. of tobacco were recoverable, and finally determinable by any one justice of ths peace. The act of 1748, c. 4, limited the jurisdiction of a single magistrate to 25.s. currency, or 200 lbs. of tobacco, and provided that in such case no execution should be granted against the body of the defendant by such justice. The act of 1792, (Edi. 1794, c. 67), extended the jurisdiction of a single justice, to causes where the sum demanded did not exceed five dollars or 200 lbs. of tobacco, and the act of 1800, c. 38, has further extended it to causes amounting to ten dollars, or 400 lbs. of tobacco, with the like restriction, as to granting an execution against the body of the defendant.[2] By the act of 1748, c. 4, it was provided that all demands where the debt, etc. did not amount to more than five pounds (except such as were under 25 s. or 200 lbs. of tobacco), might be prosecuted by petition to the county court, and decided without the solemnity of a jury. The act of 1794, c. 67, has increased this sum to twenty dollars, or 800 lbs. of tobacco. Actions of detinue and trover, where the thing demanded or the value thereof, shall not exceed 2O dollars, or 800 lbs. of tobacco, are to be prosecuted in the same manner. In these cases the clerk of the court draws the petition, stating how the debt, etc. became due and issues a summons to the sheriff, with a copy of the account, etc. which

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being executed on the defendant at least ten days before the return day, the court is to proceed to give judgment in a summary way. Penalties incurred under any act of assembly, amounting to more than five dollars, and not exceeding twenty dollars, are recoverable in the same manner, and execution may thereupon be awarded, as in other cases.

2dly. In certain cases where the defendant is a public officer, the law authorizes a recovery against him, and in some cases against his securities, on motion, the party having ten days previous notice. This happens, 1st. In the case of public collectors or other public debtors. The act of 1794, c. 64, authorizes judgment on motion to be rendered against any person receiving public money from the treasurer, for public use, and misapplying the same; or indebted to the commonwealth, by bond or other specialty, whether taken in the name of the governor, treasurer, or any other, acting in a public capacity, or on behalf of the commonwealth: or against any sheriff or collector of the public taxes, who shall fail to account for and pay the same into the treasury, in the manner, and at the time, prescribed by law, provided the defendant have ten days previous notice of such motion. The act of 1794, c. 102, gives to the overseers of the poor, the like remedy against collectors of the poor rates. 2ndly. Against sheriffs and coroners failing in their duty, in serving executions, either in behalf of the public, or any private person, the same summary proceeding is given by various acts:[3] as also against their securities, in certain cases: and in all these eases the defendant is liable to damages for the non-performance of his duty, as well as for the principal debt. 3dly. Where judgment is rendered against any high sheriff, or the heirs, executors, or administrators, of any high sheriff for the default, or misconduct of his under sheriff, it shall be lawful for the court of the county, whereof he is sheriff, or the district court including such county, upon motion to them made, by such high sheriff, his heirs, executors, or administrators, to give judgment against such deputy, and his securities, their heirs, executors, or administrators, for the full amount of the fine, penalty, amercement, or judgment assessed, or rendered against such high sheriff, etc. provided the party have ten days previous notice of such motion 1793, c. 18. Edi. 1794, c. 80,101. The act of 1795, c. 16, binds the lands of deputy sheriffs and their securities to the high sheriff, and his securities; and the act of 1787, c. 10. Edi. 1794, c. 71. 7, gives a similar recovery, by motion against an attorney, receiving money for his client and failing to pay it. These summary proceedings being calculated to enforce the regular performance of their duty by public officers, who might otherwise be tempted to swerve from it, to the great obstruction of justice, and injury to the individual, are highly necessary. It may, however, be doubted, whether the extension of them to such a number of cases as we shall hereafter meet with will not contribute to sap the foundations of the trial by jury, and finally subvert it. But of this hereafter.

3dly. Summary convictions are allowed in such particular cases, as from the delinquency of the defendant, or the equity of the plaintiffs demand, may seem to require a speedy remedy, to prevent him from suffering by the default of the defendant.

1. Where the judgment has passed against a defendant and his appearance-bail, or against the sheriff where no bail, or insufficient bail has been returned by him, for the default of the defendant in not appearing according to the writ, in this case, as was elsewhere mentioned, the law permits the bail or the sheriff, his executors, or administrators, or any other person on behalf of his estate, to obtain an attachment against the estate of the defendant on motion, and upon execution and return thereof the court shall order so much of the estate seized as will be sufficient to satisfy the judgment and costs to be sold, and out of the money such judgment shall be satisfied,[4] or the bail, his heirs, executors or administrators, who have paid the amount of the judgment, or any part thereof, may obtain judgment, in the court where the original judgment was issued, against the principal, his heirs,

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executors or administrators, on motion with ten days notice for the amount of the sum paid, and shall thereupon have execution.[5]

2. Where any debtor is removing out of his county privately, or absconds, or conceals himself, so that the ordinary process of law cannot be served upon him, any justice of the peace, upon complaint made by the creditor, may grant an attachment against his estate, (which may be levied upon the slaves, goods or chattels of the debtor, or served upon any person indebted to him) returnable to the next county or corporation court, and if the effects attached be not replevied by giving bond with good security to the sheriff or by the defendants appearance and putting in bail, the plaintiff shall be entitled to a judgment for his whole debt, and may take execution thereupon; and the effects attached shall be sold towards satisfaction thereof in like manner as goods taken upon a writ of fieri facias. And where the attachment is served upon any garnishee (or person having money or effects in his hands) he may be compelled to appear, and answer upon oath, what he is indebted to, or what effects he may have in his hands of the party absconding; and all goods and effects in his hands shall be liable to satisfy the judgment. And Where a debtor is actually moving, or absconding, on a Sunday, the attachment may be issued -and served on that day. But before granting any attachment, the justice granting the same must take care to take bond and security of the party for whom it is issued, in double the sum attached, payable to the defendant, for satisfying all costs which may be awarded him in case the plaintiff be cast in his suit; and also all damages which he shall recover against the plaintiff for suing out the attachment; which bond shall be returned to the court, and the party entitled to such costs or damages, may thereupon bring suit and recover; and every attachment issued without such bond, or where no bond shall be returned, is declared illegal and void.[6]

3. In all cases where judgment is obtained against any person, his heirs, executors, or administrators, as security for another in any note, bill, bond, or obligation, in any court of record within the commonwealth, and the amount of such judgment, or any part thereof shall have been paid by such security, etc. such security Etc. may obtain judgment, on motion with ten days notice against the principal debtor, his heirs, executors, or administrators for the lull amount of the sum paid, in any court where judgment shall have been rendered against such security etc. A similar remedy is given to one security against a co-security, where the principal shall be insolvent, or, in this last case, the court may apportion the debt between the securities.[7]

4. The like remedy is given to securities and co-securities, etc. who shall have satisfied any execution awarded or issued upon any bond, obligation, or recognizance, upon which, by the laws of the commonwealth execution can be awarded without judgment.[8] These acts, however, contain some provisions calculated to prevent the security, by neglect or collusion with the obligee, from suffering judgment to pass, so as to distress the principal debtor. On the other hand, a security apprehending himself in danger of suffering by the insolvency, or departure, of his principal from the commonwealth, may give notice to the creditor to bring suit; which, unless he does within a reasonable time, he shall forfeit his right of action against the security. And securities, or their representatives may proceed in like manner with the executors or administrators of the creditor.

4thly. Judgments in a summary way may be rendered also in certain cases, where the defendant has already received the utmost indplgence of the law. 1. Where any distress is made for rent arrear, if the goods distrained be replevied, and a replevin bond taken for payment of the money at the end of three months; or if they be sold on three months credit, and bond be taken for the amount of the purchase money pursuant to the directions of the act concerning rents, and such bond be not discharged according to the condition .thereof, judgment may be thereon rendered against the obligors on motion with ten days notice.[9] The like remedy is given where an execution has been

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issued and levied, and the goods seized have been restored upon a bond given for the forthcoming thereof at the day and place of sale; in this case the remedy is extended for and against the representatives of the obligee and obligors.[10] The like remedy was formerly given in all cases where goods were taken in execution and sold on three months credit, or replevied by the defendant, on condition of paying the same within three months.[11] But that remedy was altered by the act of 1787, c. 7, which introduced a new proceeding upon executions, and laid the foundation of some extraordinary innovations on the long established rules and maxims of the common law, substituting the oath of the party, for proof by witnesses, and the discretion of the minister of a court of justice, for the judgment of the court itself; and finally subjecting a party to process of execution against his body or estate upon proceedings *in fais*, without process, without notice, without proof, and without judgment. To explain this, it will only be necessary to refer to the act of 1787, and the subsequent acts made on the subject of executions.

Inconveniences having arisen from the act permitting goods taken in execution to be replevied for three months, which was optional in the defendant, the general assembly, by the act of 1787, c. 7, abolished the right of replevying for three months, at the option of the defendant, but permitted the sheriff, where the goods could not be sold for three-fourths of their value, to replevy them for twelve months; and the bonds taken in pursuance of that act were to be delivered to the creditor or his attorney, or be returned to the office, and to have the force of judgments; and if not paid according to the condition, the creditor, his attorney, or assignee, might lodge the same with the clerk of the court, with an affidavit that the money, or part thereof, was still due, and thereupon the clerk might issue execution, upon which no security could be taken. These bonds were likewise made assignable, and when assigned, if the sheriff returned no goods, or not sufficient to pay the debt, the clerk was authorized to issue an execution against the assignor of the bond, for the amount of the debt therein mentioned, or such part as might appear to be still due.[12] And by the act of 1794, c. 176, writs of capias ad satisfaciendum, or elegit, as well as writs of fieri facias, might be issued on replevy bonds. By the act of 1795, c. 2, the court, on motion by the assignee of a bond, who has assigned the same over, may give judgment against any prior assignor, his executors, etc. on ten days notice. And by the act of 1798, c. 3, notices of motions against sheriffs and other officers, engaged in the collection of the public revenue, were declared to be unnecessary: but this very extraordinary mode of proceeding was altered the succeeding year, 1799, c. 2. And by two subsequent acts (1800, c. 42, and 1801, c. 1) ten days notice must be given to sheriffs and collectors of the public revenue, in case of delinquency, as formerly.

NOTES

1. October, 1776, c. 15.

2. An attempt has since been made to extend the jurisdiction of a single magistrate to all causes not exceeding twenty dollars in value, the bill passed the house of delegates, but miscarried in the senate.

3. 1782, c. 8. 1737, c. 40. 1789, c. 15 and 42. 1791, c. 3. 1794, c. 84, and 151, etc.

4. 1753, c. 1. Oct. 1777, c. 17. 1788, c. 67. 1794, c. 60. Sec. 29. c. 09 Sec. 26.

5. 1786, c. 15. 1794, c. 145.

6. V. L. 1794, c. 78. 1794, c. 175.

7. 1786, c. 15. 179-1, c. 145.

8. *Ibidem.*

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9. 1748, c. 10, 1794, c. 89.

10. 1769, c. 3.1788, c. 77, 1792, c. 5, 1794, c. 151.

11. 1748, c. 8.

12. 17XX, c. 7, 1791, c. 5, 1792, c. 5, 17XX, c. 176.

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NOTE F

Of the Trial by Jury, in Virginia

ALTHOUGH our system of jurisprudence seems to favor the trial by jury, yet there is no part of our code of laws, perhaps, so defective as those which relate to this important species of trial. The disregard to the characters and qualifications of jurors which every where obtains in the practice of our courts will in time, if not remedied, bring that most valuable mode of trial into disrepute. The most beneficial parts of the system in England seem to have been almost lost sight of here. In civil cases the jurors are summoned the instant that the trial is to take place, by persons too often the least qualified to determine upon their capacity, and the most indifferent about their characters. Where the courts are held in country places, the juries, after the first day or two, instead of being composed of the most respectable freeholders in the county, men above the suspicion of improper bias, or corruption; men whose understandings may be presumed to be above the common level, are made up, generally, of idle loiterers about the court, who contrive to get themselves summoned as jurors, that they may have their expenses borne: and are in every other point of view, the most unfit persons to decide upon the controversies of the suitors. The parties and their attorney are unprepared for a challenge, and the trial proceeds, not unfrequently, without a fourth part of competent jurymen to decide the question. Hence the number of new trials granted; because the jury have not understood or have misapplied the evidence. Hence in time, must result to the courts an influence in questions of fact which may become highly pernicious. Hence the number of special verdicts, demurrers to evidence, and points reserved; which the parties, mutually apprehensive of a decision by an incompetent jury, are ever ready to propose, or agree to. These inconveniences might be greatly diminished, perhaps totally removed, were a due regard paid to the qualifications of jurors, not only in respect to estate, (which indeed is noticed by our law,) but in respect to the other more necessary qualifications of ability, integrity, and impartiality. The trial by jury would then merit every eulogium which has ever been bestowed upon it.

The technical forms, in which the mode of impaneling jurors in England appears to be involved, no doubt contributed to prevent it's adoption in this country. Until the revolution there being but one superior court of common law jurisdiction, and that held at the seat of government, the want of competent jurors was not so obvious, nor so extensive as, at this day, when there are nineteen. The county courts rarely sat above a day or two. The most respectable freeholders of the county generally attended on the first day, and sometimes a tolerable jury might have been collected on the second day of the court. But the terms being now lengthened, to six days, the courts after the first and second days are but thinly attended. In the district courts after the trials of criminals are over, it is with difficulty a jury of any kind can be procured, except in the towns, where they are generally composed of one class of people, who cannot always be supposed to be perfectly free from some bias, however upright in their intentions. In small towns, such as ours are generally, the duty falls heavy upon the few who are summoned day after day, during the whole, or the greater part of a term, to attend the courts. In questions arising in the neighborhood an imperceptible influence is too apt to govern them according to their friendships, or dislikes: such questions are not unfrequently prejudged before the suit is commenced, according to the first impressions of the nature of the dispute; and these impressions the testimony of witnesses is rarely strong enough wholly to efface. In criminal cases, although the law seems to have been more provident, the objections to the present mode of summoning jurors appear to be important; in these cases, twelve persons (the numerical number required for the trial,) are summoned by a deputy sheriff, not unfrequently three, or four, or even six months, before the period fixed for the trial.

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I have already said that this description of men are two often the least qualified to judge, and the most regardless of the characters and capacities of those whom they summon as jurors. If a criminal possesses an estate himself, or has friends who possess wealth, or influence, such persons employed as the summoners of jurors must not unfrequently invite the attempt at least to corrupt them.[1] The principle of the law is, not that those who are really guilty should escape punishment, but, that no innocent person shall be punished. But where the road to corruption is so broad and open, innocent persons will be the most likely to suffer; for, conscious of their innocence, they will neglect to take those steps which a corrupt officer, or a corrupt jury, may think they ought to have taken, but the guilty if they possess directly or indirectly the means of corruption, will be sure to escape. Whether to this cause is to be ascribed the number of acquittals against positive evidence, (more especially in cases of homicide and malicious mayhem,^ which an attentive observer might enumerate, the author of these pages cannot pretend to decide, but from the multiplicity of such acquittals, the inference to be drawn is, that there must be an infinite degree of perjury in the witnesses, or of unpardonable disregard to their duty in the jurors. How far the pica of humanity may be admitted to countervail the oath of duty, is a question which every juror ought well to consider, where evidence is positive, the characters of witnesses fair, and irreproachable, or the circumstances of the case such as admit of no rational solution, but by admitting the guilt of the party.

On the other hand, innocence can never be so safe, as in the hands of men of sound understandings, sound hearts, and clear consciences. The expense of a better system is the only reason that I have ever heard alleged in favor of the present: no country deserves to be free or happy that grudges the expense of wholesome regulations, especially, where the peace and happiness of society may be at stake on the one hand, and the life or liberty of a citizen on the other. But the expense is actually incurred although the burden of it is most partially distributed: the man who is compelled to serve as a juror without recompense serves the state for nothing, loses his own time, and pays, that expense out of his own pocket which his fellow-citizens ought, by a joint contribution, to pay out of theirs. Is it more reasonable that five hundred men should serve the state without recompense, and at the same time bear their own expenses; or that five hundred thousand, who derive benefit from their services, should not only reimburse their expenses, but pay them also for their services? The present system seems, therefore, to be not only extremely defective, and inadequate for the purposes of distributive justice, but partial and oppressive, as it relates to those who are compelled to discharge the duty. All these circumstances appear to cry aloud for reform. To suggest a perfect plan may not be very easy: but to offer one which might promise an amendment to this mode of trial, would not be a very arduous task. The following draft of a bill for amending the law concerning juries was prepared some years ago: as no plan more practicable, more cheap, or more likely to be productive of the same beneficial effects has suggested itself, the editor submits it to the consideration of his countrymen, with an earnest hope that cither that, or some better plan, may be speedily adopted.

"The trial by jury being one of the most important pillars of a free government, and the preservation of it in it's punt), the greatest security to the lives, liberty, and property of the citizens, by the due administration of justice, as well as to the peace and good order of society; and the legislature being desirous to make such provisions respecting the same, as may contribute most effectually to answer the end of it's institution.

Section 1. Be it therefore enacted by the general assembly, that the several county courts within this commonwealth at their respective quarterly sessions in the months of May or June, in every year, shall cause their clerk to lay before them the list, or lists of taxable property as well real as personal

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within their county for the preceding year, and from the list, or lists so produced, they shall cause their clerk to form an alphabetical list or roll of the names, surnames, callings, occupations, or other additions, -and places of abode of all free male white persons residing within the county, who shall not be under the age of twenty-one years, nor above fifty, whose property or estate within the county, whether real, personal or mixed, shall be rated on the said list of taxable property to one hundred pounds, or mope, to serve as jurors for such county. Which list shall be fairly entered and kept in a well bound book, and shall from time to time be corrected, in such matters as may be necessary for rendering the same, a complete list of persons qualified to serve as jurors, according to the directions of this act. Provided always, that, if any person above the age of fifty, shall through inattention of the justices be summoned to attend as a juror, in the manner herein after mentioned, he shall not, for that reason alone be exempted from attending agreeably to such summons.

Section 2. The justices of the said courts respectively, at their quarterly sessions next preceding every district court to be held for that district to which their county belongs, shall select from the whole roll of persons qualified to serve as jurors, as aforesaid, thirty-two honest, discreet and intelligent yeomen, freeholders, merchants and traders, citizens of this commonwealth, not being clergymen, practitioners of physic, or surgery, or attorneys of any court, sheriffs, or their deputies, collectors of the public taxes, county-levies, or poor rates, overseers of the poor, county surveyors, or their deputies, inspectors of tobacco, ferry-keepers, or constables, nor tavern-keepers, distillers, or venders of spirits by retail, overseers or managers of plantations or mills for others, merchants' clerks, or shopkeepers, journeymen, or apprentices; nor such as be, or be reputed conspirators, barretors, champertors, embracers, maintainers or movers of suits, swindlers, gamblers, idle haunters or frequenters of taverns, breakers or disturbers of the peace, or other disorderly persons, or person, whatsoever; but altogether such as be of the best fame, reputation, and understanding, and credit, in their county, whereof three of the least, shall be justices of the peace, in and for their said county. And furthermore, the said justices shall not select any person, as aforesaid, whom the said justices, or any of them, shall know, or have good reason to believe, to be a party, prosecutor, plaintiff or defendant in any indictment, information, suit, or controversy whatsoever depending in, or about to be brought before the said district court. And if any such conspirator or reputed conspirator, barretor, champertor, embracer, maintainer or mover of suits, swindler, gambler, haunter or frequenter of taverns, or other disorderly person, by chance or otherwise, be of the panel for the trial of any issue joined upon any indictment, information, suit or controversy, whatsoever, in any district court, it shall be good cause of challenge, before the person so liable to be challenged be sworn, but not after, unless such person be indicted, or convicted of any such conspiracy, barretry, or other misdemeanor.[2]

From the whole number of the said yeomen, freeholders, merchants and traders, so selected by the justices aforesaid, whose names shall be written upon separate pieces of paper of the same size, and rolled up alike, by the clerk of the said county-court, the high sheriff of the county, or in case of his inability to attend, the court, his deputy, in the presence of the said justices, and of the suitors, and others, attending the said court, shall draw by lot the names of sixteen of the said yeomen, freeholders, merchants and traders, to serve as jurors for their county at the next succeeding district court: and every name so drawn shall be immediately pronounced aloud by the said sheriff, in the presence and hearing of the court, and of all persons there attending. Provided always, that where the number of counties in any district shall not exceed three, the number of jurors which shall be chosen to attend at the next district court, shall not be less than twenty-one jurors from each county within such district. The clerk of the said court shall immediately issue a writ of venire facias, wherein shall be written at full length the names surnames, callings, occupations, or additions, and

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the places of abode of the persons so chosen, directed to the sheriff' of such county, and commanding him to summon the persons therein named, to attend accordingly, which writ the sheriff shall accordingly execute, under penalty of ten pounds for every person whom he may neglect to summon, unless good cause for such omission be shown by him at the next district court, and under the like penalty, in case he shall return any person as summoned, who shall not have been actually summoned by him. Every person so chosen to serve as a juryman, shall be summoned at least five days before the sitting of the district court which he shall be required to attend, and the sheriff shall return his writ to the office of the clerk of the district court, one day, at the least, before the sitting of the court, under penalty of fifty pounds. – Every juror who shall be summoned pursuant to this act, and shall fail to attend, without a reasonable excuse for so doing, or attending and afterwards departing without leave of the court, shall be fined, at the discretion of the court in any sum not exceeding thirty dollars.

Section 3. The clerk of the district court shall enter the names of all persons, summoned to attend as jurors, in a well bound book to be kept for that purpose, with their surnames, callings, occupations, additions, and the names of their counties and places of abode, distinguishing such as make default, or depart without leave of the court, from such as give their attendance; and noting their times of service respectively. And, at the expiration of the term, or when at any time a juror shall be dismissed by the court, he shall be entitled to receive from the clerk a certificate of his traveling distance, ferries, and attendance, for which he shall be paid at the like rate that witnesses summoned and attending a district court are, or shall be paid, to be levied and paid by the county wherein he resides. But no juror who shall depart without leave of the court, or being summoned as a witness, shall charge for his attendance as such, shall be entitled to receive any certificate for compensation for his services as a juryman.

Section 4. Out of the whole number of jurors who shall attend on the first day of any district court, the court shall by lot elect not less than sixteen, nor more than twenty-three, to serve as a grand jury for the body of the district, choosing as near as may be, an equal number from each county within the district, who shall be sworn to inquire of and prevent all treasons, murders, felonies, and other offenses and misdemeanors whatsoever, which shall have been committed or done within the district for which they are impaneled, and such grand jury shall not be discharged until the end of the term.

Section 5. If any person, other than a slave, shall be brought to such district court to be tried for any crime, the punishment whereof by the laws in force on the 25th day of March, 1800, did extend to .life or member, the court shall direct the jurors from that county from which the person about to be tried shall be sent, to appear; and a list of their names, if he require it, shall be given him, and if there be no challenge to -any one of them; on the part of the prisoner, nor for good cause shown to the court, on the part of the commonwealth, such jurors, not exceeding twelve, or so many of them as appear, shall be sworn to try the prisoner; and if there be not a sufficient number attending from such county to make a full jury, the clerk shall, by lot, call so many others summoned from the other counties in the district, as herein before mentioned, as shall be necessary to constitute a full jury.

Section 6. And for the trial of all other indictments and prosecutions in behalf of the commonwealth, as also of all civil suits in such courts, the name of each and every person summoned and impaneled, as-before directed, (except such of them as may be of the grand jury) shall be written on several and distinct pieces of paper, with his addition and place of abode, and being rolled up by the clerks, as near as may be, in one and the same manner, and of equal size, shall be deposited in a ballot-box for that purpose to be kept: and when any cause is brought to be tried, the clerk or the court shall draw out twelve of the said papers one after another; and, if any of the persons whose names shall be so

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drawn, do not appear, or be challenged and set aside, such further number shall be drawn as shall make up the number twelve, who do appear and be approved as indifferent, who shall thereupon be sworn of the jury to try such cause. The names of the persons so drawn and sworn, shall be kept apart by themselves, in another box or hat, until such jury shall have given their verdict, and the same be recorded; or the jury, by consent of parties, or by leave of the court, be discharged; and then the said names shall be again rolled up and returned to the former box. If any other cause shall be brought on to be tried, whereupon the jury shall have brought in their verdict, the jurors for such trial shall be drawn, in like manner, from the residue of the names in the ballot box. Any juror, who, being solemnly called, shall not appear and answer to his name immediately, may be fined,'in the discretion of the court, not exceeding ten dollars, for his contempt: and if he shall do the like a second time, it shall be considered as a departure without leave of the court.

Section 7. Every juror summoned and attending any district court, who shall thereof obtain a certificate in the manner directed by this act, shall thereby be exempted from the like duty for the space of three years next ensuing, unless every other person on the roll of jurors for the same county, qualified according to the purview of this act, shall have been summoned, and have attended within the like period, and shall be moreover exempted from serving on any jury in the county court, and also from attending musters of the militia, except in case of insurrection or invasion, and from serving on patrols for the space of one year. And, that the rotation of duty may be more easily known, the clerk of the county shall carefully enter against the name of every person in the jurors' roll, or list, the time and times when he shall have been summoned pursuant to the directions of this act.

Section 8. The justices of the several county and corporation courts at their monthly session next preceding every quarterly court to be held for their county or corporation, shall, by ballot, choose forty eight persons whose names are entered on the jurors' roll, who have neither served as jurors in the district court, nor in the county or corporation court for one year next preceding, if so many there be as to admit of such exemption, to serve as jurors for the county at the next succeeding quarterly court, who shall be summoned in like manner as is directed in the former case. And the sheriff to whom such writ shall be directed, and every person by him summoned, shall, in case of neglect or disobedience to such writ, be subject to the same penalties as are herein before imposed, in case of neglect or disobedience to a summons commanding their attendance in a district court.

Section 9. Of those who shall attend in obedience to such summons not less than sixteen, nor more than twenty shall be impaneled as a grand jury for such county, who shall be sworn to inquire into the breach of the penal laws, and make presentment of the offenders. And the residue of the said jurors, together with those sworn of the grand jury, when not necessarily acting as such, shall serve as petty jurors,'and shall be impaneled, elected, tried, and sworn, in the same manner as herein is before directed. But no grand juror shall be of the petty jury on the trial of any indictment found by a grand jury of which he was a member.

Section 10. Every person summoned to attend any court as a juror, and attending accordingly, shall be exempted from arrests and all other process in civil cases, except writs of subpoena for witnesses, during his attendance, and one day for every twenty miles that he shall necessarily travel in going to and returning from court.

Section 11. Bystanders may be impaneled on a jury, if a sufficient number of those summoned do not appear.

Section 12. The county of Northampton shall furnish twenty four jurors to attend the district court,

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and the county of Accomack thirty-six, any thing herein to the contrary notwithstanding.

Section 13. So much of the act concerning grand juries, etc. as also of the act directing the method of proceeding against free persons charged with certain crimes, etc. as is contrary to this act, shall be repealed.

NOTES

1. Some years ago eleven or twelve persons were indicted in a district court for a riot, it happened that at the same time when their trial was expected to come on, a man was sent from the same county to be tried for horse-stealing; the *venire* summoned was composed chiefly, if not wholly, of the defendants for the riot; the obvious reason in this case was that they might be paid for attending as *venire-men* whilst obliged to attend as defendants. But a case which happened in Dumfries, May term, 1800, is much stronger. A man indicted for murder was put upon his trial, and seven of the jury were sworn; when it was made to appear to the court that his father had delivered to the deputy sheriff who summoned the jury a list of twenty-four persons out of which he requested the jury might be summoned. The sheriff who was an inexperienced young man showed the list to a person, who gave the information to the court. Some of the persons named in the list had been summoned and were actually sworn on the jury before the court had notice of the affair. The trial, as may be supposed, was necessarily stopped.

2. A similar provision may be made in respect to the corporate towns, within the state: apportioning the number of jurors from each according to the number of inhabitants.

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APPENDIX
to Vol. 5

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NOTE A

Of The Cognizance of Crimes And Misdemeanors

THE complicated system of government in the United States, imposes upon us the necessity of a frequent recurrence to fundamental principles, in order to ascertain to what department of it any particular subject appertains. In no respect is this recurrence more necessary, than in the examination of the nature of crimes and misdemeanors; the cognizance of which, by the federal courts, will depend altogether upon the nature and tenor of that instrument, upon which the jurisdiction is founded: in the exposition of which, we have been repeatedly obliged to recur to the nature of the compact, for a due exposition of the text. If for example, the constitution of the United States had been intended for the establishment of a consolidated national government, instead of a federal republic, the same strict interpretation, which is at present necessary, in order to preserve to the states, respectively, whatever rights they had no design to part with, might perhaps, in many instances have been dispensed with.

It has been well observed by one of the judges of the supreme court of the United States, that "in this country every man sustains a twofold political capacity: one in relation to the state, and another in relation to the United States. In relation to the state, he is subject to various municipal regulations, founded upon the state constitution and policy, which do not affect him in his relation to the United States: For the constitution of the union is the source of all the jurisdiction of the national government; so that the departments of that government, can never assume any power, that is not expressly granted by that instrument, nor exercise a power, in any other manner than is there prescribed."[1] This is, indeed, a short, clear, and comprehensive exposition of the principles of a limited government, founded upon compact between sovereign and independent states.

For it cannot, I presume, be denied, or even doubted, that the constitution of the United States, is the instrument by which the federal government was created; its powers defined; their extent limited; the duties of the public functionaries prescribed; and the principles according to which the government is to be administered, delineated;

That the federal government of the United States, is that portion, only, of the sovereign power, which, in the opinion of the people of the several states, could be more advantageously administered in common, than by the states respectively;

That the several states at the time of adopting that constitution, being free, sovereign, and independent states, and possessing all the rights, powers, and jurisdictions, incident to civil government, according to their several constitutions; and having expressly stipulated, that 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; every power which has been carved out of the sovereignty of the states, respectively, must be construed strictly, wherever it may derogate from any power which they possessed antecedently;

And, on the other hand, that all the powers granted to the federal government, are either expressly enumerated, and positive; or must be both necessary, and proper to the execution of some enumerated power, which is expressly granted.

If these be the genuine principles of the federal constitution, as, I apprehend they are, then it seems impossible to refuse our full assent to the learned judge's observations on the subject. Adopting them therefore as our guide, let us proceed in our inquiry.

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A crime or misdemeanor, as defined by judge Blackstone, "is an act committed, or omitted in violation of a public law, either forbidding, or commanding it:" from whence it follows, that the cognizance and punishment of all crimes and misdemeanors, belongs exclusively to that body politic, or state to which the right to enact such a public law belongs.

The cognizance of all crimes and misdemeanors committed within the body of any state, therefore, belongs exclusively to the jurisdiction of that state; unless it has by compact or treaty surrendered its jurisdiction in any particular cases to some other power. And in like manner the cognizance of all crimes and misdemeanors committed on the high seas (where all nations have a common jurisdiction) by citizens of the same state against each other; or, by common pirates, or robbers, against the citizens of any state, belongs to that particular state to whose citizens the injury is offered. And consequently the American states respectively, as soon as they became sovereign, and independent states, were entitled to exclusive jurisdiction in the case of all crimes and misdemeanors, whatsoever, committed within the body of such states, respectively, or upon the high seas, in every case where any other state or nation might claim jurisdiction under similar circumstances.

By the articles of confederation concluded between the states some years after; each state, expressly, "retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which was not, by that confederation, expressly delegated to the United States in Congress assembled," The ninth article ceded to congress, the sole and exclusive right of making rules for the government, and regulation of the land and naval forces of the United States; and of appointing courts for the trial of piracies and felonies committed on the high seas: so that the states retained the exclusive cognizance of all civil crimes and misdemeanors, whatsoever, except in the cases therein mentioned. And this exclusive jurisdiction they continued to retain until the adoption of the present constitution.

By the third article of that instrument it is declared, "that the judicial power of the United States, shall extend to all cases arising under the constitution, the laws of the United States, and treaties made, or which shall be made under their authority." The same article defines the offense of treason against the United States, but leaves to Congress the power to declare the punishment, thereof, under certain limitations. Treason against the United States, is, therefore, one of those crimes, to which the jurisdiction of the federal courts extends.

The eighth section of the first article, among other things, declares, that congress shall have power to provide for the punishment of counterfeiting the securities and current coin of the United States; to define and punish piracies, and felonies committed on the high seas, and offenses against the law of nations; to exercise exclusive jurisdiction within certain specified limits; and to make all laws, which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the constitution in the government of the United States, or in any department or officer thereof.

To apply then, the observations of the learned judge; since neither Congress, nor any other department of the federal government, can ever assume any power that is not expressly granted by the constitution, nor exercise it, in any other manner, than is there prescribed, it appears to be essential that congress should define all offenses against the United States, except treason; and prescribe the punishment to be inflicted for that and every other offense against the United States, before the federal courts can proceed to try a criminal or to pronounce sentence upon him in case of conviction.[2]

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If this be doubted, let us suppose that any person had committed treason against the United States, before the passage of the act of Congress, declaring the punishment of that offense; could the federal courts, or any other, have proceeded to judgment against him for the same, or, if they could, what judgment could they have pronounced? Let us suppose again that congress having defined the offense of piracy, had omitted to declare the punishment; could the federal courts have supplied this omission by pronouncing such a sentence as they might suppose the crime deserved? Again, let us suppose that congress may have omitted altogether to define or to declare the punishment of any other offense committed upon the high seas; will it be contended that the federal courts could in any such case punish the offender, however atrocious his offense regarded in a moral light may appear? In none of these cases (as I apprehend) could the federal courts proceed to punish the delinquent, although in every one of them, the offense may be clearly acknowledged to arise under the constitution of the United States.

If in cases arising upon the high seas, (in all which the federal courts, under the federal constitution and laws, possess a jurisdiction, altogether exclusive of the state courts) it be necessary that an offense be first defined, and the punishment thereof declared by congress; how much more necessary is it, that offenses committed within the body of any state should, in the same manner, be first defined, and the punishment thereof declared by a law of the United States, before the courts of the United States can undertake to inquire into or punish it? For the presumption is, that every offense, committed within the body of any state, is an offense against that state only; and, that the state courts have the sole and exclusive cognizance and punishment thereof, unless it be shown, that the federal constitution, or some act of congress made in pursuance of it, have altogether divested the state courts of jurisdiction over the subject. For although we may readily admit, that besides the particular case of treason and those which the eighth section of the first article designates, there is a power granted to congress to create and to define and punish offenses, whenever it may be necessary and proper to do so, in order to carry into execution, the specific powers granted to the federal government, still it appears indispensably necessary, that congress should first create, (that is, define and declare the punishment of,) every such offense, before it can have existence as such, against the United States.

It has been attempted, however, to supply the silence of the constitution and statutes of the union, by resorting to the common law for the definition and punishment of offenses in such cases. To which, the same judge has given the following clear and emphatical answer. "In my opinion, the United States as a federal government have no common law: and consequently, no indictment can be maintained in their courts for offenses merely at the common law. If indeed the United States can be supposed for a moment to have a common law, it must, I presume, be that of England; and yet it is impossible to trace, when, or how, the system was adopted, or introduced. With respect to the individual states, the difficulty does not occur. When the American colonies were first settled by our ancestors, it was held, as well by the settlers as by the judges and lawyers of England, that they brought hither, as a birth right and inheritance, so much of the common law as was applicable to their local situation, and change of circumstances. But each colony judged for itself, what parts of the common law were applicable to its new condition; and in various modes, by legislative acts, by judicial decisions, or by constant usage, adopted some parts and rejected others. Hence, he who shall travel through the different states will soon discover, that the whole of the common law has been no where introduced; that some states have rejected what others have adopted; and that there is, in short, a great and essential diversity in the subjects to which the common law is applied, as well as in the extent of its application. The common law, therefore, of one state, is not the common law of another; but the common law of England is the law of each state, so far as each state has adopted it;

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and the results from that position connected with the judicial act, that the common law will always apply to suits between citizen and citizen."

"But the question recurs, when and how, the courts of the United States acquired a common law jurisdiction in criminal cases? The United States must possess the law themselves, before they can communicate it to their judicial agents: now the United States did not bring it with them from England; the constitution does not create it; and no act of congress has assumed it.[3] Besides, what is the common law to which we are referred? Is it the common law entire, as it exists in England; or modified, as it exists in some of the states; and, of the various modifications, which are we to select, the system of Georgia or New-Hampshire, of Pennsylvania or Connecticut?"

"Upon the whole," he concludes, "it may be a defect in our political institutions, it may be an inconvenience in the administration of justice, that the common law authority relating to crimes and punishments, has not been conferred upon the government of the United States, which is a government, in other respects also, of a limited jurisdiction: but judges cannot remedy political imperfections, or, supply any legislative omission."[4]

Unfortunately, perhaps, for the United States, this opinion did not prevail, the court being divided in their judgments. – We are, therefore, not only without a precedent: but, what is infinitely more important, a principle, which might have been deemed clear, and well ascertained, is now, in some degree, rendered doubtful. Nevertheless, until a contrary division shall have subverted the apparently solid foundation of that which I have cited, I shall venture to recommend it to the student, as containing the most clear, correct, and convincing, illustration of the principles of the federal constitution.

From what has been said, we may venture to draw the following conclusions.

1. That the cognizance of every crime and misdemeanor, whatsoever, committed within the body of any state, belongs to the courts of that state, in which the offense is committed, exclusively; unless it can be shown that a power over the subject has been expressly granted to the United States, by the federal constitution.

2. That the federal courts possess no jurisdiction, whatsoever, over any crime or misdemeanor, which is an offense by the common law, only, and not declared to be such, by the constitution, or some statute of the United States.

3. That although a certain class of offenses, may, by the constitution of the United States, be declared to be within the jurisdiction of the federal courts, yet those courts cannot proceed to take cognizance thereof, unless they be first defined, by the constitution; or by statute; nor to punish them, unless the punishment be likewise prescribed by a statute of the United States.

NOTES

1. See Dallas's Reports, Vol. II. p. 393.
2. Id.
3. That is, in the case of bribery, of which the judge was then speaking,
4. See Dallas's reports, Vol. II, page 394, 395. The opinion of judge CHASE in the case of the United States v. Worral.

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NOTE B

Concerning Treason

IT is probable that no part of the constitution of the United States, was supposed to be less susceptible of various interpretations than that which defines and limits the offense of treason against the United States; the text is short, and until comments upon it appeared, might have been deemed explicit; it is as follows:

"Treason against the United States shall consist ONLY in levying war against THEM, or in adhering to THEIR enemies giving them aid and comfort."[1]

From this declaration contained in the constitution of the United States, the supreme law of the land, and the fountain, both of the authority of the government, and of the crime against it, a plain man might draw conclusions, very different from the artificial reasoning, and subtle refinement of technical men: and seeing that *that* instrument is to be regarded as the act of the people of the United States, both collectively, and individually, it might seem reasonable that the interpretation of nine hundred and ninety-nine plain men, who were parties to it, ought to serve as a guide to the thousandth man, who may happen to be called upon to expound it. But as technical men are not very apt to respect the opinions of such as have not been educated in the same habits with themselves, the probability is, that the opinions of one man in a thousand, or rather in a hundred thousand, will overbalance that of the rest of the community, unless the latter should deem it an object worthy of their attention to express their opinion, in some way that may be regarded as obligatory upon the few, who dissent from them.

Two additional clauses, are to be found in the constitution of the United States, and the amendments thereto, whereby it appears, that the framers of the constitution, and those who adopted it, were of opinion, that too much caution could not be used upon so important a subject.

1. The constitution provides,[2] "That no person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act."

2. The amendments to the constitution of the United States provide,[3] "That in all criminal cases, the accused shall enjoy the right to a speedy and public trial of the state and district, wherein the crime shall have been committed: which district shall have been previously ascertained by law."

The reason of these constitutional limitations has been thus explained, on different occasions.

"As newfangled and artificial treasons have been the great engines by which violent factions in free states have usually wreaked their alternate malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime."[4]

Judge Wilson, in the first charge which he delivered in the federal circuit court of Pennsylvania, expressed himself thus on the subject. "It well deserves to be remarked, that with regard to treason a new and great improvement has been introduced into the government of the United States; Under that government, the citizens have not only a legal, but a constitutional security against the extension of that crime, or the imputation of treason. Treasons, capricious, arbitrary, and constructive, have often been the most tremendous engines of despotic or legislative tyranny.[5]

Judge Iredell, on a similar occasion in South Carolina, observed. – Treasons consists in two articles only; levying war against the United States, or adhering to their enemies, giving them aid and

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comfort. The plain definition of this crime was justly deemed of such moment to the liberties of the people, that it was made a part of the constitution itself. None can so highly prize the importance of this provision, as those who are best acquainted with the abuses which have been practiced in other countries in prosecutions for this offense. No man of humanity can read them without the highest indignation; nor, in particular, can they be read by any citizen of America, without emotions of gratitude for the much happier situation of his own country.[6]

Such, probably, were the opinions of the citizens of America in general, when they adopted the constitution; but technical men have since made some important inferences and deductions from the use of some words in that definition, which are to be found in the statute of treasons in England,[7] from whence they conclude, that the decisions made upon that act in England, during a period of near five hundred years, however contradictory or inconsistent they may be, with the text or with each other, have been adopted also by the constitution, "as a direction whereby the courts are to understand the application of that act."[8] And it has even been advanced, on a very important occasion, that, what in England is called constructive levying of war, in this country must be called direct levying of war.[9]

One of the judges present upon the occasion above alluded to, is reported to have expressed himself thus: "The authorities from British precedents and adjudications, are used as guides in our decisions. I will not enter into a discussion whether we are bound to follow them, because they are precedents, or because we think them reasonable and just."[10]

The distinction is however important; and it is therefore to be wished, that the learned judge had given an opinion on the subject. If the British authorities are to be regarded as precedents, they are, I apprehend, to be considered as the law of the land, and cannot be shaken or departed from, unless flatly absurd and unjust.[11] But if they are no further obligatory, than as they may be convincing, they are no more obligatory upon the consciences of judges, than the reasoning of other men who never sat in the chair of judgment in any country.

The presiding judge, upon the same occasion, seems to have expressed himself in a style somewhat different from that in which he addressed the grand jury of South Carolina. "I must confess," says he, "as these able and learned framers of our constitution borrowed the act in terms from the British statute alone, an authority with which they were familiar, that they certainly at least meant, that the English authorities and definitions of those terms should be much respected."[12]

Judge CHASE, on the subsequent trial of Fries, declared, "That the court would admit, as a general rule, of quotations from the English books; not as authorities whereby they were bound, but as opinions and decisions of men of great legal learning and ability. But even then the court would attend carefully to the time of the decision, and in no case must it be binding upon our juries."[13] As this was pronounced as a general rule by the court, and not as the opinion of a single judge, we may consider it as now settled that the English authorities are not binding as precedents; consequently, that they do not form a part of the law of the land, but are to be respected only as the opinions of men of great legal learning and ability, which may nevertheless be canvassed as freely as the opinions of other men. Neither are we now bound to suppose, that the framers of our constitution meant to adopt those decisions as a guide to our courts in the interpretation of the definition of treason against the United States.

By the old common law of England, before the conquest, the crime of treason, *trahison, proditio,* (which, in its very name, imports treachery or breach of faith,) when applied to the person of the king, or to his government, was called the crime of majesty, and it is said,[14] might be committed in

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three ways,

1. By those who kill the king, or compass so to do;

2. By those who disinherit the king of his realm, by bringing in an army, or compass so to do;

3. By those adulterers who ravish the king's wife, etc.

It is on the authority of this passage in the Mirror, that sir Edward Coke lays it down,[15] that levying war against the king was treason by the common law. We find then, that the common law sense of this obscure phrase, as sir Mathew Hale calls it,[16] was the bringing in or raising an army. And in this sense it is probable that every man in America (with the exception, perhaps of. half a dozen lawyers) understood the term levying war, when the constitution was adopted: and in this sense it seems to be still understood by some gentlemen, whose professional talents are both an honor and an ornament to their country.[17]

It seems to have been taken for granted, that the clause in our constitution, which relates to the crime of treason, is an exact transcript from the statute 25 Edw. III.[18] It may therefore be not amiss to compare them.

The words of that famous statute are as follows; "Whereas diverse opinions have been before this time, in what case treason shall be said, and in what not; the king at the request of the lords and commons has made a declaration in the manner as follows: that is to say, when a man does compass or imagine the death of our lord the king, etc. or if a man do levy war against our lord the king in his realm, or be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm or elsewhere, and thereof be provably attainted of open deed by people of their condition; and if a man counterfeit the great seal, etc. [enumerating several other cases.] And it is to be understood that, in the cases above rehearsed, that ought to be adjudged treason which extends to our lord the king, and his royal majesty; and the forfeiture, etc. And moreover there is another manner of treason, that is to say, when a servant slays his master, etc. and because many other like cases of treason may happen in time to come, which a man cannot think or declare at this present time, it is accorded that if any other case supposed treason, which is not above specified, does happen before any of the justices, the justices shall tarry without any going to judgment of the treason, 'till the cause be showed and declared before the king and his parliament, whether it ought to be adjudged treason, or other felony."

Upon this statute we may here remark, that there are no negative words in it, as in the constitution of the United States; and that, so far from declaring as that does, that treason shall consist, only in the cases enumerated, it expressly supposes that many other cases of treason may happen, although the framers of that statute could not then think of them.[19] True it is, such cases were to be reserved for the king and parliament to pass upon, but the violence of succeeding times, and the corruption and complying temper of succeeding parliaments, during a succession of more than two centuries, left but little room for scrupulous judges, had there been any such in those days, to apply for a parliamentary interpretation of any undefined offense supposed to be treason.[20]

Sir Mathew Hale having enumerated several instances of arbitrary and unjust decisions respecting treason, thus proceeds.[21]

"By these and the like instances that might be given, it appears how uncertain and arbitrary the crime of treason was before the statute of 25 Edw. III, whereby it came to pass, that almost every offense that was, or seemed to be a breach of the faith and allegiance due to the king, was by construction

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and consequence, and interpretation, raised into the offense of high treason."

"And we need (he proceeds) no greater instance or this multiplication of constructive treasons than the troublesome reign of Richard II, which though it were after the limitation of treasons by the statute 25 Edw. III, whom he immediately succeeded, yet things were so carried by factions and parties in this king's reign, that this statute was little observed; but as this or the other party prevailed, so the crimes of high treason were in a manner arbitrarily imposed and adjudged, to the disadvantage of that party that was intended to be suppressed; so that *de facto* that king's reign gives us as various instances of these arbitrary determinations of treasons, and the great inconveniences that arose thereby, as if indeed the statute 25 Edw. III, had not been made or in force. And though most of those judgments and declarations were made in parliament; sometimes by the king, lords and commons; sometimes by the lords, and afterwards enacted as laws; sometimes by a plenipotentiary power committed by acts of parliament to particular lords, and others, yet the inconvenience that grew thereby, and the great uncertainty that happened from the same, was exceedingly pernicious to the king and kingdom."

Abundance of cases may be collected from the same author, to show that the judges were rather astute in extending the offense of treason, than strict in the construction of the statute, which has been supposed to limit it. And, how much soever modern judges and jurists may be supposed to have been uninfluenced by their authority, yet the contagion of precedent has come down even to those days: For, I think it cannot be denied that, if all the cases of constructive treason, were destroyed and utterly forgotten, even the most modern decisions upon the subject of treason, would have been stripped of some of their circumstances and conclusions. But to proceed. –

The author above cited says,[22] "what shall be said a levying war, is in truth a question of fact, and requires many circumstances to give it that denomination, which it may be difficult to enumerate or define; and commonly is expressed, by the words *more querrino arricati*, arrayed in a warlike manner, in the indictment." Without these operative words, which are thus descriptive of the offense of treason, it would seem that the indictment would be defective and vicious,[23] men of plain understanding would be apt to infer from hence, that the fact must be proved accordingly, otherwise that the offense might be a trespass, or a riot, but could not amount to treason in levying war: but technical men have discovered, that numbers will supply the want of military array or weapons;[24] and even *Furor arma ministrat*.[25]

The same author further observes[26] "that to constitute the crime of treason, there must be a levying war against the king: otherwise, though it be *more querrino,* and a levying of war, it is not treason; therefore, if it be upon a private quarrel, or upon a private and particular design; as to pull down the enclosures of such a particular common, it is no levying war against the king, because it is not the authority of the king or his government which is attacked." And yet, the pulling down two or three bawdy-houses, which the law regards as nuisances, by a company of apprentices (as we are told by the same author[27]),was adjudged to be levying war against the king, and therefore treason within the statute. And this last case, as well as the former, has been cited to an American jury, as a guide to their interpretation of the constitution of the United States.[28]

The same author observes elsewhere; "the very use of weapons by such an assembly, without the king's license, unless in some lawful and special cases, carries a terror with it, and a presumption of warlike force, etc." The bare circumstance of having arms, therefore, of itself, creates a presumption of warlike force in England, and may be given in evidence there, to prove *quo animo* the people are assembled.

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But ought that circumstance of itself, to create any such presumption in America, where the right to bear arms is recognized and secured in the constitution itself? In many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side.

Again, in England, it is agreed on all hands, that all such as counsel, conspire, aid, or abet, the committing of any treason, *a parte ante,* whether present or absent, are all principals; and, that in all treasons except that which concerns the counterfeiting the great or privy seal, or money, whosoever knowingly receives, maintains or comforts a traitor, is a principal in high treason. And this upon the construction of the statute 25 Edw. III.[29]

To men of plain understandings, these cases may illustrate the danger of adhering too closely to the judicial decisions and opinions of judges in England, who conceive themselves bound by former precedents, even against the conviction of their own private judgments;[30] and who, in cases where the crown has been concerned, have too often thought it a duty to support it, against all dangers real or imaginary: and, at the same time, must evince the propriety of that decision of the court before-mentioned, that "in no case must they be binding upon our juries."

Rejecting, then, the authority of decisions in England, as precedents, establishing the law of the land; yet respecting them where the reason of them applies, as the opinions of learned men, I shall proceed to consider the offense of treason in a twofold light.

1. As it relates to the American states, individually.

2. As it relates to them, collectively, in the character and capacity of the United States.

1st. Then of the offense of treason as it relates to the several states, individually.

Upon the dissolution of the regal government, all public offenses became offenses against that particular state in which they were committed. Thus, murder, theft, robbery, etc. committed in Virginia, were in the indictment alleged to be committed against the peace and dignity of this commonwealth.[31] Many offenses which depended upon the nature of the British government, as a monarchy supported by aristocracy, were annihilated, by substituting in its stead, a new form of government, the principles of which were incompatible with the former. But with respect to this offense of treason, the general assembly of Virginia, at the first session after the constitution of the state was established, passed a statute, declaring "that if any man do levy war against this commonwealth within the same, or be adherent to the enemies of the commonwealth within the same, giving to them aid and comfort in the commonwealth, or elsewhere, and thereof be legally convicted of open deed, by the evidence of two sufficient and lawful witnesses or his own voluntary confession, the cases above rehearsed shall be adjudged treason which extends to the commonwealth."[32]

Now here are the very words which have since been used in the constitution of the United States, but without the restrictive word only, in that instrument: so that every offense which can be comprehended under the terms levying war, or adhering to enemies, became an offense against the commonwealth, if committed within its precincts. If therefore the pulling down bawdy-houses; destroying engines for weaving; or pulling down all enclosures could be legally construed to be a levying war, every such fact committed within the precincts of the commonwealth, was treason against the state of Virginia, and so continues to this day.

And so also, every other interpretative or constructive levying war, however general, or with

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whatever circumstances attended, must be and remain an offense against the state; unless the object of levying the war be manifestly for some matter of a general concern to the UNITED STATES; the jurisdiction in respect to which belongs to THEM, under the constitution. For it is not enough that it is of a public nature, or of a great and general concern to the citizens of the commonwealth; but it must be of a general or public nature, and concern, as it respects the United States, and their jurisdiction, to oust the state of that exclusive right which it enjoyed before the adoption of the constitution, to inquire into and punish any such violation of its peace and authority. Were an armed multitude, arrayed in order of battle, to enter and burn the city of Richmond, destroy all the public records of the state, and commit every other possible outrage, aggravated with every atrocious circumstance imaginable, if their intention in so doing, should neither be to subvert the constitution of the United States, nor to affect any object in relation to the authority of the federal government, such conduct, though in the strictest sense it might amount to actual levying war, would only amount to treason against the state of Virginia, but could never be treason against the United States. For treason against the latter, shall consist ONLY in levying war against THEM, etc. Consequently where the United States are not the object of the war, the levying it cannot be treason against them. Nor can it be pretended that the levying war against the authority of any individual state, within the same, would be levying war against the United States in any case; except where in case of insurrection or rebellion, such state should make application to the United States for such aid as the constitution guarantees to them in such cases: after which if the opposition should extend to the authority of the United States, it seems that the treason would also extend to them.

Nothing can evince more clearly than this distinction the dangerous practice of those, who are in the habit of regarding the federal government of the United States, as the legitimate successor and locum tenens of royalty in the United States of America. For such a practice is the parent of a confusion of ideas, which leads to innumerable mistakes of the utmost importance.

A second branch of high treason against the state, consists in erecting or establishing or causing or procuring to be erected or established, any government separate from, or independent of the government of Virginia, within the limits thereof, unless by act of the legislature of this commonwealth for that purpose first obtained: or in holding or executing under any such usurped government any office legislative, executive, judiciary, or ministerial, by whatever name such office may be distinguished, or called; or in swearing or otherwise solemnly professing allegiance or fidelity to the same; or, under pretext of authority derived from or protection afforded by such usurped government, in resisting or opposing the due execution of the laws of this commonwealth."[33]

"All high treasons, imprisions, and concealments of high treasons and other offenses against the commonwealth, (except piracies and felonies on the high seas) committed by any citizen of this commonwealth in any place out of the jurisdiction of the courts of the common law in this commonwealth, and all felonies committed by citizen against citizen in any such place other than the high seas, shall be inquired into, heard, determined and judged in the general court in the same manner, as offenses committed within the body of a county are triable in a district court; and such as shall be convict of any such offense, shall suffer such pains, penalties, judgment, and execution, as if they had been attainted and convicted of such offense done within the body of a county."[34]

2dly. I shall consider the offense of treason as it relates to the United States, in their collective and federal capacity.

When the federal constitution was adopted, it was deemed necessary for the more perfect security

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and preservation of the union, to create a new species of treason which might reach cases, not within the provisions of the laws of the several states; and without which, their projected union might be exposed to danger, and its authority to contempt.

But the framers of the constitution clearly saw, that this new offense should be clearly defined and strictly limited; they probably felt conscious of treading upon "*Ignes suppositos cineri doloso*;" they limited the offense therefore to two cases only, and comprised the whole definition in two lines: the whole legal vocabulary does not contain one more clear, precise, and determinate.

"Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."

In my endeavor to analyze this definition, I shall inquire,

1. What is levying war?

2. Against whom the war must be levied to constitute this new crime of treason against the United States?

3. Who may commit treason against them?

4 & 5. Who are enemies? and what is adhering to them, giving them aid and comfort?

6. The true import, and effect of the word only, and of that amendment to the constitution of the United States, which prescribes the mode of trial in this and other criminal cases.

1. First then, what is meant by the words, levying war?

I have already said enough respecting the English authorities, to show that I do not mean to rely upon their exposition of this text: happy would it have been for America, had no occasion occurred, in which her own courts had been called upon to expound them. I shall give the opinions of our own judges, as I find them reported in an account of the two trials of John Fries for high treason, in the federal circuit court of Pennsylvania, April and October 1799, and April 1800.

"The only species of treason likely to come before you," said judge Iredell in his charge to the grand-jury, "is that of levying war against the United States. There have been various opinions and different determinations on the import of these words. But, I think I am warranted in saying, that if in the case of the insurgents who may come under your consideration, the intention was to prevent by force of arms, the execution of any act of the congress of the United States altogether, (as for instance the land tax, the object of their opposition) any forcible opposition, calculated to carry that intention into effect, was a levying of war against the United States, and of course, an act of treason. But if its intention was merely to defeat its operation in a particular instance, or through the agency of a particular officer, from some private or personal motive, though a higher offense may have been committed, it did not amount to the crime of treason. The particular motive must be the sole ingredient in the case, for if combined with a general view to obstruct the execution of the act, the offense must be deemed treason."[35]

Patterson, justice, is reported to have expressed himself to the following effect, in Mitchell's case.[36] "If the object of the insurrection was to prevent the execution of an act of congress by force and intimidation; the offense in legal estimation, is high treason; it is an usurpation of the authority of the government; it is high treason by levying war."[37]

And on the trial of Rigol,[38] he is likewise reported to have said, "With respect to the intention, there

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is not, unhappily, the slightest possibility of doubt. To suppress the office of excise in the fourth survey of this state, and particularly, in the present instance to compel the resignation of Wells the excise officer, so as to render null and void, in effect, an act of congress, constituted the apparent, the avowed object of the insurrection. Combining these facts and this design, the crime is high treason."[39]

Judge Iredell, on the first trial of Fries, expressed his assent to the decision in Mitchell's case.[40]

Judge Peters, on the same occasion expressed himself thus: "It is treason in levying war against the United States, for persons, who have none but a common interest with their fellow citizens, to oppose, or prevent, by force, numbers, or intimidation, a public and general law of the United States, with intent to prevent its operation, or compel its repeal. Force is necessary to complete the crime; but the *quantum* of force is immaterial." – "If numbers and force can render one law ineffectual, which is tantamount to its repeal, the whole system of laws may be destroyed in detail. All laws will, at least, yield to the violence of the seditious and discontented." – And again – "I do not hesitate to say, that the position we have found established, viz. that opposition by force and numbers or intimidation with intent to defeat, delay or prevent the execution of a general law of the United States, or to procure, or with the hope of procuring by force and numbers, or intimidation its repeal or nonexecution, is treason by levying war against the United States. And it does not appear to me, to be what is commonly called constructive, but open and direct treason in levying war against the United States, within the plain and evident meaning and intent of the constitution."[41]

Judge Chase, on the second trial of Fries, thus delivered the opinion of the court. "It is the opinion of the court, that any insurrection, or rising of any body of people, within the United States, to attain, or effect by force or violence any object of a great public nature, or of public and general (or national) concern, is a levying of war against the United States, within the contemplation and construction of the constitution."[42]

With all submission, this part of the court's opinion seems to me to be both questionable and extrajudicial.

1. It is questionable: because taken in the latitude and extent which the words will bear and manifestly import, the rising of any body of people, in opposition to the authority of any individual state, or to the laws of such state, would, under this construction, amount to treason in levying war against the United States, which, for reasons already mentioned, I humbly apprehend, could not possibly be the case.

2. Extrajudicial: because in the case of Fries, the intention, if of a public nature, was manifestly to oppose the execution of a law of the United States, and therefore this opinion, as it might apply to any other case of opposition, except an opposition to a law of the United States, was certainly extrajudicial.

Judge Chase proceeds thus: "On this general position, the court are of opinion that any such insurrection, or rising to resist, or to prevent, by force or violence, the execution of any statute of the United States, for levying or collecting taxes, duties, imposts, or excises; or for calling forth the militia to execute the laws of the Union, or for any other object of a general nature, or national concern, under any pretense, as that the statute was unjust, burdensome, oppressive, or unconstitutional, is a levying war against the United States, within the contemplation and construction of the constitution. The reason for this opinion is, that an insurrection to resist or prevent, by force the execution of any statute of the United States, has a direct tendency to dissolve

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all the bands of society, to destroy all order, and all laws: and also all security for the lives, liberties, and properties of the citizens of the United States."

"The court are of opinion that military weapons (as guns, and swords, mentioned in the indictment) are not necessary to make such insurrection, or rising amount to levying war; because numbers may supply the want of military weapons; and other instruments may effect the intended mischief: the legal guilt of levying war may be incurred without the use of military weapons or military array."

This part of the opinion is, I humbly conceive, likewise extrajudicial: there being no question as to the fact, that Fries and his party were furnished with arms, as guns and swords, etc.

"The court are of opinion, that the assembling bodies of men armed and arrayed in a warlike manner for purposes, only of a private nature is not treason; although the judges or other peace-officers should be insulted or resisted, or even great outrages committed to the persons, or property of our citizens."

"The true criterion to determine whether acts committed are treason, or a less offense (as a riot) is the *quo animo,* or the intention with which the people did assemble. When the intention is universal, or general, as, to effect some object of a general public nature, it will be treason; and cannot be considered, construed, or reduced to a riot." – This part of the opinion, seems likewise to be extrajudicial and questionable, for the reasons mentioned under the first paragraph.

"The commission of any number of felonies, riots, or other misdemeanors cannot alter their nature, so as to make them amount to treason. And on the other hand if the intention and act together amount to treason, they cannot be sunk down to a felony or riot. The intention with which any acts (as felonies, the destruction of property, or the like) are done, will show to what class of crimes the case belongs."

"The court are of opinion, that if a body of people conspire and meditate, an insurrection to resist or oppose the execution of any statute of the United States by force, that they are only guilty of a high misdemeanor; but if they proceed to carry such intention into execution by force, that they are guilty of the treason of levying war;[43] and the *quantum* of the force employed, neither lessens nor increases the crime: Whether by one hundred, or one thousand persons, is wholly immaterial."

"The court are of opinion, that a combination or conspiracy to levy war against the United States is not treason, unless combined with an attempt to carry such combination or conspiracy into execution; some actual force or violence must be used in pursuance of such design to levy war: but that it is altogether immaterial, whether the force used is sufficient to effectuate the object; any force connected with the intention, will constitute the crime of levying war."

"In treason all the *participes criminis* are principals: there are no accessories to this crime. Every act which in the case of felony would render a man an accessory, will in the case of treason make him a principal. To render a man an accomplice and principal in felony, he must be aiding and abetting at the fact; or ready to afford assistance if necessary. If a person be present at a felony, aiding and assisting, he is a principal."

Here again, I apprehend, this part of the court's opinion is perfectly extrajudicial: Because, Fries, if guilty at all, was guilty, as a principal in the first degree; being present, and not only aiding and abetting, but commanding. And the correctness of this opinion, (even were it not extrajudicial) likewise seems to be very highly questionable, for reasons which will be mentioned, hereafter, when we inquire into the import of the word, only. – This doctrine is founded upon that artificial and

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abstruse reasoning, of which the English common lawyers were pre-eminently fond, as will appear to any person who reads their ancient tracts and reports.

The judge proceeds thus – "It is always material to consider whether the persons charged are of the same party; upon the same pursuit; and under the expectation of mutual defense and support. All persons, present, aiding, assisting or abetting any treasonable act, are principals. All persons who are present and countenancing, and are ready to afford assistance, if necessary, to those who actually commit any treasonable act, are also principals. If a number of persons assemble and set out upon a common design, as, to resist and prevent, by force, the execution of any law, and some of them commit acts of force and violence, with intent to oppose the execution of any law, and others are present to aid and assist, if necessary, they are all principals. If any man joins and acts with an assembly of people, his intent is always to be considered and adjudged to be the same as theirs; and the law, in this case, judges of the intent by the fact. If a number of persons combine or conspire to effect a certain purpose, as to oppose by force the execution of a law, any act of violence done by any one of them, in pursuance of such combination, and with intent to effect such object, is in consideration of law, the act of all who are present, when such act of violence is committed. If persons collect together to act for one and the same common end, any act done by any one of them, with intent to effectuate such common end, is a fact that may be given in evidence against all of them; the act of each is evidence against all concerned."[44]

Most devoutly is it to be wished, that no future case may occur, wherein our courts may have any further occasion to inquire into the true exposition of this part of the text of the constitution: but if such cases should arise, it seems to me, that the safer course would be for judges to consult the text and spirit of our federal constitution and government, only; for otherwise, the plain text will be completely hidden, and lost sight of, in the multitude of precedents, founded upon artificial reasons, and conclusions drawn from a different source.

It is observable, that in all these cases the judges seem to have overlooked that obvious distinction before mentioned, between such acts of force and violence as may amount to treason against a particular state, though not reducible to either head of treason against the United States, and such as may properly fall under the latter description.

This distinction may be further illustrated by the following case. By the laws of Virginia, before noticed, every person who shall erect or establish, or cause or procure to be erected or established, any government separate from, or independent of the government of Virginia, within the limits thereof, unless by act of the legislature of this commonwealth for that purpose first obtained, etc. shall be guilty of high treason.

Now let us suppose an armed multitude were to establish such a government independent of the government of Virginia, within the limits thereof, by force and violence, would such an act be treason against the United States?

If it would not, does it not prove that a general rising of the people, although with intention to obtain by force and violence an object of a great public nature, may not be treason against the United States, though unquestionably treason against the state of Virginia? This will more satisfactorily appear under the next head of our inquiry.

2dly. Then we are to inquire, against whom, war must be levied, in order to constitute this new crime of treason against the United States.

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The words of the constitution, we must remember, are, "Treason against the United States, shall consist only in levying war against them," etc.

Now, as every word in so important an instrument should be so construed as to have its particular effect, especially in cases in which the life and liberty of the citizen, on the one hand, and the safety of the union on the other, may be at stake; and more especially where the rights of the states which have formed this confederacy may be concerned, this word them can only be referred to the United States in their federal character and capacity, and as designating an offense which might be dangerous to them as such. A contrary construction must have for its foundation, the supposition that the several states intended to resign into the hands of the federal government, the power of punishing all crimes and offenses whatever against their own individual authority and sovereignty; a supposition which is contradicted by every day's practice in every state. If, then, there be an insurrection of the people, and war actually levied, within the limits of any particular state, whether it be for a private or for a public and general purpose, even so far as to affect the whole people of that particular state, yet, if that purpose extends not to any object of a general concern, wherein the United States as such are interested, such levying of war cannot be treason against them, although it might be treason against that particular state, within whose limits it may be levied.

3dly. Who may commit treason against the United States?

And here it seems to be clear, that every person whatsoever, owing allegiance to the United States, may commit treason against them. This includes all citizens, of every description, from the president of the United States to the beggar in the streets; and also all aliens residing within the United States, and being under their protection.

But it will be asked, how can the president of the United States, in whom the executive power is vested by the constitution, and who is the chief magistrate of the union, commit treason against them?

The answer is – The constitution supposes a president capable of betraying the trust reposed in him, and of misapplying the public force, to the danger of the United States; and therefore has expressly provided for the case, by declaring, that in case of conviction of treason, or other high crimes or misdemeanors, he shall be removed from office, and shall moreover be subject to indictment, trial, judgment, and punishment, according to law.[45]

If an instance be demanded, we may put the following case. If a president of the United States should, by his own authority, presume to raise an army; or should, by his own authority, keep up, and maintain an army raised by the authority of congress, after the period when by law it ought to be disbanded, such conduct, in either case, if coupled with evidence of a sinister design and intention in so doing, would, I conceive, amount to an overt act of treason against the United States.

4thly, and 5thly. Who are enemies? And what shall be said to be adhering to them, giving them aid and comfort?

Happily for the people of the United States, no case has yet occurred, in which an exposition of this branch of our constitution has been necessary. But as the nature of crimes and offenses ought to be understood in every country, and more especially in one constituted, as ours, by the people themselves, I shall therefore endeavor to investigate this point, according to the best aids which I possess.

By enemies are here understood the subjects of foreign powers, with whom we are at open war: and

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therefore a rebel is not an enemy within this clause; a rebel being one that owes allegiance, and an enemy one that does not owe allegiance to the United States.[46]

As to foreign pirates or robbers who may happen to invade Our coasts, without any open hostilities between their nation and the United States, and without any commission from any prince or state at enmity with us, it may be doubted, how far the giving them any assistance would be treason against the United States. For although sir Mathew Hale,[47] and after him sir Michael Foster,[48] have pronounced that this would be treason in England, because such unauthorized invaders are to be considered as enemies, because not subjects, yet judge Blackstone,[49] with great reason appears to doubt their authority, although he concurs with them in opinion that it would be treason; but upon a different ground: his words are – "the giving them any assistance is also clearly treason; either in the light of adhering to the public enemies of the king and kingdom, or else in that of levying war against his majesty."

But these doctrines, I apprehend, should be very cautiously admitted in the courts of the United States.

First; because the act[50] for punishment of certain crimes against the United States, in pursuance of the authority expressly given to Congress by the constitution, to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations, declares, "that if any seaman or other person shall in any wise trade with any pirate, knowing him to be such, or shall furnish such pirate with any ammunition, stores, or provisions of any kind; or shall fit out any vessel knowingly, and, with a design to trade with, or supply, or correspond with any pirate or robber on the high seas: or if any person shall any ways consult, combine, confederate, or correspond with any pirate or robber on the seas, knowing him to be guilty of any such piracy or robbery, such person so offending, and being thereof convicted, shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars."

So far, then, as relates to pirates, the offense of adhering to them, and giving them aid, and comfort seems to be strictly provided for by this act. – Consequently they are not to be deemed enemies, within this clause of the constitution.

Secondly, with respect to robbers, the subjects of foreign powers, who may, without any commission, or public authority whatsoever, make a descent upon our sea-coasts, and commit any depredations, or other acts of hostility on land; this would seem to be an offense against that particular state, only, within whose jurisdiction, such depredations may be committed, and for any reason that I can discover to the contrary, may be punished as such, by the authority of the state, if the robber be taken.[51] And, in such case, the adhering to such robber, giving him aid and comfort, could, at most, amount to felony, either as a principal, or accessory, according to the nature of the case: unless from the whole circumstances of the case taken together, such depredations, or acts of hostility should amount to levying war against the state, or against the United States. If, for example, a fort be erected and maintained by any particular state at its own expense, for the protection of any of its shores or coast, and such unauthorized robber should make a descent upon the land, and attack such fort, those who should join him in such attack, would, I think, be guilty of levying war against the state; but if the fort should belong to the United States, the offense would then be against the United States: yet unless such unauthorized robber come within the meaning and description of an enemy (as he certainly does, according to the English authorities) such acts of adherence as would not amount to the guilt of levying war, could not, I apprehend, be construed to be treason, within this clause of the constitution.

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We are next to inquire, whether under our constitution it is necessary that war be declared, in order to constitute the crime of treason in adhering to enemies under this clause. Now the English authorities all concur, that an actual declaration of war, is not necessary to such a state of war, as may render two nations enemies.[52] And yet it seems reasonable to think that there ought to be some public act, by which the citizens of America may be warned of incurring the danger of treason under this clause.

The statute of 25 Edw. 3, in relation to this offense is much more strict than the words of the constitution of the U. States, or of the act of congress which substitutes a new definition of treason in lieu of that in the constitution.

The words of the statute are – "If a man be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere." From whence it clearly appears, that the statute contemplates the case of enemies being within the realm, and not such as may be elsewhere: for the word elsewhere, does not relate to enemies, but to the act of giving them aid and comfort.[53] I know, indeed, that judges have not construed the statute thus strictly, although the words seem to me to require it.

The words of our constitution, indeed, are general enough to admit of that construction which English judges have given to the statute; and congress has accordingly added the words, "within the United States or elsewhere," in the act for the punishment of certain crimes against the United States, which is giving to the constitutional definition all the latitude that the words are capable of.

It may afford some light to this part of our subject should we here inquire, what overt acts of adherence and giving aid and comfort to enemies, constitute the offense of treason under this head?

To this, Judge Blackstone answers,[54] that such overt act may be proved by giving them intelligence, by sending them provisions, by selling them arms, by treacherously surrendering a fortress and the like.

Here we may be permitted to ask; do all these cases apply, wherever aid of any kind is given to enemies, whether such as actually invade our country, or such, as (from their connection with that government with which we are at open war) may in construction be deemed enemies though not engaged in any actual hostility against us? It would seem that there is some room for distinction between the cases, though possibly it may be dangerous to attempt to draw the line. – Let us, however, select the case of sending provisions; the doing which, if sent to an invading enemy, or one already within our country, would certainly I presume, be an overt act of adherence, and giving aid within this clause: and so perhaps would the wilful and advised sending of provisions to the ports of an enemy preparing to invade us; for that may enable them to carry their projected invasion into effect. – But what if the case be, the sending of provisions to a distant and dependent colony, belonging to a government with whom we are at war, from whence there neither is, nor from the nature of things can be, any danger of invasion apprehended; would such a conduct amount to an overt act of treason in adhering to the enemies of the United States, giving to them aid and comfort, within this clause?

The act of congress, passed May 28, 1798,[55] after reciting that armed vessels sailing under the authority of the French republic, have committed depredations upon the commerce of the United States, authorizes the capture of any such armed vessels, by the public vessels of the United States.

From, this period, a state of mutual hostility may be considered, as having existed between the two

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nations, though neither declared war against the other; the United States having in the mean time proceeded to further acts of reprisal, which it is unnecessary to notice.

On the 13th of June following, an act[56] passed to suspend the commercial intercourse between the United States and France, and the dependencies thereof, which subjects any vessel committing a breach of that act to seizure and confiscation: and moreover requires a bond with security from the owner and master of the ship for the due observance of that act: a subsequent act ‡ limits the liability of the security to ten thousand dollars.

Now let us suppose, that an enterprising merchant knowing of a scarcity of provisions in any of the dependencies of France, or in any particular port in that kingdom, after calculating the risque of confiscation, as also the loss which he might sustain from a suit upon his bond and the indemnity to his security, should send a ship laden with provisions to such port. Would this be treason against the United States, in the owner, master, and all others concerned in the voyage?

If the word enemies be applicable to all subjects of a power with whom we may be in a state of hostility, within the intent and meaning of this clause of the constitution, it would seem that not only the master and his crew, but the owner would be guilty of treason, according to the maxims of the English lawyers: and yet perhaps such a judgment would be deemed harsh in the extreme, in the United States.

For, inasmuch as it belongs to congress alone, to declare war it might be urged, that if they had intended by the first mentioned act, to put the United States in a state of war, they might with the same ease have passed an act to that effect, as to have made the act they did: but not having declared war, and thereby cut off all intercourse with France, and advertising their fellow citizens of the danger of maintaining any intercourse whatever, with that nation or its dependencies; but on the contrary, having only suspended the commercial intercourse between them, under penalties of a pecuniary and fiscal nature only; it might be alleged, that here was at least a tacit declaration on the part of congress, that any breach of the second act, should be attended by penalties of a pecuniary nature only; and should not in any manner affect the person of the offender.

On the contrary, it has been said,[57] and may be said again, "that the interpretation of the constitution belongs exclusively to the judiciary department in all cases of crimes and misdemeanors; and therefore, that congress cannot by any act of theirs alter the nature of treason, and make that a misdemeanor only which the constitution has declared shall be treason.[58]

In such a dilemma, all that we may venture to say, is, that it manifests the duty and obligation of those who are entrusted to administer the government, to deal fairly, openly, and candidly with their constituents; since an equivocal conduct on the part of the former, may involve the latter in the greatest civil guilt, and subject them to a disgraceful death, whilst they might suppose themselves in no danger of any offense, but a breach of a positive law respecting trade; nor of any punishment but a pecuniary penalty.

According to the principles in which the English jurists generally agree with each other, foreigners in our country, and our citizens, who may remain in a foreign country, after a war breaks out between the two nations are not simply for that reason adherent to our enemies; for although the subject of a foreign power is presumed to adhere to that power to whom he owes allegiance, yet such presumptive adherence, if not accompanied with any overt act of aid or assistance, as in giving intelligence and the like, does not make him an adherent within the meaning of this clause; neither is the bare remaining in an enemies country, after a war breaks out, such an adherence in one of our

citizens, as comes within this clause; if unaccompanied with any overt act as assisting our enemies in their wars; and even the refusing to return upon proclamation of recall, is held by sir Mathew Hale,[59] to be only evidence of adherence, but is not simply of itself an adherence.

6. I now proceed to consider the import and effect of the word, only, in this clause of the constitution; as also, the legal effect, and consequence of that amendment to the constitution of the United States, which declares "that in all criminal prosecutions, the trial shall be in that state and district, in which the crime shall have been committed.

This word, only, as used in this clause of the constitution, is, according to my apprehension, the strongest term of limitation and restriction, that our language affords. Its obvious meaning is, these cases and no other whatsoever. "Treason against the United States, shall consist only in levying war, etc." Here are both an affirmative and a negative in the same sentence; nay, in the same member of a sentence. The offense is created by the word consist; it is limited and restricted by the next word, only. It seems impossible to express an intention in stronger and more definite terms. But to what purpose were these terms used, and this strict limitation made, if courts, notwithstanding any such restriction, may nevertheless pronounce that other cases may by construction, amount to treason against the United States. If the authority of such explicit terms can be rejected in favor of artificial constructions, invented by arbitrary and corrupt, or by timid and complying judges, in the worst of times, a written constitution, containing what was deemed a limitation of powers, has answered no other purpose but to establish an unlimited government.

And here it may not be improper to repeat the remark, that this definition creates, as well as limits, an offense which had no previous existence; whereas, the statute 25 Edw. III, did not create but only defined an offense already known to the common law. "That statute," said Stanford, afterwards chief justice of the common pleas, "is but a declaration of certain treasons, which were treasons before at the common law. Even so there do remain diverse other treasons at this day at the common law, which be not expressed by that statute."[60]

Will any man presume to advance that there is any treason against the United States by the common law? that a limited federal republic of yesterday, has already appropriated to itself all the foul corruptions of despotism, collected from time immemorial. To infer that the courts of the United States, are left to range at large, in the boundless field of construction, in search of other cases of treason against the United States, seems to my apprehension, to be a doctrine equally unfounded, awful, and dangerous.

If then we are not at liberty to reject this important word, only, we must assign to it some determinate signification: and, if that signification be that which I have ascribed to it, to wit "these cases and no other whatsoever," its necessary operation and effect must be, to cut up all constructive treasons, root and branch. If a single scion be left, it will be the parent of ten thousand others, shedding, like the *Buonas Upas,* their baneful influence far and wide, poisoning and desolating the whole region where they are permitted to take root. Faction and factious men are not confined to any one party in a republic: and when such men have the command of the purse, the sword, and the scales of justice, the lives of their opponents will not weigh a feather, in competition with their own advancement, or that of their party. This, the framers of the constitution must have considered, and therefore endeavored by the strongest terms, and the strictest limitation, to restrain within the narrowest limits. And this should serve as the polar star of construction to judges and all others, who may be called upon to administer the government.

Thus having sought, and I trust, discovered not only the literal sense, and meaning of the word, only,

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but also its proper interpretation, according to the true spirit of our federal constitution. I shall now inquire into its effect and operation in certain cases, which might have been supposed to be treason had it been omitted.

In England, it is now generally admitted, that "in treason, all the *participes criminis* are principals; there being, as it is said, no accessories to that crime; and that every act which, in case of felony, would render a man an accessory, will, in case of treason, make him a principal."[61]

This doctrine was laid down by judge Chase, in his charge to the jury on the trial of Fries:[62] but, as I conceive it to have been extrajudicial, for reasons already mentioned, I shall take the liberty now to inquire, whether it be not also questionable. But before I do this, I shall endeavor to trace this copious branch of constructive treason to its fountain head; and, show how small a portion of that fatal torrent flows from an uncorrupted spring. In doing this, I shall begin with the latest authorities, and conclude with the most ancient.

This doctrine is advanced by judge Blackstone,[63] for which he cites 3 Inst. 138. 1 Hale's P. C. 613, and Foster 342. The latter cites 3 Inst 9[64] and 138, and 1 Hale 235, 237, 328, 376. Hale, himself, cites 3 Inst. 18 and 138. Stanford's P. C. 32, and the year book 1 H. 6, 5, of which last case I shall make particular mention by and bye.

Sir Edward Coke, 3 Inst. 16 and 138, cites Stanford's P. C. 3, and the yearbooks 19 H. 6, 47, and 3 H. 7, 10.

Stanford, P. C. 3 and 32, 40 and 44, cites the same identical cases from the year books, that sir Mathew Hale, and sir Edward Coke, had cited before. From these three original cases, viz. 1 Hen. 6, 5. 19 Hen. 6, 47, and 3 Hen. 7, 10, we must consequently derive the doctrine in question.

The case of 1 H, 6, 5, (A. D. 1422) is thus mentioned by Stanford, p. 32. – A man was outlawed of felony, was imprisoned in the king's bench, and indicted and attainted of breaking prison, and releasing certain persons confined therein for treason, and this was adjudged petit treason.

Upon what principle this case could be judged petit treason, it might puzzle any man at this day to conjecture, and creates a presumption that the case is not very accurately reported. But there is another principle of the common law, on this particular subject of breach of prison, which will probably lead us to understand it – it is this; if there be felons in prison, and a man knowing of it breaks the prison, and lets out the prisoners, though he knew not that there were felons there, it is felony; and if traitors were there, it is treason.[65] Now, if the persons released in the case here referred to, were imprisoned for petit treason, instead of high treason, this judgment would be regular: but by no rule of law could they be deemed guilty of petit treason in any other case. And, if this were the case, it would prove that there was no distinction in principle between treason and felony, inasmuch as the releasing a felon from jail is felony, in the same manner as releasing a traitor from jail is treason. And, it appears from Stanford, that a stranger rescuing one indicted for felony, was indicted, and tried and found guilty for that offense, before the principal felon was tried.[66] But sir Michael Foster[67] gives us a further clue to the understanding of this case; for in speaking on this subject, he observes with great reason, that the forcing of prison doors may be considered as overt acts of levying war; the species of treason for which Benstead, of whom he was speaking, was indicted. And this might have been the case in this instance. These cases confirm the conclusion, that the law made no distinction at that time between treason and felony. A statute was made in the year after this case was adjudged, 2 H. 6. c. ult. cited by Stanford,[68] whereby it was declared to be treason in any person imprisoned, to break prison. All which circumstances united, create a strong

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presumption, that this case is not correctly reported, nor the grounds of the judgment perfectly understood.

The second case[69] occurred thirteen years after, in the year 1441, and is thus mentioned in Brooke.[70] A man was indicted for forging false money, and another at the same time: one confesses and approves, and has a coroner assigned him; the other pleads not guilty, and it was found that he was consenting and aiding in forging the false money, and so guilty. Stanford mentions the case in the like manner, and it is evident from this state of it, that the defendant was present, aiding and assisting, and so would have been a principal in felony as well as in treason, which is confirmed by Stanford, who proceeds thus: "It is the same case in rape, where one does the act, and another assists him to commit the rape, he is by this a ravisher."[71] The law is the same in felony as well as in treason, that all present, aiding, and assisting at the fact, are principals. Neither of these cases, therefore, justify the doctrine advanced at this day, that whatever act will make a man an accessory in felony, will make him a principal in treason.

The next case is 3 H. 7, 10, and is relied on by Stanford and sir Edward Coke as establishing the doctrine above-mentioned: it was thus; one Cokker was indicted and attainted of making false money, and afterwards one J. B. was indicted for traitorously, and knowingly entertaining and comforting him, and was found guilty, and the question was, whether he could be deemed an accessory to Cokker. Brian, justice, said he might be an accessory, for such counterfeiting was felony before the statute and is not cut off by it: and in every treason, felony is implied, etc. "*et tamen* Hussey Cap. Inst. *dixit quod in hoc quod factum est proditio, non potest esse accessarius felonicè et proditoriè non potest esse accessarius,*" for which doctrine he refers to the preceding case of 19 H. 6, 47.[72] Here then we have this opinion of two judges in opposition to each other; and we find the latter supporting his opinion by a reference to the very case, which, we have already shown, does not authorize it.

These are all the ancient authorities, referred to either by Stanford, sir Edward Coke, sir Mathew Hale, or any writer on the subject; and it requires very little discernment, I apprehend, to discover that the two former do not warrant the latter, and that the latter is the *dictum* of a single judge. And Brooke,[73] cites it in that manner – "*Nota, P. Hussey C. I. que accessary ne poet este a treason; le recetment de traitor, ne poet este tantum felony, mes est treason.*" Had this been the established doctrine of the common law, we might have expected that the laborious and indefatigable sir Edward Coke (under whose auspices it was brought to maturity as we shall see hereafter) would have referred us to the Mirror, Bracton, Britton, Fleta, or Glanville, in some of which, it would most certainly have been found.

This doctrine appears to have slept from the year 1488, to the year 1554, when it was revived upon the trial of sir Nicholas Throgmorton in the first year of the reign of queen Mary.[74] He was indicted first, for conspiring and imagining the death of the queen: 2. For levying war against her within the realm: 3. For adhering to her enemies within the realm, giving them aid and comfort: 4. For conspiring and intending to depose the queen: 5. For traitorously devising and concluding to take the tower of London. Upon his trial, Stanford, author of the pleas of the crown, and Dyer, afterwards chief justice, assisted in the prosecution as queen's sergeants. Bromley, chief justice of England, who appears to have been another Jefferies, and sir Nicholas Hare, master of the rolls, a fit associate for him, and sir Roger Cholmley, one of the same stamp, were among the number of his judges, and managed the trial. At this trial, the doctrine of constructive treason in its fullest extent was insisted on by the counsel for the prosecution, and sanctioned by the judges, notwithstanding the prisoner reminded the court of a statute,[75] passed not six months before, whereby it was declared, that no

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offense made treason by act of parliament should thereafter be held to be treason except such as were so declared by the statute 25 Edw. III, which statute he desired might be read to the jury. The court told him there should be no books brought at his request: they knew the law sufficiently without book: it was not their business to provide books for him, neither did they sit there to be taught by him.[76]

If any thing more be requisite to show the respect due to the decisions of the court, it may not be amiss to mention, that they ordered a person, whom the prisoner called as a witness, on his behalf, out of court.[77] That one Vaughan, who was under sentence of death, and whose execution was respited that he might be present at this trial, was admitted as an evidence against him.[78] That the confessions of one Winter and one Crofts then alive and in custody were read in evidence against him, the witnesses themselves not being produced in court. These words of the statute 25 Edw. III, "And be thereof attainted of open deed by people of their condition," which sir Edward Coke[79] and every other writer on criminal law from his time to this, expounds to mean, by verdict of a jury of their peers were thus expounded by the chief justice addressing himself to the prisoner. – "You deceive yourself, and mistake these words by people of their condition; for thereby the law does understand the discovering of your treasons, As for example, Wyatt, and other rebels attainted for their great treasons, already declare you to be his and their adherent, inasmuch as diverse and sundry times you had conference with him and them about the treason; so as Wyatt is now one of your condition, who as the world knows, has committed an open traitorous fact."[80] The word enemies was likewise expounded to mean traitors within the statute.[81] And lastly when the jury brought in a verdict of acquittal (for there was no evidence against the prisoner upon either point) the court immediately committed them all to prison, and some of them were fined 2000 £ some 1000 £ and the lowest paid threescore pounds apiece before they were discharged from their imprisonment. Stanford, who was active in the prosecution, was afterwards promoted to the bench, and published his pleas of the crown, in 1560, six years after, in which he has laid down the doctrine at large, as it is received at this day; but cites the case 3 H. 7. 10, before-mentioned, in support of it. Abington's case was resolved when sir Edward Coke was attorney-general in the fourth year of James the first, when the spirit of persecution was at its height, from the terrors of the powder plot, in the guilt of which the prisoner was involved by receiving one Garnett, a Jesuit, knowing him to be guilty of the powder treason.

It is not improbable however, that this doctrine was aided, in its progress by the statutes which passed in the reigns of Hen. V, and Hen. VI, and the numerous acts of attainder, passed in those of Edw. IV, and Rich. III, and the multiplied treasons created in the reign of Hen. VIII, and his successors, whereby the aiders, counselors, consentors, abettors, maintainers, procurers, comforters, receivers, relievers, and so forth, of persons guilty of any such treasons, are repeatedly declared to be principal traitors also.[82] These parliamentary declarations and statutes must, I conceive, have had a strong influence over the judges, in those days, when parliaments and courts were equally devoted to the will of the ruling monarch.[83]

I should not have taken the trouble of this scrutiny, had not the same judge who declared, that the English authorities were not to be regarded as precedents in our courts, on the same occasion, declared the law to be "that in treason, all the *participes criminis* are principals; that there are no accessories in that crime, and that every act, which in case of felony would render a man an accessory, will in the case of treason, make him a principal." If the learned judge rejects the authority of the English precedents, where can the law be found? And if he relies upon those precedents, where can the reason of the law be found?

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Both common law and common sense have been able to perceive, and draw a distinction between the actual perpetration of a crime, and the bare advising, or even procuring the perpetration of it, without being present when it is perpetrated: they have also been able to distinguish between the perpetration of a crime, and the receiving, and comforting one, who has been himself the perpetrator, knowing him to be such: it was reserved for the astute reason of judges appointed by the crown, to discover, that there was no distinction between these cases, when the sacred majesty of their master's head was in danger, or supposed to be so: it was reserved for them to declare, that to give a meal's victuals to one guilty of treason, was a crime of the same malignity as levying war against the throne, or as aiming a dagger at the heart of the monarch.

This was the case of the lady Alicia Lisle, who was indicted 1 Ja. 2, for high treason, in comforting, upholding, and maintaining, one John Hicks, (not then convicted) by giving him meat and drink: upon which indictment she was convicted as a principal in high treason, and executed.[84] True it is, that infamous judgment was reversed by act of parliament after the revolution, "because the said John Hicks was not, at the trial of the said Alicia Lisle, attainted or convicted of any such crime;"[85] but the law in other respects, remains unaltered there, and the giving a traitor meat and drink, knowing him to have committed treason, is, of itself, an act of high treason of the same nature as that, of which the traitor himself has been guilty.

Now, let us appeal from this decision of judges, learned in the law, to common sense and reason for a decision thereon, under the constitution of the United States.

Let us suppose that John Hicks had been concerned with John Fries, in the Northampton insurrection; and, that some weeks after the termination of that affair, he had repaired to the house of the lady Lisle, situated in Philadelphia, and had there been entertained by her, by giving him meat, drink, and lodgings for one night (as was the case for which she suffered) she knowing at the same time that he had been concerned in that insurrection. Is there a man in the United States, who could under such circumstances, upon his oath, say that the lady Lisle had levied war against the United States?

I put the question thus, because the constitution says, that treason shall consist ONLY in levying war against the united states. And I repeat the question – would this conduct in the lady Lisle be an overt act of levying war against the United States?

If common sense, and reason dare not answer this question least they should be brow beaten by the authority of the sages of the law, let us hear what one of them will say to us.

"Though the receiver of a traitor, knowing it, be a principal traitor, and shall not be said an accessory, yet this much he partakes of an accessory. – That his indictment must be special of the receipt, and not generally, that he did the thing."[86] Now if the indictment must not be general, that he did the thing; that is, that she, the lady Lisle, in the case supposed, levied the war. I would fain know how she could be found guilty of treason against the United States?

If there be not a man in the United States (and I trust there is not) who, in the case here supposed, would have found the lady Lisle guilty of levying war against the United States, nor have directed a jury to have found her so guilty, then have I proved that the word only in the constitution must be construed to have cut off this branch of constructive treason; that is, I have proved that whatever will make a person an accessory after the fact in felony, will not make him a principal in treason in the United States.

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Let us now inquire, whether it be true, that whatever act will make a man an accessory before the fact in felony, will make him a principal in treason in the United States?

Let us suppose the same lady Lisle to have been a resident of Maryland, at the time of Fries's insurrection, and that John Hicks, hearing of the intended insurrection in Pennsylvania, had informed her of his intention to join the insurgents; and that she had lent him a horse, or money to assist him on his journey.

Now, if Hicks had not gone after this, but had kept the money, or rode away with the horse, and never returned him, this would not have been treason in either, even according to the English authorities; but if he had gone and joined Fries, he would have been guilty of treason in England. But in neither case, could it be said, that there had been war levied in Maryland. I ask then, if the lady Lisle had done, what we have above supposed in the state of Maryland, would such act of lending a horse or money in Maryland have amounted to levying war in Pennsylvania where she never was?

If she were indicted in Maryland, the indictment must allege, that war was levied in Maryland. – Now could it be given in evidence to a jury in Maryland, that war was levied by John Hicks in Pennsylvania, in order to charge the Lady Lisle with treason in levying war in Maryland, by construction. On the other hand, if she were apprehended and tried in Pennsylvania, where the war was levied by Hicks, could the fact which took place in Maryland, be given in evidence to a jury in Pennsylvania? We might vouch the English authorities, were it necessary, to prove that neither of these things could be done, except under the authority of some special acts of parliament. And we may with confidence answer, that under the provisions of the federal constitution, she could not possibly be found guilty of treason, without rejecting the word, only, and Without spurning at that direction of the constitution, which secures a trial in that state and district, in which the crime shall have been committed. For having never been in Pennsylvania, she could not be found guilty of levying war there. – Evidence that a war was levied in that state, would not be evidence to any jury, in any other state; and without a violation of the constitution, she could not be carried out of Maryland, where her offense, whatever it might be deemed, was committed, to be tried in Pennsylvania, where she never had been, for a constructive treason imputed to her, by relation to a fact done in another state.

By what finesse or subtlety, a Jeffries (were he to rise from the dead, and again to preside at the trial of the unfortunate lady) would support the prosecution, I should be sorry to be able to discover. But with that understanding, which I possess, I deem it impossible, that she could be convicted even in this case.

3. To proceed, then, one step higher. If diverse persons conspire together to levy war, this is not treason, even in England; but if war be levied in consequence of this conspiracy by a part of them, although the rest of them have nothing further to do in the business, this is treason in the whole of them; as well those who are absent and do nothing, as in those who are present at the fact. A similar doctrine was laid down, on the trial of Fries. How far it might, or might not have applied to his case, I will not undertake to say. But let us put the following case:

A, B, & C, meet together in Baltimore and conspire together to levy war against the United States. In pursuance of this conspiracy A & B, proceed to Pennsylvania, and there levy war: C goes not with them, nor has any further communication with them, but remains peaceably at home in Maryland. Now this conspiracy being formed in Maryland, but nothing being done in consequence of it in that state, no treason can be said to have been committed either by A, B, or C, in Maryland neither could

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the act of A and B in Pennsylvania, be considered as an overt act of levying war, by C, who was never in that state, nor could it be given in evidence, against C, in Maryland, for the reasons before mentioned. How then can C. be found guilty of treason in levying war against the United States? Certainly, only by overleaping the limits of the constitution, and referring a fact committed by A. and B. in Pennsylvania, to C, in Maryland; in order to convict C, in Maryland, of levying war against the United States in Maryland, where no war was ever levied, or in Pennsylvania, where C. never was.

If, in the cases here supposed, it shall appear that the doctrine of constructive treasons cannot stand the test of the federal constitution, may we not conclude, that the proper inference is, that no other case whatsoever, except those two, which are expressly created, defined, and limited by the constitution ought to be deemed treason against the United States?

NOTE.

SINCE the former volumes of this Edition have been printed, and since this volume has been in some forwardness in the Press, the Editor has seen in a public news-paper, a letter from JUDGE CHASE to one of the Printers in Baltimore; in which he declares – "That in some instances judicial opinions have been imputed to him which he never gave; and in other instances they have been grossly and wilfully misrepresented, particularly in the Case of FRIES, FOR TREASON."

The strictures contained in the preceding essay were suggested not only by a thorough conviction in the mind of the author, of the dangerous and unconstitutional tendency of the opinions therein attributed to Judge Chase, but by an unfeigned belief that they were accurately reported. Having the sanction of his name, (however improperly,) in a publication, apparently authentic, and of extensive circulation, the author of the essay conceives it to be equally as necessary to expose their unconstitutionality, and dangerous tendency, as if they had never been disavowed by Judge Chase. – Not having access to the essay, at present, he is unable to decide whether a previous knowledge of this disavowal on the part of Judge Chase, would have induced any alteration therein; or might render any further apology for the use of his name necessary.

NOTES

1. Article 3.
2. Article 3.
3. Article 8 [6th Amendment].
4. Federalist, No. 43.
5. Carey's American Museum, Vol. 7, page 40.
6. Idem, Vol. XII, part 2, p. 36.
7. 25 Edw. III.
8. Trial of Fries, p. 123 and 168.
9. The passage stands thus: "If you expunge what is a direct levying of war, there can no such thing as treason be found; either the law is wrong, or the arguments used on the other side. Gentlemen, the law is established, but the arguments vanish like vapor before the morning sun; what then in England is called constructive levying of war, in this country must be called direct levying of war." Trial of Fries, p. 161. I should incline to suspect the reporter of some mistake in this passage, but it would seem that it had been submitted to the inspection of the counsel to whom it is ascribed.
10. Judge Peter's charge to the jury. Trial of Fries, 205.

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11. 1 Blacks. Com. p. 70.

12. Judge Iredell's charge to the jury. Trial of Fries, 167.

13. Trial of Fries, 180.

14. Home's Mirror, ch. 1. Sec. 4.

15. 3 Inst. page 9.

16. 1 Hale's Hist. P. C. 148.

17. Trial of Fries, 92, 99, 139, etc.

18. Ib. 19, 123, 160, 161.

19. "You are deceived to conclude all treasons be by the statute 25 Edw. III, for that statute is but a declaration of certain treasons which were treasons before at the common law. Even so, there does remain diverse other treasons at this day at the common law, which be not expressed by that statute as the judges can declare." Per Stanford – State Trials, Vol. I, p. 72.

20. See the statutes 21 R. 2. c. 3. 3 H. 7. c. 14. 26 H. 8. c. 13. 28 H. 8. c. 7. 1 Edw. 6. c. 12. 3 & 4 Edw. 6. c. 5. 1 & 2 P & M. c. 8, 9, 10. 1 Eliz. c. 5. 13 Eliz. c. 1, 14. 14 Eliz. c. 1. 23 Eliz. c. 2, with many others whereby so many pains of treason were ordained by statute, "that no man knew what he ought to know, or to do, or to say, or to speak through doubt of such pains." Preamble to stat. 1 H. 4. And that judges were not less complying than parliaments, the histories of those times fully prove. See 1 Hale's Hist. P. C. 84, 115, 119, 120, 121, etc. and the State Trials, passim.

21. 1 Hales, P. C. 82, 83.

22. 1 Hales, P. C. 130.

23. 1 Hales, P. C. 146, 150, 144.

24. 1 Hales, P. C. 144.

25. Foster 208.

26. 1 Hales, P. C. 131.

27. *Ibid.* 134.

28. Trial of Fries, 87.

29. 1 Hales. P. C. 233, 237.

30. Const. of Virginia, Art. 18.

31. 1 Black. Com. 70.

32. V. L. Oct. 1796. ch. 3.

33. V. L. 1794, c. 136, Sec. 2.

34. Ibidem. Sect.

35. Trial of Fries, p. 14.

36. 2 Dallas, p. 355.

37. Trial of Fries, p. 86.

38. 2 Dallas, p. 355. § 2 Dallas, p 340.

39. Trial of Fries, p. 86.

40. Ibid. p. 168.

41. Trial of Fries, p. 204, 207.

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42. *Ibid.* p. 196 to 199.

43. See State Trials, per Bromley, C.J. who may be considered as the father of this doctrine. He says, "He that does *procure* another man to commit a felony, or a *murder,* the law does adjudge the procurer then a felon or a murderer. And in case of treason, it has always been so taken and reputed." page 73.

44. See Trial of Fries, p. 196 to 199.

45. C.U.S. Art. 23.

46. 4 Black. Com. 83.

47. 1 Pl. Crown, 164.

48. p. 219.

49. 4 Black. Com. 83.

50. L. U. S. 1 Cong. 2 Sess. c. 9. Sec. 12.

51. I know the English authorities say that he shall not be punished by the civil law. But Vattel with more reason says; "If the offended state keeps the guilty in its power it may with difficulty punish him and oblige him to make satisfaction. If the guilty escape and return into his own country, Justice may be demanded from his sovereign." B 2. ch. 6. Sec. 75. "If an alien enemy come to invade the realm and be taken in war he cannot be indicted of treason; for the indictment cannot conclude *contra ligeantiæ suæ debitum,* for he never was in the protection of the king, nor ever owed any manner of ligeance unto him, but malice and enmity, and therefore he shall be put to death by martial law. And so it was in Anno 15 H. VII in Perkin Warbeck's case, who being an alien born in Flanders feigned himself to be one of the sons of Edward the fourth, and invaded this realm with great power, with intent to take upon him the dignity royal: but being taken in war, it was resolved by the justices that he could not be punished by the common law, but before the constable and marshal, who had special commission under the great seal, to hear and determine the same according to martial law, he had sentence to be drawn hanged, and quartered, which was executed accordingly." Perkin Warbeck's case, 7 Co. 6. *b.*

52. 1 Hale's P. C. 162. Fost. 219. 4 Blacks. Com. p. 83.

53. See State Trials, Vol. I, p. 75.

54. 4 Blacks. Com. p. 82.

55. L. U. S. 5 Cong. c. 66 ‡ Ibid. c. 103.

56. Ibid c. 70.

57. See the opinions of judge Iredell, judge Peters, and judge Chase. Trial of Fries, p. 165, 206, 201.

58. But as congress has power to declare the punishment in case of treason, if, by a subsequent law to that by which the punishment is first declared, it should prescribe a lesser punishment for an offense, which the courts may determine to be treason, could they be justified in inflicting the greater punishment, formerly prescribed.

59. 1 P. C page 164.

60. State Trials, Vol. I, page 72.

61. The ancient law of England was, that they who were present, and abetting others to do the act, were *accessories,* and not *principals.* Per Bromley C. I. Plowden 97, 98. See Plowden's note thereon, Ib. 99, 100, whereby it seems the law was changed *tempore H*. 4. 1 Hale, 437.

62. Page 198.

63. 4. Commentary, 35, 36.

64. This is a mistaken reference in Foster – it should be 16.

65. 1 Hale's P. C, 60C. *Vide* 2 Inst. 590.

66. Stanford's P. C. 32.

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67. Page 345.
68. P. C. 32.
69. 19 H. 6, 47.
70. Title Treason, Sec. 9.
71. Stanford's P. C. 44.
72. See the Year-book, 3 II. 7, 10.
73. Title Treason, 19.
74. See 1 State Trials, 63, etc.
75. 1 Mary, c. 1.
76. 1 State Trials, 71, 72.
77. *Ibidem.* 70.
78. *Ibidem.* 67, 68.
79. 3 Inst. 14.
80. 1 State Trials, 75.
81. Ibid. 75.
82. 1 Hale's Pleas of the crown, c, 24, etc.
83. Ibid. 73.
84. State trials Vol. IV. 105, etc.
85. Ibid. 130.
86. 1 Hale 338.

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NOTE C

Summary View of The Courts Possessing Criminal Jurisdiction, Within The Commonwealth of Virginia

COURTS of criminal jurisdiction in Virginia, are of different kinds: 1. Those which are established under the constitution and laws of the state: 2. Those which are established under the federal constitution, and laws of the United Slates. 1. Courts of criminal jurisdiction established under the authority of the state constitution and laws, are,

1st. The court of appeals, whose jurisdiction in criminal cases is, by the constitution, expressly extended only to a single case; the trial of an impeachment against a judge of the general court. Whether this court possesses any jurisdiction, by writ of error, or otherwise, in any other criminal case, has been doubted. C. V. Art. 17.

2. The GENERAL COURT of this commonwealth, is likewise a court of impeachment for the trial of all persons impeached, except the members of their own body; the trial, in case any of these be impeached, being expressly vested in the court of appeals, as before mentioned. C. V. Art. 16, 17.

By the act for establishing a general court, Oct. 1777, c. 17, it is declared, that for establishing a court of common law of general jurisdiction, there shall be held one principal court of judicature for this commonwealth, which shall be styled the general court of Virginia, and whose jurisdiction shall be general, over all persons, and in all causes, matters, and things, at common law, whether brought before them by original process, by appeal from any inferior court, *habeas corpus, certiorari*, writ of error, *supersedeas, mandamus*, or by any other legal ways or means. And, moreover, shall have full power to hear and determine all treasons, murders, felonies, and other crimes and misdemeanors which shall be brought before them.

In the years 1787 and 1788, the constitution of this court was altered by the establishment of district courts; which, as they are composed of the judges of the general court, who sit there, by virtue of their commissions, as judges of that court, and by no other authority must be considered as branches of the GENERAL COURT, and not as distinct and independent jurisdictions. The acts by which they have been established, declare that they shall have full power to hear and determine all treasons, murders, felonies, and other crimes and misdemeanors committed within their district, and which shall be brought before them. This has been supposed to oust the general court of original jurisdiction in any criminal case committed within the body of any district, except in the cases which are expressly reserved to it, either by the constitution, or by some statute. It still has cognizance of prosecutions against the clerks of courts for breach of good behavior, under the 15th article of the constitution. And all high treasons, misprisions, and contempts of high treason, and other offenses against the commonwealth, (except piracies and felonies on the high seas) committed by any citizen of this commonwealth, in any place out of the jurisdiction of the courts of common law in this commonwealth; and all felonies committed by any citizen against a citizen in any such place other than the high seas, shall be inquired into, heard, determined, and adjudged in the GENERAL COURT, in like manner as offenses committed within the body of any county, are to be tried in any district court. L. V. 1794, c. 136. §. 7, and c. 66. §. 3.

Any question of law arising in any criminal case, may be adjourned by the district court to the general court, with the consent of the criminal; and may be there argued and decided, although such criminal be not present. Ibid. c. 66. Sec. 16.

The general court has power, to issue writs of *mandamus* to the district courts; in this respect it is

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considered as a superior jurisdiction to them, whether it has power under the very general words in which its jurisdiction is still defined, to giant a writ of error, in a criminal case, is n question which has not yet been agitated, that I know of. That such a power should exist, somewhere, seems reasonable; whether it does in fact exist, any where, it would be presumption to decide, until the inquiry be made in its proper place.

3. The district courts of this commonwealth, are superior courts, of criminal, as well as civil, jurisdiction; and, have power to hear and determine all treasons, murders, felonies, and other crimes and misdemeanors, committed within their districts, respectively. And this limited territorial cognizance has been so strictly construed, that it has been decided, that it is absolutely necessary to allege in the indictment that the offense was committed within the jurisdiction of the court, or judgment shall be arrested. Preeson Richard's case in general court, 1789 or 1790.

The jurisdiction of the district courts, in all cases where the judgment by the common law, or by any statute, (made before the penitentiary law was declared in force) extended to life or member, seems to be exclusive of the county-court-jurisdiction. Yet it has been held,[1] that a discharge by an examining court is an ACQUITTAL, and may be pleaded as such in bar of any future prosecution; and this opinion is founded upon this passage. They, (i. e. the justices convened to hold a court for the examination of a person charged with felony before a justice of the peace) shall consider, whether, as the case may appear to them, the prisoner may be discharged from further prosecution; may be tried in the county, or corporation; or must be tried in the district court." L. V. 1794, c. 66. Sec. 16, c. 74. Sec. 1.

Whether this point, (which, I believe, has never been judicially decided) be correctly understood, will be examined elsewhere.

4. The county and corporation courts of this commonwealth, are courts of criminal jurisdiction; possessing the power of life and death, in all cases where a slave, may be accused of any crime whatsoever; and that without the intervention of a jury; but in every such case the court must consist of five judges, at least, and no slave can be convicted of any crime but by the unanimous opinion of his judges. L. V. 1794, c. 103. Sec. 30.

The justices of every county, and corporation court or any four of them have jurisdiction to hear and determine all causes whatsoever at common law, within their respective counties and corporations, and all such other matters as by any particular statute, is, or shall be made cognizable therein, except such criminal causes, where the judgment upon conviction shall be for the loss of life or member. L. V. 1794, c. 67. Sec. 5.

And by an act passed in the Sessions of 1796, c. 2, §. 28, no change is made in respect to the jurisdiction of the district and county courts, notwithstanding the act of 1796, c. 2, for amending the penal laws of this commonwealth; but the jurisdiction of those courts, respectively, remains as before the passing of that act.

When any person not being a slave, is charged before a justice of the peace with any criminal offense, which in his opinion, ought to be examined into by the county, or corporation court, he shall immediately issue his warrant to the sheriff or sergeant, requiring him to summon the justices thereof, to hold a court for the examination of the fact; which court shall consider, whether, as the case may appear to them, the prisoner may be discharged from further prosecution; may be tried in the county or corporation; or must be tried in the district court. If they shall be of opinion, that the fact may be tried in the county or corporation, the prisoner shall be bound over to the next grand-jury to be held for the county, then to be tried. If they shall be of opinion, that he ought to be

tried in the district court, they shall remand him thither for trial. L. V. 1794, c. 74, §. 1.

By the act concerning juries, it is enacted, that the grand juries of the several counties and corporations, shall be sworn to inquire into the breach of penal laws, and make presentment of the offenders; but shall present such offenses and breaches, only, as have been committed within twelve months. L. V. 1764, c. 73, §. 2.

The grand-juries in the district court, are sworn to inquire into, and present all treasons, murders, felonies, or other misdemeanors whatsoever, committed within the district; except such breaches of penal laws where a specific penalty under five dollars, or two hundred pounds of tobacco is inflicted by law. So that the district courts have concurrent jurisdiction with the county courts, in lesser offenses and misdemeanors at common law; and superior jurisdiction, or jurisdiction in the last resort, in the case of treason, murder or other felony. Ibid. c. 74, §. 1, 9.

II. Courts of criminal jurisdiction under the authority of the federal constitution, and laws of the union.

1. The SENATE of the United States constitutes a court of IMPEACHMENTS, in which the President, Vice-President and all the civil officers of the United States, may be impeached by the House of Representatives of the U. S. and there tried, for treason, bribery, or other high crimes and misdemeanors.

On the trial of William Blount, formerly a senator of the United States, for high crimes and misdemeanors, who was expelled from the senate after the impeachment was made known to the Senate: but before the articles of impeachment were exhibited, he pleaded by his counsel, that although true it was that he was a senator of the United States at the several periods in the articles of impeachment referred to, yet, that he was not then a senator; nor was he at the several periods so as aforesaid referred to, a CIVIL OFFICER of the United States; and that he was not, in and by the said articles charged with having committed any crime or misdemeanor in the execution of any civil office, held under the United States, nor with any mal-conduct IN a civil office, or abuse of any public trust in the execution thereof: which plea was sustained by the Senate, and the impeachment was thereupon dismissed January 14, 1799. Whether the plea was sustained upon all these points, does not appear by the printed account of the trial published in Philadelphia soon after.

The question was taken, and negatived upon two points, 1. Whether a senator of the United States is a civil officer? 2. Whether a senator be impeachable for high crimes and misdemeanors, committed by him while he is a senator? On both questions there was a majority of 14 to 11.

The senators of the United States when sitting as a court of impeachments 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 cases 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. C. U. S. Art. 1. §. 3. Art. 2. §. 4.

2. The supreme court of the United States has, exclusively, all such jurisdiction of SUITS or PROCEEDINGS, against ambassadors, or other public ministers, or their domestics, or domestic servants as a court of law can have or exercise consistently with the law of nations." Although the person of ambassadors be sacred even in case of murder, according to some authorities, there seems but little reason to regard their domestics, or domestic servants, in so scrupulous, a light, as to make

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their offenses cognizable only before the supreme court of the United States. See L. U. S. 1 Cong. c. 20. §. 13.

3. The circuit courts of the United States have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where the same act otherwise provides, or the laws of the United States shall otherwise direct; and concurrent jurisdiction with the district courts of the crimes and offenses cognizable therein. Ib. §. 11.

4. The district courts of the United States have, exclusively of the courts of the several states, cognizance of all crimes and offenses cognizable under the authority of the United States committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted. L. U. S. 1 Cong. 1 Sess. c. 20. §. 9.

And by the amendments to the federal constitution, in all criminal prosecutions, the trial shall be had 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. Amendments to C. U. S. Art. 8.

The power of pardoning is taken from the president of the United States, and from the governor of the commonwealth, in cases of impeachment. C. U. S. Art. 2. §. 2. C. V. Art. 9.

By the act of 7 Cong. c. 13. §. 14 and 15, it is provided, that if any Indian belonging to any tribe in amity with the United States, shall cross over the boundary-line, and steal or destroy any property belonging to any inhabitant of the United States, or commit any murder, violence, or outrage upon any such inhabitant, the superior courts in each of the territorial districts of the United States, and the circuit courts and other courts of the United States of similar jurisdiction in criminal causes in each district of the United States in which such offender shall be apprehended, or agreeably to the provisions of that act, be brought to trial, shall have full power and authority to hear and determine all crimes, offenses, and misdemeanors against that act; such courts proceeding therein in the same manner as if such offenses had been committed within their respective districts.

And the governors of the territorial districts of the United States into which such offenders may be brought, and the president of the United States, where the offender is apprehended, or brought within any of the United States, except Kentucky or Tennessee, may issue special commissions of *oyer* and *terminer* to the superior judges of such territorial district, or to any one or more judges of the supreme court of the United States, and the judge of the district in which the offender may be apprehended or brought to trial, who shall have the same jurisdiction in capital cases as the superior court of the territorial district, or the circuit court of the United States, and shall proceed in the same manner. And the district courts of Kentucky, Tennessee, and Maine, shall have the like jurisdiction. And, in cases not capital, the county courts of quarter sessions within the territorial districts, and the district courts of the United States, have the like jurisdiction. L. U. S. 7 Cong. c. 13.

THE END.

NOTES

1. In the case of one Thomas Sorrel, tried in the general court, April 1786. This doctrine was advanced by the attorney general, *arguemto,* and by three judges out of five, admitted; but the question turned entirely upon another point – so that this point was not judicially decided, not being before the court.

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