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BLACKSTONE'S COMMENTARIES:

WITH

NOTES OF REFERENCE,

TO

THE CONSTITUTION AND LAWS,

OF THE

FEDERAL GOVERNMENT OF THE UNITED STATES;

AND OF THE

COMMONWEALTH OF VIRGINIA.

IN FIVE VOLUMES.

WITH AN APPENDIX TO EACH VOLUME,

CONTAINING

SHORT TRACTS UPON SUCH SUBJECTS AS APPEARED NECESSARY TO FORM A CONNECTED

VIEW OF THE LAWS OF VIRGINIA,

AS A MEMBER OF THE FEDERAL UNION.

BY ST. GEORGE TUCKER,

PROFESSOR OF LAW, IN THE UNIVERSITY OF WILLIAM AND MARY, AND ONE OF THE JUDGES OF THE GENERAL COURT IN VIRGINIA.

PHILADELPHIA:

PUBLISHED BY WILLIAM YOUNG BIRCH, AND ABRAHAM SMALL,

NO. 17, SOUTH SECOND-STREET.

ROBERT CARR, PRINTER.

1803.

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District of Pennsylvania: to wit.

BE it remembered, That on the ninth day of May, in the twenty-seventh Year of the Independence of the United States of America, William Young Birch, and Abraham Small, of the said District, have deposited in this Office the Title of a Book, the right whereof they claim as Proprietors, in the words following, to wit:

"Blackstone's Commentaries: with Notes of Reference, to the "Constitution and Laws of the Federal Government of the United "States; and of the Commonwealth of Virginia. In Five Volumes. "With an Appendix to each Volume, containiug, Short Tracts "upon such Subjects as appeared necessary to form a connected "View of the Laws of Virginia, as a Member of the Federal "Union. By St. George Tucker, Professor of Law, in the Uni-"versity of William and Mary, and one of the Judges of the "General Court in Virginia."

In Conformity to the Act of the Congress of the United States, intituled, "An Act for the Encouragement of Learning, by securing the Copies of Maps, Charts, and Books, to the Authors and Proprietors of such Copies during the times therein mentioned," and also, to an Act entituled, "An Act supplementary to an Act, entituled, an Act for the Encouragement of Learning, by securing the Copies of Maps, Charts, and Books, to the Authors and Proprietors of such Copies, during the Times therein mentioned. And extending the Benefits thereof to the Arts of designing, engraving, and etching historical, and other Prints."

(L. S.) D. CALDWELL,
Clerk of the District of Pennsylvania.

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COMMENTARIES

ON THE

LAWS OF ENGLAND.

IN FOUR BOOKS.

BY SIR WILLIAM BLACKSTONE, KNT.
ONE OF THE JUSTICES OF HIS MAJESTY'S COURT OF COMMON PLEAS.

WITH THE LAST CORRECTIONS OF THE AUTHOR.

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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.

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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.

TABLE.

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

Sessions Acts.	Pace's Edi.	Sessions Acts	Pace's Edi.	Sessions Acts.	Pace's Edi.	Sessions Acts.	Pace's Edi.
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. 45	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. 23	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. 10	c. 228	c. 46	c. 262	c. 13	c. 296
c. 18	c. 195	c. 12	c. 229	c. 49	c. 263	c. 14	c. 297
c. 19	c. 196	c. 13	c. 230	c. 58	c. 264	c. 25	c. 298
c. 20	c. 197	c. 14	c. 231	c. 59	c. 265	c. 23	c. 299
c. 54	c. 198	c. 15	c. 232	c. 64	c. 266	c. 15	c. 300
1796 c. 1	c. 199	c. 16	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. 28	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		
c. 16	c. 209	c. 3	c. 243	c. 53	c. 277		
c. 17	c. 210	c. 6	c. 244	c. 54	c. 278		
c. 18	c. 211	c. 7	c. 245	c. 58	c. 279		
c. 19	c. 212	c. 9	c. 246	c. 59	c. 280		
c. 20	c. 213	c. 10	c. 247	c. 60	c. 281		
c. 23	c. 214	c. 11	c. 248	c. 61	c. 282		
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October	Appx.
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1784 c. —	c. 2
—— ——	c. 3
—— ——	c. 4
1792 c. 20	c. 5
c. 27	c. 6

* 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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PREFACE.

THE following sheets contain the substance of a course of Lectures on the Laws of England, which were read by the author in the university of OXFORD. His original plan took its rise in the year 1753: and, notwithstanding the novelty of such an attempt in this age and country, and the prejudices usually conceived against any innovations in the established mode of education, he had the satisfaction to find, (and he acknowledges it with a mixture of pride and gratitude) that his endeavours were encouraged and patronized by those, both in the university and out of it, whose good opinion and esteem he was principally desirous to obtain.

The death of Mr. VINER, in 1756, and his ample benefaction to the university for promoting the study of the law, produced about two years afterwards a regular and public establishment of what the author had privately undertaken. The knowledge of our laws and constitution was adopted as a liberal science by general academical authority; competent endowments were decreed for the support of a lecturer, and the perpetual encouragement of students; and the

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compiler of the ensuing commentaries had the honour to be elected the first Vinerian professor.

In this situation, he was led, both by duty and inclination, to investigate the elements of the law, and the grounds of our civil polity, with greater assiduity and attention than many have thought it necessary to do. And yet all, who of late years have attended the public administration of justice, must be sensible that a masterly acquaintance with the general spirit of laws and the principles of universal jurisprudence, combined with an accurate knowledge of our own municipal constitutions, their original, reason, and history, hath given a beauty and energy to many modern judicial decisions, with which our ancestors were wholly unacquainted. If, in the pursuit of these inquiries, the author hath been able to rectify any errors which either himself or others may have heretofore imbibed, his pains will be sufficiently answered: and, if in some points he is still mistaken, the candid and judicious reader will make due allowances for the difficulties of a search so new, so extensive, and so laborious.

2d Nov. 1765.

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THE EDITOR'S 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 labours.

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 plea- "sure 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 mode- "rate capacity confuse themselves at first setting out, and conti- "nue 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

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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 labour, or assistance; the crude and immethodical labours 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 labour 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 endeavours to procure one have hitherto been ineffectual.

Not many years after the reception of the COMMENTARIES into the libraries of gentleman 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

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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 *stiched* 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,* to whose advice and friendly instruction he was indebted for whatever talent he might be supposed to possess for filling the office of his successor. Great as he felt the distance between himself

* Mr. Wythe the present chancellor of Virginia.

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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 labour, 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 endeavours 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 unfrequent-

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ly 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 goverment, 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 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

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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.

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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 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.

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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 labour, 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 lat-

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ter, 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 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

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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

* Purvis's collection of the Laws of Virginia 1684
Park's Edition 1733
Hunters's edition 1753
Rind and Purdie's 1769
Nicolson and Prentis's 1785
The three first are rarely to be met with....and the two last are now growing scarce.

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the unbound Sessions's acts, scarcely less difficult to be collected than the leaves of the Sybils. To assist his labours, 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 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 favourite 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*

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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 authorised? 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 neighbours the Germans, not to mention other barbarous

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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 hath 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 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.

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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 hath 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 hath 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

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to those who administer it, that no man can pretend to a knowledge of the laws of his country, who doth 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 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 favour 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 turn-

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pikes, 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 controul; 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 controul 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 labours; 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 10*th*, 1802.

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COMMENTARIES

ON THE

LAWS OF ENGLAND.

BOOK THE FIRST.



PART THE FIRST.

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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.

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INTRODUCTION.

OF THE

STUDY, NATURE, AND EXTENT,

OF THE

LAWS OF ENGLAND.

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INTRODUCTION.

SECTION THE FIRST.

ON THE STUDY OF THE LAW*.

MR. VICE-CHANCELLOR, AND GENTLEMEN OF THE UNIVERSITY,

THE general expectation of so numerous and respectable an audience, the novelty, and (I may add) the importance of the duty required from this chair, must unavoidably be productive of great diffidence and apprehensions in him who has the honour to be placed in it. He must be sensible how much will depend upon his conduct in the infancy of a study which is now first adopted by public academical authority; which has generally been reputed (however unjustly) of a dry and unfruitful nature; and of which the theoretical elementary parts have hitherto received a very moderate share of cultivation. He cannot but reflect that, if either his plan of instruction be crude and injudicious, or the execution of it lame and superficial, it will cast a damp upon the farther progress of this most useful and most rational branch of learning; and may defeat for a time the public-spirited design of our wise and munificent benefactor. And this he must more especially dread, when he feels by experience how unequal his abilities are (unassisted by preceding examples) to complete, in the manner he could wish, so extensive and arduous a task; since he freely confesses, that his former more private attempts have fallen very short of his own ideas

* Read in Oxford, at the opening of the Vinerian lectures: 25 Oct. 1758.

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of perfection. And yet the candour he has already experienced, and this last transcendent mark of regard, his present nomination by the free and unanimous suffrage of a great and learned university, (an honour to be ever remembered with the deepest and most affectionate gratitude,) these testimonies of your public judgment must entirely supersede his own, and forbid him to believe himself totally insufficient for the labour at least of this employment. One thing he will venture to hope for, and it certainly shall be his constant aim, by diligence and attention to atone for his other defects; esteeming, that the best return, which he can possibly make for your favourable opinion of his capacity, will be his unwearied endeavours in some little degree to deserve it.

The science thus committed to his charge, to be cultivated, methodized, and explained in a course of academical lectures, is that of the laws and constitution of our own country: a species of knowledge, in which the gentlemen of England have been more remarkably deficient than those of all Europe besides. In most of the nations on the continent, where the civil or imperial law under different modifications is closely interwoven with the municipal laws of the land, no gentleman, or at least no scholar, thinks his education is completed, till he has attended a course or two of lectures, both upon the institutes of Justinian and the local constitutions of his native soil, under the very eminent professors that abound in their several universities. And in the northern parts of our own island, where also the municipal laws are frequently connected with the civil, it is difficult to meet with a person of liberal education, who is destitute of a competent knowledge in that science, which is to be the guardian of his natural rights and the rule of his civil conduct.

5 Nor have the imperial laws been totally neglected even in the English nation. A general acquaintance with their decisions has ever been deservedly considered as no small accomplishment of a gentleman; and a fashion has prevailed, especially of late, to transport the growing hopes of this island to foreign universities, in Switzerland, Germany, and Holland; which, though infinitely inferior to our own in every other consideration, have

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been looked upon as better nurseries of the civil, or (which is nearly the same) of their own municipal law. In the mean time it has been the peculiar lot of our admirable system of laws, to be neglected, and even unknown, by all but one practical profession, though built upon the soundest foundations, and approved by the experience of ages.

Far be it from me to derogate from the study of the civil law, considered (apart from any binding authority) as a collection of written reason. No man is more thoroughly persuaded of the general excellence of it's rules, and the usual equity of it's decisions, nor is better convinced of it's use as well as ornament to the scholar, the divine, the statesman, and even the common lawyer. But we must not carry our veneration so far as to sacrifice our Alfred and Edward to the manes of Theodosius and Justinian; we must not prefer the edict of the prætor, or the rescript of the Roman emperor, to our own immemorial customs or the sanctions of an English parliament; unless we can also prefer the despotic monarchy of Rome and Byzantium, for whose meridians the former were calculated, to the free constitution of Britain, which the latter are adapted to perpetuate.

Without detracting therefore from the real merit which abounds in the imperial law, I hope I may have leave to assert, that if an Englishman must be ignorant of either the one or the other, he had better be a stranger to the Roman than the English institutions. For I think it an undeniable position, that a competent knowledge of the laws of that society in which we live, is 6
the proper accomplishment of every gentleman and scholar; an highly useful, I had almost said essential, part of liberal and polite education. And in this I am warranted by the example of ancient Rome; where, as Cicero inform us[a], the very boys were obliged to learn the twelve tables by heart as a *carmen necessarium*, or indispensable lesson, to imprint on their tender minds an early knowledge of the laws and constitution of their country.

But as the long and universal neglect of this study, with us in England, seems in some degree to call in question the truth

[a] *De Legg.* 2. 23.

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of this evident position, it shall therefore be the business of this introductory discourse, in the first place to demonstrate the utility of some general acquaintance with the municipal law of the land, by pointing out it's particular uses in all considerable situations of life. Some conjectures will then be offered with regard to the causes of neglecting this useful study; to which will be subjoined a few reflections on the peculiar propriety of reviving it in our own universities.

And, first, to demonstrate the utility of some acquaintance with the laws of the land, let us only reflect a moment on the singular frame and polity of that land, which is governed by this system of laws. A land, perhaps the only one in the universe, in which political or civil liberty is the very end and scope of the constitution[b]. This liberty, rightly understood consists in the power of doing whatever the laws permit[c]; which is only to be effected by a general conformity of all orders and degrees to those equitable rules of action, by which the meanest individual is protected from the insults and oppression of the greatest. As therefore every subject is interested in the preservation of the laws, it is incumbent upon every man to be acquainted with those at least with which he is immediately concerned; lest he incur the censure, as well as inconvenience, of living in society without knowing the obligations which it lays him under. And thus much may suffice for persons of inferior condition, who have neither time nor capacity to enlarge their views beyond that contracted sphere in which they are appointed to move. But those on whom nature and fortune have bestowed more abilities and greater leisure, cannot be so easily excused. These advantages are given them, not for the benefit of themselves only, but also of the public; and yet they cannot, in any scene of life, discharge properly their duty either to the public or themselves, without some degree of knowledge in the laws. To evince this the more clearly, it may not be amiss to descend to a few particulars.

Let us therefore begin with our gentlemen of independent estates and fortune, the most useful as well as considerable body

b Montesq. *Esp. L. l.* 11. c. 5.

c *Facultas ejus, quod cuique facere, libet, nisi quid vi, aut jure prohibetur. Inst.* 1. 3. 1.

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of men in the nation; whom even to suppose ignorant in this branch of learning is treated by Mr. Locke[d] as a strange absurdity. It is their landed property, with it's long and voluminous train of descents and conveyances, settlements, entails and incumbrances, that forms the most intricate and most extensive object of legal knowledge. The thorough comprehension of these, in all their minute distinctions, is perhaps too laborious a task for any but a lawyer by profession; yet still the understanding of a few leading principles, relating to estates and conveyancing, may form some check and guard upon a gentleman's inferior agents, and preserve him at least from very gross and notorious imposition.

Again, the policy of all laws has made some forms necessary in the wording of last wills and testaments, and more with regard to their attestation. An ignorance in these must always be of dangerous consequence, to such as by choice or necessity compile their own testaments without any technical assistance. Those who have attended the courts of justice are the best witnesses of the confusion and distresses that are hereby occasioned in families; and of the difficulties that arise in discerning the true meaning of the testator, or sometimes in discovering any meaning at all; so that in the end his estate may often be vested 8
quite contrary to these his enigmatical intentions, because perhaps he has omitted one or two formal words, which are necessary to ascertain the sense with indisputable legal precision, or has executed his will in the presence of fewer witnesses than the law requires.

But to proceed from private concerns to those of a more public consideration. All gentlemen of fortune are, in consequence of their property, liable to be called upon to establish the rights, to estimate the injuries, to weigh the accusations, and sometimes to dispose of the lives of their fellow-subjects, by serving upon juries. In this situation they have frequently a right to decide, and that upon their oaths, questions of nice importance, in the solution of which some legal skill is requisite;

d Education, §. 167.

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especially where the law and the fact, as it often happens, are intimately blended together. And the general incapacity, even of our best juries, to do this with any tolerable propriety, has greatly debased their authority; and has unavoidably thrown more power into the hands of the judges, to direct, control, and even reverse their verdicts, than perhaps the constitution intended.

But it is not as a juror only that the English gentleman is called upon to determine questions of right, and distribute justice to his fellow-subjects; it is principally with this order of men that the commission of the peace is filled. And here a very ample field is opened for a gentleman to exert his talents, by maintaining good order in his neighbourhood; by punishing the dissolute and idle; by protecting the peaceable and industrious; and above all, by healing petty differences and preventing vexatious prosecutions. But in order to attain these desirable ends, it is necessary that the magistrate should understand his business; and have not only the will, but the power also, (under which must be included the knowledge) of administering legal and effectual justice. Else, when he has mistaken his authority, through passion, through ignorance, or absurdity, he will be the object of
9 contempt from his inferiors, and of censure from those to whom he is accountable for his conduct.

Yet farther; most gentlemen of considerable property, at some period or other in their lives, are ambitious of representing their country in parliament: and those, who are ambitious of receiving so high a trust, would also do well to remember it's nature and importance. They are not thus honourably distinguished from the rest of their fellow-subjects, merely that they may privilege their persons, their estates, or their domestics; that they may list under party banners; may grant or with-hold supplies; may vote with or vote against a popular or unpopular administration; but upon considerations far more interesting and important. They are the guardians of the English constitution; the makers, repealers, and interpreters of the English laws; delegated to watch, to check, and to avert every dangerous innovation, to propose, to adopt, and to cherish any solid

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and well-weighed improvement; bound by every tie of nature, of honour, and of religion, to transmit that constitution and those laws to their posterity, amended if possible, at least without any derogation. And how unbecoming must it appear in a member of the legislature to vote for a new law, who is utterly ignorant of the old! what kind of interpretation can he be enabled to give, who is a stranger to the text upon which he comments!

Indeed it is perfectly amazing, that there should be no other state of life, no other occupation, art, or science, in which some method of instruction is not looked upon as requisite, except only the science of legislation, the noblest and most difficult of any. Apprenticeships are held necessary to almost every art, commmercial or mechanical: a long course of reading and study must form the divine, the physician, and the practical professors of the laws: but every man of superior fortune thinks himself *born* a legislator. Yet Tully was of a different opinion; 10
"it is necessary, says he[e], for a senator to be thoroughly ac-
"quainted with the constitution; and this, (he declares,) is a
"knowledge of the most extensive nature; a matter of science,
"of diligence, of reflexion; without which no senator can pos-
"sibly be fit for his office."

The mischiefs that have arisen to the public from inconsiderate alterations in our laws, are too obvious to be called in question; and how far they have been owing to the defective education of our senators, is a point well worthy the public attention. The common law of England has fared like other venerable edifices of antiquity, which rash and unexperienced workmen have ventured to new-dress and refine, with all the rage of modern improvement. Hence frequently it's symmetry has been destroyed, it's proportions destorted, and it's majestic simplicity exchanged for specious embellishments and fantastic novelties. For, to say the truth, almost all the perplexed questions, almost all the niceties, intricacies, and delays, (which have sometimes disgraced the English, as well as other courts of justice)

e *De Legg.* 3. 18. *Est senatori necessarium nosse rempublicam; idque late patet:....genus hoc omne scientiae, diligentiae, memoriae est; sine quo paratus esse senator nullo pacto potest.*

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owe their original not to the common law itself, but to innovations that have been made in it by acts of parliament; "over-"laden (as sir Edward Coke expresses it[f]) with provisoes and "additions, and many times on a sudden penned or corrected "by men of none or very little judgment in law." This great and well experienced judge declares, that in all his time he never knew two questions made upon rights merely depending upon the common law; and warmly laments the confusion introduced by ill-judging and unlearned legislators. "But if," he subjoins, "acts of parliament were after the old fashion penned, "by such only as perfectly knew what the common law was be-"fore the making of any act of parliament concerning that mat-"ter, as also how far forth former statutes had provided remedy "for former mischiefs, and defects discovered by experience;
11 "then should very few questions in law arise, and the learned "should not so often and so much perplex their heads to make "atonement and peace, by construction of law, between insensi-"ble and disagreeing words, sentences, and provisoes, as they "now do." And if this inconvenience was so heavily felt in the reign of queen Elizabeth, you may judge how the evil is increased in later times, when the statute book is swelled to ten times a larger bulk: unless it should be found, that the penners of our modern statutes have proportionably better informed themselves in the knowledge of the common law.

What is said of our gentlemen in general, and the propriety of their application to the study of the laws of their country, will hold equally strong or still stronger with regard to the nobility of this realm, except only in the article of serving upon juries. But, instead of this, they have several peculiar provinces of far greater consequence and concern; being not only by birth hereditary counsellors of the crown, and judges upon their honour of the lives of their brother peers, but also arbiters of the property of all their fellow-subjects, and that in the last resort. In this their judicial capacity they are bound to decide the nicest and most critical points of the law: to examine and correct such errors as have escaped the most experienced sages of the profession, the lord keeper and the judges of the courts at West-

[f] 2 Rep. pref.

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minster. Their sentence is final, decisive, irrevocable: no appeal, no correction, not even a review, can be had: and to their determination, whatever it be, the inferior courts of justice must conform; otherwise the rule of property would no longer be uniform and steady.

Should a judge in the most subordinate jurisdiction be deficient in the knowledge of the law, it would reflect infinite contempt upon himself, and disgrace upon those who employ him. And yet the consequence of his ignorance is comparatively very trifling and small: his judgment may be examined, and his errors rectified, by other courts. But how much more serious and affecting is the case of a superior judge, if without any skill 12
in the laws he will boldly venture to decide a question, upon which the welfare and subsistence of whole families may depend! where the chance of his judging right, or wrong, is barely equal; and where, if he chances to judge wrong, he does an injury of the most alarming nature, an injury without possibility of redress!

Yet, vast as this trust is, it can no where be so properly reposed, as in the noble hands where our excellent constitution has placed it: and therefore placed it, because, from the independence of their fortune and the dignity of their station, they are presumed to employ that leisure which is the consequence of both, in attaining a more extensive knowledge of the laws than persons of inferior rank: and because the founders of our polity relied upon that delicacy of sentiment, so peculiar to noble birth; which, as on the one hand it will prevent either interest or affection from interfering in questions of right, so on the other it will bind a peer in honour, an obligation which the law esteems equal to another's oath, to be master of those points upon which it is his birthright to decide.

The Roman pandects will furnish us with a piece of history not unapplicable to our present purpose. Servius Sulpicius, a gentleman of the patrician order, and a celebrated orator, had occasion to take the opinion of Quintus Mutius Scaevola, the then oracle of the Roman law; but, for want of some knowledge

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in that science, could not so much as understand even the technical terms, which his friend was obliged to make use of. Upon which Mutius Scaevola could not forbear to upbraid him with this memorable reproof[g], "that it was a shame for a patrician, "a nobleman, and an orator of causes, to be ignorant of that "law in which he was so peculiarly concerned." This reproach made so deep an impression on Sulpicius, that he immediately applied himself to the study of the law; wherein he arrived to that
13 proficiency, that he left behind him about an hundred and fourscore volumes of his own compiling upon the subject; and became, in the opinion of Cicero[h], a much more complete lawyer than even Mutius Scaevola himself.

I would not be thought to recommend to our English nobility and gentry, to become as great lawyers as Sulpicius; though he, together with this character, sustained likewise that of an excellent orator, a firm patriot, and a wise indefatigable senator; but the inference which arises from the story is this, that ignorance of the laws of the land hath ever been esteemed dishonourable in those, who are entrusted by their country to maintain, to administer, and to amend them.

But surely there is little occasion to enforce this argument any farther to persons of rank and distinction, if we of this place may be allowed to form a general judgment from those who are under our inspection; happy, that while we lay down the rule, we can also produce the example. You will therefore permit your professor to indulge both a public and private satisfaction, by bearing this open testimony; that in the infancy of these studies among us, they were favoured with the most diligent attendance, and pursued with the most unwearied application, by those of the noblest birth and most ample patrimony; some of whom are still the ornaments of this seat of learning; and others at a greater distance continue doing honour to it's institutions, by comparing our polity and laws with those of other kingdoms abroad, or exerting their senatorial abilities in the councils of the nation at home.

g *Ff.* 1. 2. 2. §. 43. *Turpe esse patricio, et nobili, et causas oranti, jus in quo versaretur ignorare.* h *Brut.* 41.

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Nor will some degree of legal knowledge be found in the least superfluous to persons of inferior rank; especially those of the learned professions. The clergy in particular, besides the common obligations they are under in proportion to their rank and fortune, have also abundant reason, considered merely as 14
clergymen, to be acquainted with many branches of the law, which are almost peculiar and appropriated to themselves alone. Such are the laws relating to advowsons, institutions, and inductions; to simony, and simoniacal contracts; to uniformity, residence, and pluralities; to tithes and other ecclesiastical dues; to marriages (more especially of late) and to a variety of other subjects, which are consigned to the care of their order by the provisions of particular statutes. To understand these aright, to discern what is warranted or enjoined, and what is forbidden by law, demands a sort of legal apprehension; which is no otherwise to be acquired, than by use and a familiar acquaintance with legal writers.

For the gentlemen of the faculty of physic, I must frankly own that I see no special reason, why they in particular should apply themselves to the study of the law; unless in common with other gentlemen, and to complete the character of general and extensive knowledge; a character which their profession, beyond others, has remarkably deserved. They will give me leave however to suggest, and that not ludicrously, that it might frequently be of use to families upon sudden emergencies, if the physician were acquainted with the doctrine of last wills and testaments, at least so far as relates to the formal part of their execution.

But those gentlemen who intend to profess the civil and ecclesiastical laws, in the spiritual and maritime courts of this kingdom, are of all men (next to common lawyers) the most indispensably obliged to apply themselves seriously to the study of our municipal laws. For the civil and canon laws, considered with respect to any intrinsic obligation, have no force or authority in this kingdom: they are no more binding in England than our laws are binding at Rome. But as far as these foreign laws on account of some peculiar propriety, have in some particular cases, and in some particular courts, been introduced and al-

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lowed by our laws, so far they oblige, and no farther; their authority being wholly founded upon that permission and adoption. In which we are not singular in our notions: for even in Holland, where the imperial law is much cultivated and it's decisions pretty generally followed, we are informed by Van Leeuwen[i], that "it receives it's force from custom and the consent of "the people, either tacitly or expressly given: for otherwise, he "adds, we should no more be bound by this law, than by that of "the Almains, the Franks, the Saxons, the Goths, the Vandals, "and other of the antient nations." Wherefore, in all points in "which the different systems depart from each other, the law of the land takes place of the law of Rome, whether ancient or modern, imperial or pontifical. And, in those of our English courts wherein a reception has been allowed to the civil and canon laws, if either they exceed the bounds of that reception, by extending themselves to other matters than are permitted to them; or if such courts proceed according to the decisions of those laws, in cases wherein it is controlled by the law of the land the common law in either instance both may, and frequently does prohibit and annul their proceedings[k]: and it will not be a sufficient excuse for them to tell the king's courts at Westminster, that their practice is warranted by the laws of Justinian or Gregory, or is conformable to the degrees of the Rota or imperial chamber. For which reason it becomes highly necessary for every civilian and canonist, that would act with safety as a judge, or with prudence and reputation as an advocate, to know in what cases and how far the English laws have given sanction to the Roman; in what points the latter are rejected; and where they are both so intermixed and blended together as to form certain supplemental parts of the common law of England distinguished by the titles of the king's maritime, the king's military, and the king's ecclesiastical law. The propriety of which inquiry the university of Oxford has for more than a century so thoroughly seen, that in her statutes[l] she appoints, that one of the three questions to be annually discussed at the act by the jurist-inceptors shall relate to the common law; subjoining this reason, "*quia*

i *Dedicatio corporis juris civilis. Edit.* 1663.

k Hale Hist. C. L. c. 2. Selden *in Fletam.* 5 Rep. Caudrey's case. 2 Inst. 599.

l *Tit. VII. Sect.* 2. §. 2.

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"*juris civilis studiosos decet haud imperitos esse juris municipalis,* "*et differentias exteri patriique juris notas habere.*" And the statutes [m] of the university of Cambridge speak expressly to the same effect.

From the general use and necessity of some acquaintance with the common law, the inference were extremely easy with regard to the propriety of the present institution, in a place to which gentlemen of all ranks and degrees resort, as the fountain of all useful knowledge. But how it has come to pass that a design of this sort has never before taken place in the university, and the reason why the study of our laws has in general fallen into disuse, I shall previously proceed to enquire.

Sir John Fortescue, in his panegyric on the laws of England (which was written in the reign of Henry the sixth) puts[n] a very obvious question in the mouth of the young prince, whom he is exhorting to apply himself to that branch of learning: "why "the laws of England, being so good, so fruitful, and so com- "modious, are not taught in the universities, as the civil and ca- "non laws are?" In answer to which he gives[o] what seems, with due deference be it spoken, a very jejune and unsatisfactory reason; being in short, that "as the proceedings at common law "were in his time carried on in three different tongues, the Eng- "lish, the Latin, and the French, that science must be necessa- "rily taught in those three several languages; but that in the uni- "versities, all sciences were taught in the Latin tongue only;" and therefore he concludes, "that they could not be conveniently "taught or studied in our universities." But without attempting to examine seriously the validity of this reason, (the very shadow of which by the wisdom of your late constitutions is entirely taken away,) we perhaps may find out a better, or at least a more plausible, account, why the study of the municipal laws has been banished from these seats of science, than what the learned chancellor thought it prudent to give to his royal pupil.

m *Doctor legum mox a doctoratu dabit operam legibus Angliae, ut non sit imperitus earum legum quas habet sua patria, et differentias exteri patriique juris noscat* Stat. Eliz. *R* c. 14. Cowel. *Institut. in proemio.*

n c. 47. o c. 48.

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That antient collection of unwritten maxims and customs, which is called the common law, however compounded or from whatever fountains derived, had subsisted immemorially in this kingdom; and, though somewhat altered and impaired by the violence of the times, had in great measure weathered the rude shock of the Norman conquest. This had endeared it to the people in general, as well because it's decisions were universally known, as because it was found to be excellently adapted to the genius of the English nation. In the knowledge of this law consisted great part of the learning of those dark ages; it was then taught, says Mr. Selden[p], in the monasteries; *in the universities*, and in the families of the principal nobility. The clergy in particular, as they then engrossed almost every other branch of learning, so (like their predecessors the British Druids[q]) they were peculiarly remarkable for their proficiency in the study of the law. *Nullus clericus nisi causidicus*, is the character given of them soon after the conquest by William of Malmsbury[r]. The judges therefore were usually created out of the sacred order[s], as was likewise the case among the Normans[t]; and all the inferior offices were supplied by the lower clergy, which has occasioned their successors to be denominated *clerks* to this day.

But the common law of England, being not committed to writing; but only handed down by tradition, use, and experience, was not so heartily relished by the foreign clergy; who came over hither in shoals during the reign of the conqueror and his two sons, and were utter strangers to our constitution as well as our language. And an accident, which soon after happened, had nearly completed it's ruin. A copy of Justinian's

p *in Fletam.* 7. 7.

q Cæsar *de bello Gal.* 6. 12.

r *de gest. reg. l.* 4.

s Dugdale *Orig. jurid. c.* 8.

t *Les juges sont sages personnes et autentiques....sicome les archevesques, evesques les chanoines des eglises cathedraulx, et les autres personnes qui ont dignitez in saincte eglise; les abbez, les prieurs conventaulx, et les gouverneurs des eglises, &c. Grand Coustumier, ch.* 9.

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pandects, being newly[u] discovered at Amalfi, soon brought the civil law into vogue all over the west of Europe, where before it was quite laid aside[w] and in a manner forgotten; though some traces of it's authority remained in Italy[x] and the eastern provinces of the empire[y]. This now became in a particular manner the favourite of the popish clergy, who borrowed the method and many of the maxims of their canon law from this original. The study of it was introduced into several universities abroad, particularly that of Bologna; where exercises were performed, lectures read, and degrees conferred in this faculty, as in other branches of science: and many nations on the continent, just then beginning to recover from the convulsions consequent upon the overthrow of the Roman empire, and settling by degrees into peaceable forms of government, adopted the civil law, (being the best written system then extant) as the basis of their several constitutions; blending and interweaving it among their own feodal customs, in some places with a more extensive, in others a more confined authority[z].

Nor was it long before the prevailing mode of the times reached England. For Theobald, a Norman abbot, being elected to the see of Canterbury[a], and extremely addicted to this new study, brought over with him in his retinue many learned proficients therein; and among the rest Roger sirnamed Vacarius, whom he placed in the university of Oxford[b], to teach it to the people of this country. But it did not meet with the same easy reception in England, where a mild and rational system of laws had been established, as it did upon the continent; and, though the monkish clergy (devoted to the will of a foreign primate) received it with eagerness and zeal, yet the laity, who were more interested to preserve the old constitution, and had already se-

u *circ. A. D.* 1130.

w *LL. Wisigoth.* 2. 1, 9.

x *Capitular. Hludov. Pii.* 4. 102.

y Selden *in Fletam.* 5. 5.

z Domat's treatise of law, c. 13. §. 9. *Epistol. Innocent. IV. in M. Paris ad A. D.* 1254.

a *A. D.* 1138.

b Gervas. Dorobern. *Act. Pontif. Cantuar. col.* 1665.

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verely felt the effect of many Norman innovations, continued wedded to the use of the common law. King Stephen immediately published a proclamation[c], forbidding the study of the laws, then newly imported from Italy; which was treated by the monks[d] as a piece of impiety, and, though it might prevent the introduction of the civil law process into our courts of justice, yet did not hinder the clergy from reading and teaching it in their own schools and monasteries.

19

From this time the nation seems to have been divided into two parties; the bishops and clergy, many of them foreigners, who applied themselves wholly to the study of the civil and canon law, which now came to be inseparably interwoven with each other; and the nobility and laity, who adhered with equal pertinacity to the old common law: both of them reciprocally jealous of what they were unacquainted with, and neither of them perhaps allowing the opposite system that real merit which is abundantly to be found in each. This appears, on the one hand, from the spleen with which the monastic writers[e] speak of our municipal laws upon all occasions; and, on the other, from the firm temper which the nobility shewed at the famous parliament of Merton: when the prelates endeavoured to procure an act, to declare all bastards legitimate in case the parents intermarried at any time afterwards; alleging this only reason, because holy church (that is, the canon law) declared such children legitimate: but "all the earls and barons (says the parliament roll[f]) with one voice answered, that they would not "change the laws of England, which had hitherto been used "and approved." And we find the same jealousy prevailing above a century afterwards[g], when the nobility declared with a kind of prophetic spirit, "that the realm of England hath "never been unto this hour, neither by the consent of our lord "the king and the lords of parliament shall it ever be, ruled or

c Rog. Bacon *citat. per* Selden *in Fletam.* 7 6. *in Fortesc.* c. 33. & 8 Rep. Pref.

d Joan. Sarisburiens. *Polycrat.* 8. 22.

e *Idem, ibid.* 5. 16. Polydor. Virgil. *Hist. l.* 9.

f *Stat. Merton.* 20 *Hen. III.* c. 9. *Et omnes comites et barones una voce responderunt, quod nolunt leges Angliae mutare, quae hucusque usitatae sunt et approbatae.*

g 11 Ric. II.

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"governed by the civil law[h]." And of this temper between the clergy and laity many more instances might be given.

While things were in this situation, the clergy, finding it impossible to root out the municipal law, began to withdraw themselves by degrees from the temporal courts: and to that end, very early in the reign of king Henry the third, episcopal constitutions were published[i], forbidding all ecclesiastics to appear as advocates *in foro saeculari:* nor did they long continue to act as judges there, not caring to take the oath of office which was then found necessary to be administered, that they should in all things determine according to the law and custom of this realm[k]; though they still kept possession of the high office of chancellor, an office then of little juridical power; and afterwards, as it's business increased by degrees, they modelled the process of the court at their own discretion.

But wherever they retired and wherever their authority extended, they carried with them the same zeal to introduce the rules of the civil, in exclusion of the municipal law. This appears in a particular manner from the spiritual courts of all denominations, from the chancellor's courts in both our universities, and from the high court of chancery before mentioned; in all of which the proceedings are to this day in a course much conformed to the civil law: for which no tolerable reason can be assigned, unless that these courts were all under the immediate direction of the popish ecclesiastics, among whom it was a point of religion to exclude the municipal law; pope Innocent the fourth having forbidden[l] the very reading of it by the clergy because it's decisions were not founded on the imperial constitutions, but merely on the customs of the laity. And if it be considered, that our universities began about that period to receive their present form of scholastic discipline; that they were then, and continued to be till the time of the reformation, entirely under the influence of the popish clergy; (sir John Mason 21

h Selden. *Jan. Anglor. l.* 2. §. 43. *in Fortesc. c.* 33.
i Spelman. *Concil. A. D.* 1217. Wilkins, *vol.* 1. *p.* 574. 599.
k Selden *in Fletam.* 9. 3.
l M. Paris *ad A. D.* 1254.

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the first protestant, being also the first lay, chancellor of Oxford) this will lead us to perceive the reason, why the study of the Roman laws was in those days of bigotry[m] pursued with such alacrity in these seats of learning; and why the common law was entirely despised, and esteemed little better than heretical.

And, since the reformation, many causes have conspired to prevent it's becoming a part of academical education. As, first, long usage and established custom; which, as in every thing else, so especially in the forms of scholastic exercise, have justly great weight and authority. Secondly, the real intrinsic merit of the civil law, considered upon the footing of reason and not of obligation, which was well known to the instructors of our youth and their total ignorance of the merit of the common law, though it's equal at least, and perhaps an improvement on the other. But the principal reason of all, that has hindered the introduction of this branch of learning, is, that the study of the common law, being banished from hence in the times of popery, has fallen into a quite different channel, and has hitherto been wholly cultivated in another place. But as the long usage and established custom, of ignorance of the laws of the land, begin now to be thought unreasonable; and as by these means the merit of those
22 laws will probably be more generally known; we may hope that the method of studying them will soon revert to it's antient

m There cannot be a stronger instance of the absurd and superstitious veneration that was paid to these laws, than that the most learned writers of the times thought they could not form a perfect character, even of the blessed virgin, without making her a civilian and a canonist. Which Albertus Magnus, the renowned dominican doctor of the thirteenth century, thus proves in his *Summa de laudibus christiferae virginis (divinum magis quam humanum opus) qu.* 23. §. 5. "*Item quod jura civilia, & leges, & decreta scivit in summo, probatur* "*hoc modo: sapientia advocati manifestatur in tribus; unum, quod obtineat om-*" *nia contra judicem justum & sapientem; secundo, quod contra adversarium as-*" *tutum & sagacem; tertio, quod in causa desperata: sed beatissima virgo, contra* "*judicem sapientissimum, Dominum; contra adversarium callidissimum, dya-*" *bolum; in causa nostra desperata; sententiam optatam obtinuit.*" To which an eminent franciscan, two centuries afterwards, Bernardinus de Busti (*Mariale, part.* 4. *serm.* 9.) very gravely subjoins this note. "*Nec videtur incon-*" *gruum mulieres habere peritiam juris. Legitur enim de uxore Joannis An-*" *dreae glossatoris, quod tantam peritiam in utroque jure habuit, ut publice in scho-*" *lis legere ausa sit.*"

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course, and the foundations at least of that science will be laid in the two universities; without being exclusively confined to the channel which it fell into at the times I have just been describing.

For, being then entirely abandoned by the clergy, a few stragglers excepted, the study and practice of it devolved of course into the hands of laymen: who entertained upon their parts a most hearty aversion to the civil law[n], and made no scruple to profess their contempt, nay even their ignorance[o] of it, in the most public manner. But still, as the balance of learning was greatly on the side of the clergy, and as the common law was no longer *taught*, as formerly, in any part of the kingdom, it must have been subjected to many inconveniencies, and perhaps would have been gradually lost and overrun by the civil, (a suspicion well justified from the frequent transcripts of Justinian to be met with in Bracton and Fleta) had it not been for a peculiar incident, which happened at a very critical time, and contributed greatly to it's support.

The incident which I mean was the fixing the court of common pleas, the grand tribunal for disputes of property, to be held in one certain spot; that the seat of ordinary justice might be permanent and notorious to all the nation. Formerly that, in conjunction with all the other superior courts, was held be- 23
fore the king's capital justiciary of England, in the *aula regis*, or such of his palaces wherein his royal person resided; and

n Fortesc. *de laud. LL.* c. 25.

o This remarkably appeared in the case of the abbot of Torun. *M.* 22. *Edw. III.* 24. who had caused a certain prior to be summoned to answer at Avignon for erecting an oratory *contra inhibitionem novi operis;* by which words Mr. Selden, (*in Flet.* 8. 5.) very justly understands to be meant the title *de novi operis nuntiatione* both in the civil and canon laws, (*Ff.* 39. 1. *C.* 8. 11. and *Decretal.* not *Extrav.* 5. 32.) whereby the erection of any new buildings in prejudice of more antient ones was prohibited. But Skipwith the king's serjeant and afterwards chief baron of the exchequer, declares them to be flat nonsense; "*in ceux parolx*, contra inhibitionem novi operis, *ny ad pas entendment:*" and justice Schardelow mends the matter but little by informing him, that they signify a restitution *in their law:* for which reason he very sagely resolves to pay no sort of regard to them. "*Ceo n'est que un restitution en lour ley, par que a ceo* "*n'avomus regard, &c.*"

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removed with his houshold from one end of the kingdom to the other. This was found to occasion great inconvenience to the suitors; to remedy which it was made an article of the great charter of liberties, both that of king John and king Henry the third[p], that "common pleas should no longer follow the "king's court, but be held in some certain place:" in consequence of which they have ever since been held (a few necessary removals in times of the plague excepted) in the palace of Westminster only. This brought together the professors of the municipal law, who before were dispersed about the kingdom, and formed them into an aggregate body; whereby a society was established of persons, who, (as Spelman[q] observes) addicting themselves wholly to the study of the laws of the land, and no longer considering it as a mere subordinate science for the amusement of leisure hours, soon raised those laws to that pitch of perfection, which they suddenly attained under the auspices of our English Justinian, king Edward the first.

In consequence of this lucky assemblage, they naturally fell into a kind of collegiate order, and, being excluded from Oxford and Cambridge, found it necessary to establish a new university of their own. This they did by purchasing at various times certain houses (now called the inns of court and of chancery) between the city of Westminster, the place of holding the king's courts, and the city of London; for advantage of ready access to the one, and plenty of provisions in the other[r]. Here exercises were performed, lectures read, and degrees were at length conferred in the common law, as at other universities in the canon and civil. The degrees were those of barristers (first stiled
24 apprentices[s] from *apprendre*, to learn) who answered to our bachelors: as the state and degree of a serjeant[t], *servientis ad legem*, did to that of doctor.

p c. 11. q *Glossar.* 334.

r Fortesc. *c.* 48.

s Apprentices or barristers seem to have been first appointed by an ordinance of king Edward the first in parliament, in the 20th year of his reign, (Spelm. *Glos.* 37. Dugdale, *Orig. jurid.* 55.)

t The first mention which I have met with in our lawbooks of serjeants or countors, is in the statute of Westm. 1. 3 Edw. I. c. 29. and in Horn's Mirror, c 1. §. 10. c. 2. §. 5. c. 3. §. 1. in the same reign. But M. Paris in his life of

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The crown seems to have soon taken under it's protection this infant seminary of common law; and, the more effectually to foster and cherish it, king Henry the third in the nineteenth year of his reign issued out an order directed to the mayor and sheriffs of London, commanding that no regent of any law schools *within* that city should for the future teach law therein[u]. The word, law, or *leges*, being a general term, may create some doubt at this distance of time whether the teaching of the civil law, or the common, or both, is hereby restrained. But in either case it tends to the same end. If the civil law only is prohibited, (which is Mr. Selden's[w] opinion) it is then a retaliation upon the clergy, who had excluded the common law from *their* seats of learning. If the municipal law be also included in the restriction, (as sir Edward Coke[x] understands it, and which the words seem to import) then the intention is evidently this; by preventing private teachers within the walls of the city, to collect all the common lawyers into the one public university, which was newly instituted in the suburbs.

In this juridical university (for such it is insisted to have been by Fortescue[y] and sir Edward Coke[z]) there are two sorts of collegiate houses; one called inns of chancery, in which the younger students of the law were usually placed, "learning and "studying, says Fortescue[a], the originals and as it were the ele- 25

John II, abbot of St. Alban's, which he wrote in 1255, 39 Hen. III. speaks of advocates at the common law, or countors, *(quos banci narratores vulgariter appellamus)* as of an order of men well known. And we have an example of the antiquity of the coif in the same author's history of England, *A D.* 1259, in the case of one William de Bussy; who, being called to account for his great knavery and mal-practices, claimed the benefit of his orders or clergy, which till then remained an entire secret; and to that end *volvit ligamenta coifae suae solvere, ut palam monstraret se tonsuram habere clericalem; sed non est permissus. .....Satelles vero eum arripiens, non per coifea ligamina sed per gutter eum apprehendens, traxit ad carcerem.* And hence sir H. Spelman conjectures, *(Glossar. 335.)* that coifs were introduced to hide the tonsure of such renegade clerks, as were still tempted to remain in the secular courts in the quality of advocates or judges, notwithstanding their prohibition by canon.

u *Ne aliquis scholas regens de legibus in eadem civitate de caetero ibidem leges doceat.*

w *in Flet.* 8. 2.

x 2 Inst. proem.

y c. 49.

z 3 Rep. pref.

a 3 Rep pref.

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"ments of the law; who profiting therein, as they grew to ripe-
"ness so were they admitted into the greater inns of the same
"study, called the inns of court." And in these inns of both kinds, he goes on to tell us, the knights and barons, with other grandees and noblemen of the realm, did use to place their children, though they did not desire to have them thoroughly learned in the law, or to get their living by it's practice: and that in his time there were about two thousand students at these several inns, all of whom he informs us were *filii nobilium*, or gentlemen born.

Hence it is evident, that (though under the influence of the monks our universities neglected this study, yet) in the time of Henry the sixth it was thought highly necessary and was the universal practice, for the young nobility and gentry to be instructed in the originals and elements of the laws. But by degrees this custom has fallen into disuse; so that in the reign of queen Elizabeth sir Edward Coke[b] does not reckon above a thousand students, and the number at present is very considerably less. Which seems principally owing to these reasons; first, because the inns of chancery, being now almost totally filled by the inferior branch of the profession, are neither commodious nor proper for the resort of gentlemen of any rank or figure; so that there are very rarely any young students entered at the inns of chancery; secondly, because in the inns of court all sorts of regimen and academical superintendance, either with regard to morals or studies, are found impracticable and therefore entirely neglected; lastly, because persons of birth and fortune, after having finished their usual courses at the
26 universities, have seldom leisure or resolution sufficient to enter upon a new scheme of study at a new place of instruction. Wherefore few gentlemen now resort to the inns of court, but such for whom the knowledge of practice is absolutely necessary; such I mean as are intended for the profession: the rest of our gentry, (not to say our nobility also) having usually retired to their estates, or visited foreign kingdoms, or entered upon public life, without any instruction in the laws of the land, and indeed with hardly any opportunity of gaining instruction, unless it can be afforded them in these seats of learning.

b *Ibid.*

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And that these are the proper places for affording assistances of this kind to gentlemen of all stations and degrees, cannot (I think) with any colour of reason be denied. For not one of the objections, which are made to the inns of court and chancery, and which I have just now enumerated, will hold with regard to the universities. Gentlemen may here associate with gentlemen of their own rank and degree. Nor are their conduct and studies left entirely to their own discretion; but regulated by a discipline so wise and exact, yet so liberal, so sensible and manly, that their conformity to it's rules (which does at present so much honour to our youth) is not more the effect of constraint, than of their own inclinations and choice. Neither need they apprehend too long an avocation hereby from their private concerns and amusements, or (what is a more noble object) the service of their friends and their country. This study will go hand in hand with their other pursuits: it will obstruct none of them; it will ornament and assist them all.

But if, upon the whole, there are any, still wedded to monastic prejudice, that can entertain a doubt how far this study is properly and regularly *academical*, such persons I am afraid either have not considered the constitution and design of an university, or else think very meanly of it. It must be a deplorable narrowness of mind, that would confine these seats of instruction to the limited views of one or two learned professions. To the praise of this age be it spoken, a more open and generous 27
way of thinking begins now universally to prevail. The attainment of liberal and genteel accomplishments, though not of the intellectual sort, has been thought by our wisest and most affectionate patrons[c], and very lately by the whole university[d], no small improvement of our antient plan of education: and therefore I may safely affirm that nothing (how *unusual* soever) is,

c Lord chancellor Clarendon, in his dialogue of education, among his tracts, p. 325. appears to have been very sollicitous, that it might be made "a part of the "ornament of our learned academies to teach the qualities of riding, dancing and "fencing, at those hours when more serious exercises should be intermitted."

d By accepting in full convocation the remainder of lord Clarendon's history from his noble descendants, on condition to apply the profits arising from its publication to the establishment of a *manage* in the university.

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under due regulations improper to be taught in this place, which is proper for a gentleman to *learn*. But that a science, which distinguishes the criterions of right and wrong; which teaches to establish the one, and prevent, punish, or redress the other; which employs in it's theory the noblest faculties of the soul, and exerts in it's practice the cardinal virtues of the heart; a science, which is universal in it's use and extent, accommodated to each individual, yet, comprehending the whole community; that a science like this should ever have been deemed unnecessary to be studied in an university, is matter of astonishment and concern. Surely, if it were not before an object of academical knowledge, it was high time to make it one; and to those who can doubt the propriety of its reception among us (if any such there be) we may return an answer in their own way; that ethics are confessedly a branch of academical learning, and Aristotle *himself has said*, speaking of the laws of his own country, that jurisprudence or the knowledge of those laws is the principal and most perfect branch of ethics[e].

From a thorough conviction of this truth, our munificent benefactor Mr. Viner, having employed above half a century in amassing materials for new-modelling and rendering more com-
28 modious the rude study of the laws of the land, consigned both the plan and execution of these his public-spirited designs to the wisdom of his parent university. Resolving to dedicate his learned labours "to the benefit of posterity and the perpetual "service of his country[f]," he was sensible he could not perform his resolution in a better and more effectual manner, than by extending to the youth of this place those assistances, of which he so well remembered and so heartily regretted the want. And the sense, which the university has entertained of this ample and most useful benefaction, must appear beyond a doubt, from their gratitude in receiving it with all possible marks of esteem[g]; from their alacrity and unexampled dispatch in carrying

e Τελεια μαλιστα αρετη, ὁτι της τελειας αρετης χρησις εστι.
Ethic. ad Nicomach. l. 5. c. 3.

f See the preface to the eighteenth volume of his abridgment.

g Mr. Viner is enrolled among the public benefactors of the university by decree of convocation.

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it into execution [h]; and, above all, from the laws and constitutions by which they have effectually guarded it from the neglect and abuse to which such institutions are liable [i]. We have seen

h Mr. Viner died June 5, 1756. His effects were collected and settled, near a volume of his work printed, almost the whole disposed of, and the accounts made up in a year and a half from his decease, by the very diligent and worthy administratorswith the will annexed,(Dr. West and Dr. Good of Magdalane, Dr. Whalley of Oriel, Mr Buckler of All Souls, and Mr. Betts of University college) to whom that care was consigned by the university. Another half year was employed in considering and settling a plan of the proposed institution, and in framing the statutes thereupon, which were finally confirmed by convocation on the 3d of July 1758. The professor was elected on the 20th of October following, and two scholars on the succeeding day. And, lastly, it was agreed at the annual audit in 1761, to establish a fellowship; and a fellow was accordingly elected in January following....The residue of this fund, arising from the sale of Mr Viner's abridgment, will probably be sufficient hereafter to found another fellowship and scholarship, or three more scholarships, as shall be thought most expedient.

i The statutes are in substance as follows:

1. THAT the accounts of this benefaction be separately kept, and annually audited by the delegates of accounts and professor, and afterwards reported to convocation.

2. THAT a professorship of the laws of England be established, with a salary of two hundred pounds *per annum*; the professor to be elected by convocation, and to be at the time of his election at least a master of arts or bachelor of civil law in the university of Oxford, of ten years standing from his matriculation; and also a barrister at law of four years standing at the bar.

3. THAT such professor (by himself, or by deputy to be previously approved by convocation) do read one solemn public lecture on the laws of England, and in the English language, in every academical term, at certain stated times previous to the commencement of the common law term; or forfeit twenty pounds for every omission to Mr. Viner's general fund: and also (by himself, or by deputy to be approved, if occasional, by the vice-chancellor and proctors; or if permanent, both the cause and the deputy to be annually approved by convocation) do yearly read one complete course of lectures on the laws of England, and in the English language, consisting of sixty lectures at the least; to be read during the university term time, with such proper intervals that not more than four lectures may fall within any single week: that the professor do give a month's notice of the time when the course is to begin, and do read *gratis* to the scholars of Mr. Viner's foundation: but may demand of other auditor's such gratuity as shall be settled from time to time by decree of convocation; and that, for every of the said sixty lectures omitted, the professor on complaint made to the vice-chancellor within the year, do forfeit forty shillings to Mr. Viner's general fund; the proof of having performed his duty to lie upon the said professor.

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an universal emulation, who best should understand, or most
29 faithfully pursue, the designs of our generous patron: and with pleasure we recollect, that those who are most distinguished by

4. THAT every professor do continue in his office during life, unless in case of such misbehaviour as shall amount to bannition by the university statutes; or unless he deserts the profession of the law by betaking himself to another profession; or unless, after one admonition by the vice-chancellor and proctors for notorious neglect, he is guilty of another flagrant omission: in any of which cases he be deprived by the vice-chancellor, with consent of the house of convocation.

5. THAT such a number of fellowships with a stipend of fifty pounds *per annum*, and scholarships with a stipend of thirty pounds, be established, as the convocation shall from time to time ordain, according to the state of Mr. Viner's revenues.

6. THAT every fellow be elected by convocation, and at the time of election be unmarried, and at least a master of arts or bachelor of civil law, and a member of some college or hall in the university of Oxford: the scholars of this foundation or such as have been scholars (if qualified and approved of by convocation) to have the preference: that, if not a barrister when chosen, he be called to the bar within one year after his election; but do reside in the university two months in every year, or in case of non-residence do forfeit the stipend of that year to Mr. Viner's general fund.

7. THAT every scholar be elected by convocation, and at the time of election be unmarried, and a member of some college or hall in the university of Oxford, who shall have been matriculated twenty-four calendar months at the least: that he do take the degree of bachelor of civil law with all convenient speed; (either proceeding in arts or otherwise) and previous to his taking the same, between the second and eighth year from his matriculation, be found to attend two courses of the professor's lectures, to be certified under the professor's hand; and within one year after taking the same to be called to the bar: that he do annually reside six months till he is of four years standing, and four months from that time till he is master of arts or bachelor of civil law: after which he be bound to reside two months in every year; or, in case of non-residence, do forfeit the stipend of that year to Mr. Viner's general fund.

8. That the scholarships do become void in case of non-attendance on the professor, or not taking the degree of bachelor of civil law, being duly admonished so to do by the vice-chancellor and proctors: and that both fellowships and scholarships do expire at the end of ten years after each respective election; and become void in case of gross misbehaviour, non-residence for two years together, marriage, not being called to the bar within the time before limited (being duly admonished so to be by the vice-chancellor, and proctors) or deserting the profession of the law by following any other profession: and that in any of these cases the vice-chancellor, with consent of convocation, do declare the place actually void.

9. That in case of any vacancy of the professorship, fellowships, or scholarships, the profits of the current year be ratably divided between the predecessor

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their quality, their fortune, their station, their learning, or their 30
experience, have appeared the most zealous to promote the success of Mr. Viner's establishment.

The advantages that might result to the science of the law itself, when a little more attended to in these seats of knowledge, perhaps, would be very considerable. The leisure and abilities of the learned in these retirements might either suggest expedients, or execute those dictated by wiser heads[k], for improving it's method, retrenching it's superfluities, and reconciling the little contrarieties, which the practice of many centuries will necessarily create in any human system: a task, which those, who are deeply employed in business and the more active scenes of the profession, can hardly condescend to engage in. And as to the interest, or (which is the same) the reputation of the universities themselves, I may venture to pronounce, that if ever this study should arrive to any tolerable perfection either here or at Cambridge, the nobility and gentry of this kingdom would not shorten their residence upon this account, nor perhaps entertain a worse opinion of the benefits of academical education. Neither should it be considered as a matter of light importance, that while we thus extend the *pomoeria* of university learning, and adopt a new tribe of citizens within these philosophical walls, we interest a very numerous and very powerful profes- 31
sion in the preservation of our rights and revenues.

For I think it past dispute that those gentlemen, who resort to the inns of court with a view to pursue the profession, will find it expedient (whenever it is practicable) to lay the previous foundations of this, as well as every other science, in one of our learned universities. We may appeal to the experience of every sensible lawyer, whether any thing can be more hazardous or discouraging than the usual entrance on the study of

or his representatives, and the successor; and that a new election be had within one month afterwards, unless by that means the time of election shall fall within any vacation, in which case it be deferred to the first week in the next full term. And that before any convocation shall be held for such election, or for any other matter relating to Mr. Viner's benefaction, ten days public notice be given to each college and hall of the convocation, and the cause of convoking it.

k See lord Bacon's proposals and offer of a digest.

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the law. A raw and unexperienced youth, 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 will 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; or else by an assiduous attendance on the courts to pick up theory and practice together, sufficient to qualify him for the ordinary run of business. How little therefore is it to be wondered at, that we hear of so frequent miscarriages; that so many gentlemen of bright imaginations grow weary of so unpromising a search[1], and addict themselves wholly to amusements, or other less innocent pursuits; 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.

The evident want of some assistance in the rudiments of legal knowledge has given birth to a practice, which, if ever it had grown to be general, must have proved of extremely perni-
32 cious consequence. I mean the custom by some so very warmly recommended, of dropping all liberal education, as of no use to students in the law: and placing them, in it's stead, at the desk of some skilful attorney; in order to initiate them early in all the depths of practice, and render them more dexterous in the mechanical part of business. A few instances of particular persons, (men of excellent learning, and unblemished integrity,) who, in spite of this method of education, have shone in the foremost ranks of the bar, have afforded some kind of sanction to this illiberal path to the profession, and biassed many parents, of short-sighted judgment, in it's favour: not consider-

1 Sir Henry Spelman, in the preface to his glossary, has given us a very lively picture of his own distress upon this occasion. "*Emisit me mater Lon-*
"*dinum, juris nostri capessendi gratia; cujus cum vestibulum salutassem, reperis-*
"*semque linguam peregrinam, dialectum barbaram, methodum inconcinnam, mo-*
"*lem non ingentem solum sed perpetuis humeris sustinendam, excidit mihi fateor)*
"*animus, &c.*"

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ing, that there are some geniuses, formed to overcome all disadvantages, and that from such particular instances no general rules can be formed; nor observing, that those very persons have frequently recommended by the most forcible of all examples, the disposal of their own offspring, a very different foundation of legal studies, a regular academical education. Perhaps too, in return, I could now direct their eyes to our principal seats of justice, and suggest a few hints in favour of university learning[m]:....but in these all who hear me, I know, have already prevented me.

Making therefore due allowance for one or two shining exceptions, experience may teach us to foretell that a lawyer thus educated to the bar, in subservience to attorneys and solicitors[n], will find he has begun at the wrong end. If practice be the whole he is taught, practice must also be the whole he will ever know: if he be uninstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him: *ita lex scripta est*[o] is the utmost his knowledge will arrive at; he must never aspire to form, and seldom expect to comprehend, any arguments drawn *a priori*, from the spirit of the laws and the natural foundations of justice.

Nor is this all; for (as few persons of birth, or fortune, or 33
even of scholastic education, will submit to the drudgery of servitude and the manual labour of copying the trash of an office) should this infatuation prevail to any considerable degree, we must rarely expect to see a gentleman of distinction or learning at the bar. And what the consequence may be, to have their interpretation and enforcement of the laws (which include the entire disposal of our properties, liberties, and lives) fall wholly into the hands of obscure or illiterate men, is matter of very public concern.

m The four highest judicial offices were at that time filled by gentlemen, two of whom had been fellows of All Souls college; another, student of Christ church; and the fourth a fellow of Trinity college, Cambridge.

n See Kennet's Life of Somner, p. 67.

o *Ff.* 40. 9. 12.

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The inconveniences here pointed out can never be effectually prevented, but by making academical education a previous step to the profession of the common law, and at the same time making the rudiments of the law a part of academical education. For sciences are of a sociable disposition, and flourish best in the neighbourhood of each other: nor is there any branch of learning, but may be helped and improved by assistances drawn from other arts. If therefore the student in our laws hath formed both his sentiments and style, by perusal and imitation of the purest classical writers, among whom the historians and orators will best deserve his regard; if he can reason with precision, and separate argument from fallacy, by the clear simple rules of pure unsophisticated logic; if he can fix his attention, and steadily pursue truth through any the most intricate deduction, by the use of mathematical demonstrations; if he has enlarged his conceptions of nature and art, by a view of the several branches of genuine, experimental philosophy; if he has impressed on his mind the sound maxims of the law of nature, the best and most authentic foundation of human laws; if, lastly he has contemplated those maxims reduced to a practical system in the laws of imperial Rome; if he has done this or any part of it, (though all may be easily done under as able instructors as ever graced any seats of learning) a student thus qualified may enter upon the study of the law with incredible advantage and reputation. And if, at the conclusion, or during
34 the acquisition of these accomplishments, he will afford himself here a year or two's farther leisure, to lay the foundation of his future labours in a solid scientifical method, without thirsting too early to attend that pratice which it is impossible he should rightly comprehend, he will afterwards proceed with the greatest ease, and will unfold the most intricate points with an intuitive rapidity and clearness.

I shall not insist upon such motives as might be drawn from principles of œconomy, and are applicable to particulars only: I reason upon more general topics. And therefore to the qualities of the head, which I have just enumerated, I cannot but add those of the heart; affectionate loyalty to the king, a zeal for liberty and the constitution, a sense of real honour, and well-

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grounded principles of religion; as necessary to form a truly valuable English lawyer, a Hyde, a Hale, or a Talbot. And, whatever the ignorance of some, unkindness of others, may have heretofore untruly suggested, experience will warrant us to affirm, that these endowments of loyalty and public spirit, of honour and religion, are no where to be found in more high perfection than in the two universities of this kingdom.

Before I conclude, it may perhaps be expected, that I lay before you a short and general account of the method I propose to follow, in endeavouring to execute the trust you have been pleased to repose in my hands. And in these solemn lectures, which are ordained to be read at the entrance of every term, (more perhaps to do public honour to this laudable institution, than for the private instruction of individuals[p]) I presume it will best answer the intent of our benefactor and the expectation of this learned body, if I attempt to illustrate at times such detached titles of the law, as are the most easy to be understood, and most capable of historical or critical ornament. But in reading the complete course, which is annually consigned to my care, a more regular method will be necessary; and, till a better is proposed, I shall take the liberty to follow the same that I have already submitted to the public[q]. To fill up and finish that outline with propriety and correctness, and to render the whole intelligible to the uninformed minds of beginners, (whom we are too apt to suppose acquainted with terms and ideas, which they never had opportunity to learn,) this must be my ardent endeavour, though by no means my promise, to accomplish. You will permit me however very briefly to describe, rather what I conceive an academical expounder of the laws should do, than what I have ever known to be done. 35

He should consider his course as a general map of the law, marking out the shape of the country, it's connexions and boun-

p See Lowth's *Oratio Crewiana*, p. 365.

q The analysis of the laws of England, first published, *A. D.* 1759, and exhibiting the order and principal division of the ensuing COMMENTARIES; which were originally submitted to the university in a private course of lectures, *A. D.* 1753.

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daries, it's greater divisions and principal cities: it is not his business to describe minutely the subordinate limits, or to fix the longitude and latitude of every inconsiderable hamlet. His attention should be engaged, like that of the readers in Fortescue's inns of chancery, "in tracing out the originals, and as it "were the elements of the law." For if, as Justinian[r] has observed, the tender understanding of the student be loaded at the first with a multitude and variety of matter, it will either occasion him to desert his studies, or will carry him heavily through them, with much labour, delay, and despondence. These originals should be traced to their fountains, as well as our distance will permit; to the customs of the Britons and Germans, as recorded by Cæsar and Tacitus; to the codes of the northern nations on the continent, and more especially to those of our own Saxon princes; to the rules of the Roman law either left here in the days of Papinian, or imported by Vacarius and
36 his followers; but, above all, to that inexhaustible reservoir of legal antiquities and learning, the feodal law, or, as Spelman[s] has entitled it, the law of nations in our western orb. These primary rules and fundamental principles should be weighed and compared with the precepts of the law of nature, and the practice of other countries; should be explained by reasons, illustrated by examples, and confirmed by undoubted authorities; their history should be deduced, their changes and revolutions observed, and it should be shewn how far they are connected with, or have at any time been affected by, the civil transactions of the kingdom.

A plan of this nature, if executed with care and ability, cannot fail of administering a most useful and rational entertainment to students of all ranks and professions; and yet it must be con-

r *Incipientibus nobis exponere jura populi Romani, ita videntur tradi posse commodissime, si primo levi ac simplici via cingula tradantur: alioqui, si statim ab initio rudem adhuc et infirmum animum studiosi multitudine ac varietate rerum oneravimus, duorum alterum, aut desertorem studiorum efficiemus, aut cum magno labore, saepe etiam cum diffidentia (quae plerumque juvenes avertit) serius ad id perducemus, ad quod, leviore via ductus, sine magno labore, et sine ulla diffidentia maturius perduci potuisset.* *Inst.* l. 1. 2.

s Of parliaments. 57.

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fessed that the study of the laws is not merely a matter of amusement; for, as a very judicious writer[t] has observed upon a similar occasion, the learner "will be considerbly disappointed if he looks for entertainment without the expence of attention." An attention, however, not greater than is usually bestowed in mastering the rudiments of other sciences, or sometimes in pursuing a favourite recreation or exercise. And this attention not equally necessary to be exerted by every student upon every occasion. Some branches of the law, as the formal process of civil suits, and the subtile distinctions incident to landed property, which are the most difficult to be thoroughly understood, are the least worth the pains of understanding, except to such gentlemen as intend to pursue the profession. To others I may venture to apply, with a slight alteration, the words of sir John Fortescue[u], when first his royal pupil determines to engage in this study. "It will not be necessary for a gentleman, as such, "to examine with a close application the critical niceties of the "law. It will fully be sufficient, and he may well enough be "denominated a lawyer, if under the instruction of a master he 37
"traces up the principles and grounds of the law, even to their "original elements. Therefore in a very short period, and "with very little labour, he may be sufficiently informed in the "laws of his country, if he will but apply his mind in good ear- "nest to receive and apprehend them. For, though such know- "ledge as is necessary for a judge is hardly to be acquired by "the lucubrations of twenty years, yet, with a genius of toler- "able perspicacity, that knowledge which is fit for a person of "birth or condition may be learned in a single year, without ne- "glecting his other improvements."

To the few therefore (the very few I am persuaded) that entertain such unworthy notions of an university, as to suppose it intended for mere dissipation of thought; to such as mean only to while away the aukward interval from childhood to twenty-one, between the restraints of the school and the licentiousness of politer life, in a calm middle state of mental and of moral inactivity; to these Mr. Viner gives no invitation to an enter-

t Dr. Taylors pref. to Elem. of civil law.
u *De laud. Leg.* c. 8.

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tainment which they never can relish. But to the long and illustrious train of noble and ingenuous youth, who are not more distinguished among us by their birth and possessions, than by the regularity of their conduct and their thirst after useful knowledge, to these our benefactor has consecrated the fruits of a long and laborious life, worn out in the duties of his calling; and will joyfully reflect (if such reflexions can be now the employment of his thoughts) that he could not more effectually have benefited posterity, or contributed to the service of the public, than by founding an institution which may instruct the rising generation in the wisdom of our civil polity, and inspire them with a desire to be still better acquainted with the laws and constitution of their country.

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SECTION THE SECOND.

OF THE NATURE OF LAWS IN GENERAL.

LAW, in it's most general and comprehensive sense, signifies a rule of action; and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nations. And it is that rule of action, which is prescribed by some superior, and which the inferior is bound to obey.

Thus when the supreme being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be. When he put that matter into motion, he established certain laws of motion, to which all moveable bodies must conform. And, to descend from the greatest operations to the smallest, when a workman forms a clock, or other piece of mechanism, he establishes at his own pleasure certain arbitrary laws for it's direction; as that the hand shall describe a given space in a given time; to which law as long as the work conforms, so long it continues in perfection, and answers the end of it's formation.

If we farther advance, from mere inactive matter to vegetable and animal life, we shall find them still governed by laws; more numerous indeed, but equally fixed and invariable. The whole progress of plants, from the seed to the root, and from thence to the seed again;....the method of animal nutrition, digestion, secretion, and all other branches of vital economy;.... are not left to chance, or the will of the creature itself, but are performed in a wondrous involuntary manner, and guided by unerring rules laid down by the great creator.

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This then is the general signification of law, a rule of action dictated by some superior being: and, in those creatures that have neither the power to think, nor to will, such laws must be invariably obeyed, so long as the creature itself subsists, for it's existence depends on that obedience. But laws, in their more confined sense, and in which it is our present business to consider them, denote the rules, not of action in general, but of *human* action or conduct: that is, the precepts by which man, the noblest of all sublunary beings, a creature endowed with both reason and freewill, is commanded to make use of those faculties in the general regulation of his behaviour.

Man, considered as a creature, must necessarily be subject to the laws of his creator, for he is entirely a dependent being. A being, independent of any other, has no rule to pursue, but such as he prescribes to himself; but a state of dependence will inevitably oblige the inferior to take the will of him, on whom he depends, as the rule of his conduct: not indeed in every particular, but in all those points wherein his dependence consists. This principle therefore has more or less extent and effect, in proportion as the superiority of the one and the dependence of the other is greater or less, absolute or limited. And consequently, as man depends absolutely upon his maker for every thing, it is necessary that he should in all points conform to his maker's will.

This will of his maker is called the law of nature. For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man, and endued him with freewill to conduct himself in all parts of life, he laid down cer-
40 tain immutable laws of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.

Considering the creator only as a being of infinite *power*, he was able unquestionably to have prescribed whatever laws he pleased to his creature, man, however unjust or severe. But as he is also a being of infinite *wisdom*, he has laid down only

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such laws as were founded in those relations of justice, that existed in the nature of things antecedent to any positive precept. These are the eternal, immutable laws of good and evil, to which the creator himself in all his dispensations conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions. Such among others are these principles: that we should live honestly, should hurt nobody, and should render to every one his due; to which three general precepts Justinian[a] has reduced the whole doctrine of law.

But if the discovery of these first principles of the law of nature depended only upon the due exertion of right reason, and could not otherwise be obtained than by a chain of metaphysical disquisitions, mankind would have wanted some inducement to have quickened their inquiries, and the greater part of the world would have rested content in mental indolence, and ignorance it's inseparable companion. As therefore the creator is a being, not only of infinite *power*, and *wisdom*, but also of infinite *goodness*, he has been pleased so to contrive the constitution and frame of humanity, that we should want no other prompter to inquire after and pursue the rule of right, but only our own self-love, that universal principle of action. For he has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former; and, if the former be punctually obeyed, it cannnot but induce the latter. In consequence of which mutual connection of justice and human felicity, he has not perplexed the law of nature with a multitude of 41
abstracted rules and precepts, referring merely to the fitness or unfitness of things, as some have vainly surmised; but has graciously reduced the rule of obedience to this one paternal precept, "that man should pursue his own true and substantial "happiness." This is the foundation of what we call ethics, or natural law. For the several articles into which it is branched in our systems, amount to no more than demonstrating, that

[a] *Juris praecepta sunt haec, honeste vivere, alterum non laedere, suum cuique tribuere. Inst.* 1. 1. 3.

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this or that action tends to man's real happiness, and therefore very justly concluding that the performance of it is a part of the law of nature; or, on the other hand, that this or that action is destructive of man's real happiness, and therefore that the law of nature forbids it.

This law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times; no human laws are of any validity, if contrary to this: and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.

But in order to apply this to the particular exigencies of each individual, it is still necessary to have recourse to reason; whose office it is to discover, as was before observed, what the law of nature directs in every circumstance of life: by considering, what method will tend the most effectually to our own substantial happiness. And if our reason were always, as in our first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, the task would be pleasant and easy; we should need no other guide but this. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error.

This has given manifold occasion for the benign interposition of divine providence; which, in compassion to the frailty,
42 the imperfection, and the blindness of human reason, hath been pleased, at sundry times and in divers manners, to discover and enforce it's laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature, as they tend in all their consequences to man's felicity. But we are not from thence to conclude that the knowledge of these truths was attainable by reason, in it's present corrupted state; since we find that, until they were revealed, they were hid from the wisdom of ages. As then the

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moral precepts of this law are indeed of the same original with those of the law of nature, so their intrinsic obligation is of equal strength and perpetuity. Yet undoubtedly the revealed law is of infinitely more authenticity than that moral system, which is framed by ethical writers, and denominated the natural law. Because one is the law of nature, expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we imagine to be that law. If we could be as certain of the latter as we are of the former, both would have an equal authority; but, till then, they can never be put in any competition together.

Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these. There are, it is true a great number of indifferent points, in which both the divine law and the natural leave a man at his own liberty; but which are found necessary for the benefit of society to be restrained within certain limits. And herein it is that human laws have their greatest force and efficacy; for, with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to, the former. To instance in the case of murder; this is expressly forbidden by the divine, and demonstrably by the natural law; and from these prohibitions arises the true unlawfulness of this crime. Those human laws that annex a punishment to it, do not at all increase its moral guilt, or superadd any 43
fresh obligation *in foro conscientiae* to abstain from it's perpetration. Nay, if any human law should allow or enjoin us to commit it, we are bound to transgress that human law, or else we must offend both the natural and the divine. But with regard to matters that are in themselves indifferent, and are not commanded or forbidden by those superior laws; such, for instance, as exporting of wool into foreign countries; here the inferior legislature has scope and opportunity to interpose, and to make that action unlawful which before was not so.

If man were to live in a state of nature, unconnected with other individuals, there would be no occasion for any other laws, than the law of nature, and the law of God. Neither could any

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other law possibly exist; for a law always supposes some superior who is to make it; and in a state of nature we are all equal, without any other superior but him who is the author of our being. But man was formed for society; and, as is demonstrated by the writers on this subject[b], is neither capable of living alone, nor indeed has the courage to do it. However, as it is impossible for the whole race of mankind to be united in one great society, they must necessarily divide into many; and form separate states, commonwealths and nations, entirely independent of each other, and yet liable to a mutual intercourse. Hence arises a third kind of law, to regulate this mutual intercourse, called "the law of nations:" which, as none of these states will acknowledge a superiority in the other, cannot be dictated by any; but depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between these several communities: in the construction also of which compacts we have no other rule to resort to, but the law of nature; being the only one to which all the communities are equally subject: and therefore the civil law[c] very justly observes, that *quod naturalis ratio inter omnes homines constituit, vocatur jus gentium.*

44 Thus much I thought it necessary to premise concerning the law of nature, the revealed law, and the law of nations, before I proceeded to treat more fully of the principal subject of this section, municipal or civil law; that is, the rule by which particular districts, communities, or nations are governed; being thus defined by Justinian[d], "*jus civile est quod quisque sibi populus constituit.*" I call it *municipal law*, in compliance with common speech for, though strictly that expression denotes the particular customs of one single *municipium* or free town, yet it may with sufficient propriety be applied to any one state or nation, which is governed by the same laws and customs.

Municipal law, thus understood, is properly defined to be "a rule of civil conduct prescribed by the supreme power in a

b Puffendorf, *l.* 7. c. 1. compared with Barbeyrac's Commentary.
c *Ff.* 1. 1 9.
d Inst. 1. 2. 1.

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"state commanding what is right, and prohibiting what is wrong." Let us endeavour to explain it's several properties, as they arise out of this definition.

And, first, it is a *rule;* not a transient sudden order from a superior, to or concerning a particular person; but something permanent, uniform and universal. Therefore a particular act of the legislature to confiscate the goods of Titius, or to attaint him of high treason, does not enter into the idea of a municipal law; for the operation of this act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence than a law. But an act to declare that the crime of which Titius is accused shall be deemed high treason; this has permanency, uniformity, and universality, and therefore is properly a *rule.* It is also called a *rule,* to distinguish it from *advice* or *counsel,* which we are at liberty to follow or not, as we see proper, and to judge upon the reasonableness or unreasonableness of the thing advised; whereas our obedience to the law depends not upon *our approbation,* but upon the *maker's will.* Counsel is only matter of persuasion, law is matter of injunction: counsel acts only upon the willing, law upon the unwilling also.

It is also called a rule, to distinguish it from a compact or 45
agreement; for a compact is a promise proceeding *from* us, law is a command directed *to* us. The language of a compact is, "I will, or will not, do this;" that of a law is, "thou shalt, or "shalt not, do it." It is true there is an obligation which a compact carries with it; equal in point of conscience to that of a law; but then the original of the obligation is different. In compacts, we ourselves determine and promise what shall be done, before we are obliged to do it; in laws, we are obliged to act without ourselves determining or promising any thing at all. Upon these accounts law is defined to be "*a rule.*"

Municipal law is also "a rule of *civil conduct.*" This distinguishes municipal law from the natural, or revealed; the former of which is the rule of *moral* conduct, and the latter not only the rule of moral conduct, but also the rule of faith. These regard man as a creature, and point out his duty to God, to

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himself, and to his neighbour, considered in the light of an individual. But municipal or civil law regards him also as a citizen, and bound to other duties towards his neighbour, than those of mere nature and religion: duties, which he has engaged in by enjoying the benefits of the common union: and which amount to no more, than that he do contribute, on his part, to the subsistence and peace of the society.

It is likewise "a rule *prescribed*." Because a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it. But the manner in which this notification is to be made, is matter of very great indifference. It may be notified by universal tradition and long practice, which supposes a previous publication, and is the case of the common law of England. It may be notified, *viva voce*, by officers appointed for that purpose, as is done with regard to proclamations, and such acts of parliament
46 as are appointed to be publicly read in churches and other assemblies. It may lastly be notified by writing, printing, or the like; which is the general course taken with all our acts of parliament[1]. Yet, whatever way is made use of, it is incumbent

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1 The laws of Virginia are promulgated by printing; copies of them are sent to the clerks of the county courts for the use of each magistrate, clerk, state's attorney, and sheriff in the County, or Corporation. Copies are likewise furnished the Judges of the Superior Courts. The Laws of the United States have been usually reprinted by the Printer to the Commonwealth, at the public expence, and distributed in the same manner. See V. L. 1794. c. 62. 3. 8. Certain laws are likewise directed to be translated and printed in the German language. Resolution of both Houses, December 23, 1794. Sessions Acts.

By the Act of 3. Cong. c. 115. the Secretary of State is required to furnish the Executives of the several States, and of the Territories Northwest, and South of the River Ohio, with four thousand five hundred copies of the Edition of the Laws of the United States, by that Act directed to be printed, and the like number of the Acts passed at each succeeding Session, to be divided among them according to the rule for apportioning Representatives, and distributed as the Executive or Legislature of the States shall deem most conducive

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on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare the people. There is still a more unreasonable method than this, which is called making of laws *ex post facto*[2]; when after an action (indifferent in itself) is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law: he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust[e]. All laws should be therefore made to commence *in futuro*, and be notified before their commencement; which is implied in the term "*prescribed.*" But when this rule is in the usual manner notified, or prescribed, it is then the subject's business to be thoroughly acquainted therewith; for if ignorance, of what he might know, were admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity.

But farther: municipal law is "a rule of civil conduct prescribed *by the supreme power in a state.*" For legislature, as was before observed, is the greatest act of superiority that can be exercised by one being over another. Wherefore it is requisite

e Such laws among the Romans were denominated *privilegia*, or private laws of which Cicero (*de leg.* 3. 19. and in his oration *pro domo*, 17.) thus speaks: "*Vetant* "*leges sacratae, vetant duodecim tabulae, leges privatis hominibus irrogari; id enim* "*est priviligium. Nemo unquam tulit, nihil est crudelius, nihil perniciosus, nihil quod* "*minus haec civitas ferre possit.*"

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to the general information of the people. And by the act of 5. Cong. c. 136. five thousand copies are directed to be printed and distributed in like manner. The act further directs that every order, resolution, or law passed by Congress, shall be published by the Secretary of State in at least one, and not more than three, of the Newspapers in each State.

2. No *ex post facto* law shall be passed by Congress; or by any of the United States. C. U. S. Art. 1. 9. §. 10.

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to the very essence of a law, that it be made by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other[3].

47 This will naturally lead us into a short inquiry concerning the nature of society and civil government; and the natural, inherent right that belongs to the sovereignty of a state, wherever that sovereignty be lodged, of making and enforcing laws.

The only true and natural foundations of society are the wants and the fears of individuals. Not that we can believe, with some theoretical writers, that there ever was a time when there was no such thing as society, either natural or civil; and that, from the impulse of reason, and through a sense of their wants and weaknesses, individuals met together in a large plain, entered into an original contract, and chose the tallest man present to be their governor. This notion, of an actually existing unconnected state of nature, is too wild to be seriously admitted: and besides it is plainly contradictory to the revealed accounts of the primitive origin of mankind, and their preservation two thousand years afterwards; both which were effected by the means of single families. These formed the first natural society, among themselves; which, every day extending it's limits, laid the first though imperfect rudiments of civil or political society: and when it grew too large to subsist with convenience in that pastoral state wherein the patriarchs appear to have lived, it necessarily subdivided itself by various migrations into more. Afterwards, as agriculture increased, which employs and can maintain a much greater number of hands, migrations became less frequent; and various tribes, which had formerly separated, reunited again; sometimes by compulsion and conquest, sometimes by accident, and sometimes perhaps by compact. But, though society had not it's formal beginning from any convention of individuals, actuated by their wants and their fears; yet it is the *sense* of their weakness and imperfection that *keeps* mankind together, that demonstrates the necessity of this union, and that therefore is the solid and natural

3. See Appendix to this Volume, Note A.

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foundation, as well as the cement, of civil society. And this is what we mean by the original contract of society; which, though perhaps in no instance it has ever been formally expressed at the first institution of a state, yet in nature and reason must always be understood and implied, in the very act of associating 48
together: namely, that the whole should protect all its parts, and that every part should pay obedience to the will of the whole; or, in other words, that the community should guard the rights of each individual member, and that (in return for this protection) each individual should submit to the laws of the community; without which submission of all it was impossible that protection could be certainly extended to any.

For when civil society is once formed, government at the same time results of course, as necessary to preserve and to keep that society in order. Unless some superior be constituted, whose commands and decisions all the members are bound to obey, they would still remain as in a state of nature, without any judge upon earth to define their several rights, and redress their several wrongs. But, as all the members which compose this society were naturally equal, it may be asked, in whose hands are the reins of government to be entrusted? To this the general answer is easy; but the application of it to particular cases has occasioned one half of those mischiefs, which are apt to proceed from misguided political zeal. In general, all mankind will agree that government should be reposed in such persons, in whom those qualities are most likely to be found, the perfection of which is among the attributes of him who is emphatically stiled the supreme being; the three grand requistes, I mean, of wisdom, of goodness, and of power: wisdom, to discern the real interest of the community: goodness, to endeavour always to pursue that real interest; and strength, or power, to carry this knowledge and intention into action. These are the natural foundations of sovereignty, and these are the requisites that ought to be found in every well-constituted frame of government.

How the several forms of government we now see in the world at first actually began, is matter of great uncertainty, and

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has occasioned infinite disputes.[4] It is not my business or intention to enter into any of them. However they began, or by
49 what right soever they subsist, there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside. And this authority is placed in those hands, wherein (according to the opinion of the founders of such respective states, either expressly given, or collected from their tacit approbation) the qualities requisite for supremacy, wisdom, goodness, and power, are the most likely to be found.

The political writers of antiquity will not allow more than three regular forms of government; the first, when the sovereign power is lodged in an aggregate assembly consisting of all the free members of a community, which is called a democracy; the second, when it is lodged in a council, composed of select members, and then it is stiled an aristocracy; the last, when it is entrusted in the hands of a single person, and then it takes the name of a monarchy. All other species of government, they say, are either corruptions of, or reducible to, these three.

By the sovereign power, as was before observed, is meant the making of laws; for wherever that power resides, all others must conform to, and be directed by it, whatever appearance the outward form and administration of the government may put on. For it is 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; by constituting one, or a few, or many executive magistrates: and all the other powers of the state must obey the legislative power in the discharge of their several functions, or else the constitution is at an end.[5]

4. Whatever difficulty or uncertainty there may be in tracing the origin of the several forms of government in the Old World, it is the distinguished happiness of America that no such difficulty or uncertainty can here prevail as will be shewn hereafter.

5. In a former note, (Appendix, note A,) we endeavoured to shew that this maxim does not apply to the governments of the American States; by whose respective Constitutions, as also by the Constitution

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In a democracy, where the right of making laws resides in the people at large, public virtue, or goodness of intention, is more likely to be found, than either of the other qualities of government. Popular assemblies are frequently foolish in their contrivance, and weak in their execution; but generally mean to do the thing that is right and just, and have always a degree of patriotism or public spirit. In aristocracies there is more 50
wisdom to be found, than in the other frames of goverment;

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of the Federal Government, the legislative power is restrained within certain limits, both in the Federal and State Governments, which neither the Congress, nor the State Legislatures can transgress, without an absolute breach of the Constitutions from whence the Legislative Authority is derived. For, both the Federal, and State Constitutions derive their authority and existence from the immediate act, and consent of the people, "in whom" as our bill of rights expresses it, "all power is vested, and consequently, "is derived from them." These acts of the people having, then, the stamp of primitive authority, must be paramount to the act of the Legislative body, which derives its authority, and even its existence from that origin.* And since the powers of the Legislature are thus limited, it follows that the *Jura summi imperii*, or that supreme, irresistible, absolute, uncontrolled authority, of which the commentator makes mention in a preceding paragraph, doth not reside in the legislature, nor in any other of the branches of the Government, nor in the whole of them united. For if it did reside in them, or either of them, then would there be no limits, such as may be found in all the American Constitutions, to the powers of Government. The existence of such limits proves the existence of an higher power elsewhere; that is, in the PEOPLE; in whom, and in whom, only, the rights of sovereignty remain: the people, therefore, only, and not the Legislature, have it at any time in their option to alter the form and administration of Government, by a new edict or rule, and to put the execution of their authority into whatever hands they please: and all the powers of the State, the Legislature as well as the rest, must obey them in the execution of their several functions, or the Constitution will, indeed, be at an end. For the Constitution is a law to the Government, "which derives its just powers there-"from, as from the consent of the governed, for whose benefit that "power is entrusted, and by whom, whenever it is abused, or ex-"ceeded, it may be revoked, and a new government instituted." See the American Declaration of Independence, July 1776.

* And herewith Vattel, B. 1. c. 3. §. 34. agrees.

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being composed, or intended to be composed, of the most experienced citizens: but there is less honesty than in a republic, and less strength than in a monarchy. A monarchy is indeed the most powerful of any; for by the entire conjunction of the legislative and executive powers all the sinews of government are knit together, and united in the hand of the prince: but then there is eminent danger of his employing that strength to improvident or oppressive purposes.

Thus these three species of government have, all of them, their several perfections and imperfections. Democracies are usually the best calculated to direct the end of a law; aristocracies to invent the means by which that end shall be obtained; and monarchies to carry those means into execution. And the antients, as was observed, had in general no idea of any other permanent form of government but these three: for though Cicero[f] declares himself of opinion, "*esse optime constitutam rem-*" *publicam, quae ex tribus generibus illis, regali, optimo, et popu-*" *lari, sit modice confusa;*" yet Tacitus treats this notion of a mixed government, formed out of them all, and partaking of the advantages of each, as a visionary whim, and one that, if effected, could never be lasting or secure[g][6].

But, happily for us of this island, the British constitution has long remained, and I trust will long continue, a standing exception to the truth of this observation. For, as with us, the executive power of the laws is lodged in a single person, they have all the advantages of strength and dispatch, that are to be found in the most absolute monarchy: and as the legislature of the kingdom is entrusted to three distinct powers, entirely independent of each other; first, the king; secondly, the lords spiritual and temporal, which is an aristocratical assembly of per-
51 sons selected for their piety, their birth, their wisdom, their va-

f In his fragments *de rep. l.* 2.

g "*Cunctas nationes et urbes populus aut primores, aut singuli regunt: delecta ex* " *bis et constituta reipublicae forma laudari facilius quam evenire, vel, si evenit,* " *haud diuturna esse potest. Ann l.* 4."

6. See Appendix. Note B.

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lour, or their property[7]; and thirdly, the house of commons, freely chosen by the people from 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 parliment, and has the supreme disposal of every thing; there can no inconvenience be attempted by either of the three branches, 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 or dangerous.

Here then is lodged the sovereignty of the British constitution; and lodged as beneficially as is possible for society. For in no other shape could we be so certain of finding the three great qualities of government so well and so happily united. If the supreme power were lodged in any one of the three branches separately, we must be exposed to the inconveniences of either absolute monarchy, aristrocacy, or democracy; and so want two of the three principal ingredients of good polity, either virtue, wisdom, or power. If it were lodged in any two of the branches for instance, in the king and house of lords, our laws might be providently made, and well executed, but they might not have always the good of the people in view: if lodged in the king and commons, we should want that circumspection and mediatory caution, which the wisdom of the peers is to afford: if the supreme rights of legislature were lodged in the two houses only

7. This is an imposing picture: but let us see how this assembly is described, by an Ethical writer of the same country, and age. "Officers of the army and Navy, courtiers, ecclesiastics, young "men who have just attained the age of twenty one, and who have "passed their youth in the dissipation and pursuits which commonly "accompany the possession, or inheritance of great fortunes; coun- "try gentlemen occupied in the management of their estates, or in "the care of their domestic concerns, and family interests; the "greater part of the Assembly born to their station, that is, placed "in it by chance; most of the rest advanced to the peerage, for "services," &c. Paley's Philosophy B. 6. c. 8. May we not conclude with him. That there appears to be nothing in the education, habits, character, or professions of the members who compose that Assembly; in the mode of their appointment, or in the right by which they succeed to their places in it, to qualify them for their station?

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and the king had no negative upon their proceedings, they might be tempted to encroach upon the royal prerogative, or perhaps to abolish the kingly office, and thereby weaken (if not totally destroy) the strength of the executive power. But the constitutional government of this island is so admirably tempered and compounded, that nothing can endanger or hurt it, but destroying the equilibrium of power between one branch of the legislature and the rest. For if ever it should happen that the independence of any one of the three should be lost, or that it should become subservient to the views of either of the other two, there
52 would soon be an end of our constitution[8]. The legislature

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8. How then must it be if the two most numerous branches should become subservient to the views of the third. See Mackintosh's Defence of the French Revolution, 3d. London Edition....pa. 264, 265, and pa. 337, to 341, cited in Appendix to this Volume. Note B.

"The Constitution of Great Britain, says an American writer, "is established only on precedents, or compulsory concessions, be- "tween parties at variance. These can be no longer binding than "whilst the parties respectively possess the means of enforcing "their observance. Of course it is, and always has been a govern- "ment of contention, in which the opposite parties have been for a "length of time by chance so nearly balanced, as not to have de- "stroyed each other. How long this will last it is difficult to say; "but it may be affirmed that there is nothing of stability in their "Constitution, and that almost every new case of importance in- "troduces some new innovation in it. This is evident from their "history and will appear particularly so from a perusal of Judge "Blackstone's ingenious explanation of the right of succession to "the crown; where it may be seen how every fresh incident has "given occasion to a different modification of this right. The "several powers of government are limited, though in an uncer- "tain way, with respect to each other; but the three together are "without any check in the Constitution, although neither can be "properly called the Representatives of the people. It is for this "reason that this transcendant power, or omnipotence is ascribed "to their parliaments....What stretch of authority they have usurp- "ed and exercised with impunity, is considered as their established "privilege; for they hold it as a maxim, that whatever they have "once done, however improperly, they have a right to do again. "What farther powers they may safely assume experiment only "can teach." Conciliatory Hints to the Citizens of South Carolina: by Philodemus....1784.

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would be changed from that, which (upon the supposition of an original contract, either actual or implied) is presumed to have been originally set up by the general consent and fundamental act of the society: and such a change, however effected is according to Mr. Locke[h] (who perhaps carries his theory too far) at once an entire dissolution of the bands of government; and the people are thereby reduced to a state of anarchy, with liberty to constitute to themselves a new legislative power.

Having thus cursorily considered the three usual species of government, and our own singular constitution, selected and compounded from them all, I proceed to observe, that as the power of making laws constitutes the supreme authority, so wherever the supreme authority in any state resides, it is the right of that authority to make laws[9]; that is, in the words of our definition, *to prescribe the rule of civil action.* And this may be discovered from the very end and institution of civil states.

h On government, part ii. §. 212.

9. Since, according to the fundamental principles of both the Federal and State Constitution, and Government, the supreme power (or *Jura summi imperii*) resides in the people, it follows that it is the right of the people to make laws. But as the exercise of that Right by the people at large would be equally inconvenient and impracticable, the constitution of the State has vested that power in the General Assembly of the Commonwealth; and the Constitution of the United States has reposed the exercise of the same power as it relates to the Federal Government, in the Congress of the United States; a body composed either immediately, or mediately, of Representatives of the People; the House of Representatives being the immediate delegates of the people in their individual capacity; the Senate representing them in their politic capacity, as forming different States; the latter although not chosen by the people, themselves, yet being chosen by the State-Legislatures, which have no rights, nor authority, nor even an existence, but from the People, must be considered in the same light as the Representatives who are immediately chosen by them. It is from these express provisions both in the State, and Federal Constitutions, and not from metaphysical deduction, that the State, and Federal Legislatures derive the power of making Laws. See Constitution of Virginia, Art. 8. C. U. S. Art. 1.

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For a state is a collective body, composed of a multitude of individuals, united for their safety and convenience, and intending to act together as one man. If it therefore is to act as one man, it ought to act by one uniform will. But, inasmuch as political communities are made up of many natural persons, each of whom has his particular will and inclination, these several wills cannot by any natural union be joined together, or tempered and disposed into a lasting harmony, so as to constitute and produce that one uniform will of the whole. It can therefore be no otherwise produced than by a *political* union; by the consent of all persons to submit their own private wills to the will of one man, or of one or more assemblies of men, to whom the supreme authority is entrusted; and this will of that one man, or assemblage of men, is in different states, according to their different constitutions, understood to be *law*.

Thus far as to the right of the supreme power to make laws;
53 but farther, it is it's duty likewise. For since the respective members are bound to conform themselves to the will of the state, it is expedient that they receive directions from the state declaratory of that it's will. But, as it is impossible, in so great a multitude, to give injunctions to every particular man, relative to each particular action, it is therefore incumbent on the state to establish general rules, for the perpetual information and direction of all persons in all points, whether of positive or negative duty. And this, in order that every man may know what to look upon as his own, what as another's; what absolute and what relative duties are required at his hands; what is to be esteemed honest, dishonest or indifferent; what degree every man retains of his natural liberty; what he has given up as the price of the benefits of society; and after what manner each person is to moderate the use and exercise of those rights which the state assigns him, in order to promote and secure the public tranquillity.

From what has been advanced, the truth of the former branch of our definition is (I trust) sufficiently evident; that "*municipal law is a rule of civil conduct prescribed by the supreme power in*

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"*a state*[10]." I proceed now to the latter branch of it; that it is a rule so prescribed, "*commanding what is right, and prohibiting what is wrong.*"

Now in order to do this completely, it is first of all necessary that the boundaries of right and wrong be established and ascertained by law. And when this is once done, it will follow of course

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10. After what has been said in two former notes, it may be expected that we should refuse our assent, in America, to the applicability of this part of the commentator's definition of municipal law to the nature of our own governments. I therefore incline to prefer the definition of Justinian; "*Just civile est quod quisque sibi populus constituit,*" to that of Mr. Blackstone, thus far. This I apprehend may be considered as comprehending the whole body of national institutions, from whatever source or authority derived; whether the immediate act of the people, or that of the ordinary legislature, or founded on long and immemorial usage; whereas Mr. Blackstone's definition presuposses an act of the legislature in every case whatsoever; otherwise according to his own principles, no rule of law can be said to be "prescribed by the supreme power in the state." And however ingenious, and specious the argument may appear, that all the unwritten rules of law are founded upon some positive Statute, the memory of which has been lost, I can not help suspecting that there is more of ingenuity than truth in the idea; for the remote vestiges of legislative authority in England are too faint at this day, for us to repose much confidence in such theoretical conjectures.

According to Cicero, every rule of law must have a just sanction for its support. This may be, either the immediate act of the people declaring and establishing the fundamental laws and constitution of the state; or the act of the ordinary legislature; or immemorial Custom, and Usage; or former precedents, founded upon the nature of the Government, and the application of its principles, and the maxims of sound reason, to each particular case; or lastly, the application of those maxims and principles, to any new case; where no former precedent, custom, usage or positive precept can be found: but in this application we must be careful not to introduce any new law, but, as far as possible to adapt the established rules of law to every such new case; and where that can not otherwise be done, we must adhere to the maxim, "*potior est conditio defendentis.*"

We shall now proceed with the Commentator to the remaining parts of his definition, in which we shall probably meet with no difficulty in subscribing to his opinion.

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that it is likewise the business of the law, considered as a rule of civil conduct, to enforce these rights and to restrain or redress these wrongs. It remains therefore only to consider in what manner the law is said to ascertain the boundaries of right and wrong; and the methods which it takes to command the one and prohibit the other.

For this purpose every law may be said to consist of several parts: one, *declaratory;* whereby the rights to be observed, and
54 the wrongs to be eschewed, are clearly defined and laid down: another, *directory:* whereby the subject is instructed and enjoined to observe those rights, and to abstain from the commission of those wrongs: a third, *remedial:* whereby a method is pointed out to recover a man's private rights, or redress his private wrongs: to which may be added a fourth, usually termed the *sanction*, or *vindicatory* branch of the law; whereby it is signified what evil or penalty shall be incurred by such as commit any public wrongs, and transgress or neglect their duty.

With regard to the first of these, the *declaratory* part of the municipal law, this depends not so much upon the law of revelation or of nature as upon the wisdom and will of the legislator. This doctrine, which before was slightly touched, deserves a more particular explication. Those rights then which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolable. On the contrary, no human legislature has power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture. Neither do divine or natural *duties* (such as, for instance, the worship of God, the maintenance of children, and the like) receive any stronger sanction from being also declared to be duties by the law of the land. The case is the same as to crimes and misdemesnors, that are forbidden by the superior laws, and therefore stiled *mala in se*, such as murder, theft, and perjury; which contract no additional turpitude from being declared unlawful by the inferior legislature. For that legislature in all these cases

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acts only, as was before observed, in subordination to the great lawgiver, transcribing and publishing his precepts. So that, upon the whole, the declaratory part of the municipal law has no force or operation at all, with regard to actions that are naturally and intrinsically right or wrong.

But with regard to things in themselves indifferent, the case 55
is entirely altered. These become either right or wrong, just or unjust, duties or misdemesnors, according as the municipal legislator sees proper, for promoting the welfare of the society, and more effectually carrying on the purposes of civil life. Thus our own common law has declared, that the goods of the wife do instantly upon marriage become the property and right of the husband; and our statute law has declared all monopolies a public offence: yet that right, and this offence, have no foundation in nature; but are merely created by the law, for the purposes of civil society. And sometimes, where the thing itself has it's rise from the law of nature, the particular circumstances and mode of doing it become right or wrong, as the laws of the land shall direct. Thus, for instance, in civil duties; obedience to superiors is the doctrine of revealed as well as natural religion: but who those superiors shall be, and in what circumstances or to what degrees they shall be obeyed, it is the province of human laws to determine. And so, as to injuries or crimes, it must be left to our own legislature to decide, in what cases the seising another's cattle shall amount to a trespass or a theft; and where it shall be a justifiable action, as when a landlord takes them by way of distress for rent.

Thus much for the *declaratory* part of the municipal law: and the *directory* stands much upon the same footing; for this virtually includes the former, the declaration being usually collected from the direction. The law that says, "thou shalt not "steal," implies a declaration that stealing is a crime. And we have seen[i] that, in things naturally indifferent, the very essence of right and wrong depends upon the direction of the laws to do or to omit them.

i See page 43.

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The *remedial* part of a law is so necessary a consequence of the former two, that laws must be very vague and imperfect
56 without it. For in vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights, when wrongly withheld or invaded. This is what we mean properly, when we speak of the protection of the law. When, for instance, the *declaratory* part of the law has said, "that the field or inheritance, which belonged to "Titius's father, is vested by his death in Titius;" and the *directory* part has "forbidden any one to enter on another's pro-"perty, without the leave of the owner:" if Gaius after this will presume to take possession of the land, the *remedial* part of the law will then interpose it's office; will make Gaius restore the possession to Titius, and also pay him damages for the invasion.

With regard to the *sanction* of laws, or the evil that may attend the breach of public duties; it is observed, that human legislators have for the most part chosen to make the sanction of their laws rather *vindicatory* than *remuneratory*, or to consist rather in punishments, than in actual particular rewards. Because, in the first place, the quiet enjoyment and protection of all our civil rights and liberties, which are the sure and general consequence of obedience to the municipal law, are in themselves the best and most valuable of all rewards. Because also, were the exercise of every virtue to be enforced by the proposal of particular rewards, it were impossible for any state to furnish stock enough for so profuse a bounty. And farther, because the dread of evil is a much more forcible principle of human actions than the prospect of good[k]. For which reasons, though a prudent bestowing of rewards is sometimes of exquisite use, yet we find that those civil laws, which enforce and enjoin our duty, do seldom, if ever, propose any privilege or gift to such as obey the law; but do constantly come armed with a penalty denounced against transgressors, either expressly defining the nature and quantity of the punishment, or else leaving it to the discretion of the judges, and those who are entrusted with the care of putting the laws in execution.

k Locke, Hum. Und. b. 2. c. 21.

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Of all the parts of a law the most effectual is the *vindicatory*. For it is but lost labour to say, "do this, or avoid that," unless we also declare, "this shall be the consequence of your non-compliance." We must therefore observe, that the main strength and force of a law consists in the penalty annexed to it. Herein is to be found the principal obligation of human laws.

Legislators and their laws are said to *compel* and *oblige;* not that by any natural violence they so constrain a man, as to render it impossible for him to act otherwise than as they direct, which is the strict sense of obligation: but because, by declaring and exhibiting a penalty against offenders, they bring it to pass that no man can easily choose to transgress the law; since, by reason of the impending correction, compliance is in a high degree preferable to disobedience. And, even where rewards are proposed as well as punishments threatened, the obligation of the law seems chiefly to consist in the penalty: for rewards, in their nature, can only *persuade* and *allure;* nothing is *compulsory* but punishment.

It is true, it hath been holden, and very justly, by the principal of our ethical writers, that human laws are binding upon men's consciences. But if that were the only or most forcible obligation, the good only would regard the laws, and the bad would set them at defiance. And, true as this principle is, it must be understood with some restriction. It holds, I apprehend, as to *rights;* and that, when the law has determined the field to belong to Titius, it is matter of conscience no longer to withhold or to invade it. So also in regard to *natural duties*, and such offences as are *mala in se:* here we are bound in conscience, because we are bound by superior laws, before those human laws were in being, to perform the one and abstain from the other. But in relation to those laws which enjoin only *positive duties*, and forbid only such things as are not *mala in se* but *mala prohibita* merely, without any intermixture of moral 58
guilt, annexing a penalty to non-compliance[1], here I apprehend conscience is no farther concerned, than by directing a submission to the penalty, in case of our breach of those laws: for other-

1 See Vol. III. 420.

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wise the multitude of penal laws in a state would not only be looked upon as impolitic, but would also be a very wicked thing; if every such law were a snare for the conscience of the subject. But in these cases the alternative is offered to every man; "either abstain from this "or submit to to such a penalty:" and his conscience will be clear, whichever side of the alternative he thinks proper to embrace..... Thus, by the statutes for preserving the game, a penalty is denounced against every unqualified person that kills a hare, and against every person who possesses a partridge in August..... And so too, by other statutes, pecuniary penalties are inflicted for exercising trades without serving an apprenticeship thereto, for not burying the dead in woollen, for not performing statute-work on the public roads, and for innumerable other positive misdemesnors. Now these prohibitory laws do not make the transgression a moral offence, or sin: the only obligation in conscience is to submit to the penalty, if levied. It must however be observed, that we are here speaking of laws that are simply and purely penal, where the thing forbidden or enjoined is wholly a matter of indifference, and where the penalty inflicted is an adequate compensation for the civil inconvenience supposed to arise from the offence*. But where disobedience to the law in-

* This is a doctrine to which the Editor cannot subscribe. It is an important question, and deserves a more extensive discussion than can conveniently be introduced into a note. The solution of it may not only affect the quiet of the minds of conscientious men, but may be the foundation of arguments and decisions in every branch of the law. To form a true judgment upon this subject, it is necessary to take into consideration the nature of moral and positive laws. The principle of both is the same, viz. utility, or the general happiness and true interests of mankind,

Atque ipsa utilitas justi prope mater et æqui.

But the necessity of one set of laws is seen prior to experience; of the other, posterior. A moral rule is such, that every man's reason (if not perverted) dictates it to him as soon as he associates with other men. It is universal, and must be the same in every part of the world. Do not kill, do not steal, do not violate promises, must be equally obligatory in England, Lapland, Kamtschatka, and New Holland. But a positive law is discovered by experience to be useful and necessary only to men in certain districts, or under peculiar circumstances. It is said that it is a capital crime in Holland to kill a stork, because that animal destroys the vermin which would undermine the dykes or banks, upon which the existence of the country depends. This may be a wise law in

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volves in it also any degree of public mischief or private injury, there it falls within our former distinction, and is also an offence against conscience[m].

m *Lex pure poenalis obligat tantum ad poenam, non item ad culpam: lex poenalis mixta et ad culpam obligat, et ad poenam,* (Sanderson *de conscient. obligat. prael. viii.* §. 17. 24.)

Holland; but the life of a stork in England would probably be of no more value than that of a sparrow, and such a law would be useless and cruel in this country.

By the laws of nature and reason, every man is permitted to build his house in any manner he pleases; but from the experience of the destructive effects of fire in London, the legislature with great wisdom enacted that all party-walls should be of a certain thickness; and it is somewhat surprising that they did not extend this provident act to all other great towns. (14 Geo. 3. c. 78.)

It was also discovered by experience, that dreadful consequences ensued, when sea-faring people, who returned from distant countries infected with the plague, were permitted immediately to come on shore, and mix with the healthy inhabitants; it was therefore a wise and merciful law, though restrictive of natural right and liberty, which compelled such persons to be purified from all contagion by performing quarantine. (4 Vol. 161.)

He who, by the breach of these positive laws, introduces conflagration and pestilence, is surely guilty of a much greater crime than he is who deprives another of his purse or his horse.

The laws against smuggling are entirely *juris positivi*; but the criminality of actions can only be measured by their consequences; and he who saves a sum of money by evading the payment of a tax, does exactly the same injury to society as he who steals so much from the treasury; and is therefore guilty of as great immorality, or as great an act of dishonesty. Or smuggling has been compared to that species of fraud which a man would practise who should join with his friends in ordering a dinner at a tavern, and after the festivity and gratifications of the day, should steal away, and leave his companions to pay his share of the reckoning.

Punishment or penalties are never intended as an equivalent or a composition for the commission of the offence; but they are that degree of pain or inconvenience, which are supposed to be sufficient to deter men from introducing that greater degree of inconvenience, which would result to the community from the general permission of that act, which the law prohibits. It is no recompence to a man's country for the consequences of an illegal act, that he should afterwards be whipped, or should stand in the pillory, or lie in a gaol. But in positive laws, as in moral rules, it is equally false that *omnia peccata paria sunt.* If there are laws, such perhaps as the game-laws, which in the public opinion produce little benefit or no salutary effect to society, a conscientious man will feel perhaps no further regard for the observance of them, than from the consideration that his example may encourage others to violate those laws which are more highly beneficial to the community. Indeed, the last sentence of the

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I have now gone through the definition laid down of a municipal law; and have shewn that it is "a rule....of civil con-
59 "duct....prescribed....by the supreme power in a state....com-"manding what is right and prohibiting what is wrong:" in the explication of which I have endeavoured to interweave a few useful principles, concerning the nature of civil government, and the obligation of human laws. Before I conclude this section, it may not be amiss to add a few observations concerning the *interpretation* of laws.

When any doubt arose upon the construction of the Roman laws, the usage was to state the case to the emperor in writing, and take his opinion upon it. This was certainly a bad method of interpretation. To interrogate the legislature to decide particular disputes, is not only endless, but affords great room for partiality and oppression. The answers of the emperor were called his rescripts, and these had in succeeding cases the force of perpetual laws; though they ought to be carefully distinguished, by every rational civilian, from those general constitutions, which had only the nature of things for their guide. The emperor Macrinus, as his historian Capitolinus informs us, had once resolved to abolish these rescripts, and retain only the general edicts: he could not bear that the hasty and crude answers of such princes as Commodus and Caracalla should be reverenced as laws. But Justinian thought otherwise[n], and he has preserved them all. In like manner the canon laws, or decretal epistles of the popes,

n *Inst.* 1. 2. 6.

learned Judge upon this subject, is an answer to his own doctrine; for the disobedience of any law in existence, must be presumed to involve in it either public mischief or private injury. It is related of Socrates, that he made a promise with himself to observe the laws of his country; but this is nothing more than what every good man ought both to promise and to perform: and he ought to promise still farther, that he will exert all his power to compel others to obey them. As the chief design of established government is the prevention of crimes and the enforcement of the moral duties of man, obedience to that government necessarily becomes one of the highest of moral obligations: and the principle of moral and positive laws being precisely the same, they become so blended, that the discrimination between them is frequently difficult or impracticable, or, as the author of the Doctor and Student has expressed it with beautiful simplicity "In every law positive well-made, is somewhat of the law "of reason and of the law of God; and to discern the law of God and the law of "reason from the law positive, is very hard." 1 *Dial. c.* 4. CHRISTIAN.

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are all of them rescripts in the strictest sense. Contrary to all true forms of reasoning, they argue from particulars to generals.

The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable. And these signs are either the words, the context, the subject-matter, the effects and consequence, or the spirit and reason of the law. Let us take a short view of them all.

1. Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use. Thus the law mentioned by Puffendorf[o], which forbad a layman to *lay hands* on a priest, was adjudged to extend to him, who had hurt a priest with a weapon. Again; terms of art, or technical terms, must be taken according to the acceptation of the learned in each art, trade, and science. So in the act of settlement, where the crown of England is limited "to the princess Sophia, and the heirs of her body, being protestants," it becomes necessary to call in the assistance of lawyers, to ascertain the precise idea of the words "*heirs of her body*;" which in a legal sense comprize only certain of her lineal descendants. 60

2. If words happen to be still dubious, we may establish their meaning from the *context*; with which it may be of singular use to compare a word, or a sentence, wherever they are ambiguous, equivocal, or intricate. Thus the proeme, or preamble, is often called in to help the construction of an act of parliament. Of the same nature and use is the comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point*.

o L. of N. and N. 5. 12. 3.

* It is an established rule of construction that statutes *in pari materia*, or upon the same subject, must be construed with a reference to each other; that is, that what is clear in one statute, shall be called in aid to explain what is obscure and ambiguous in another.....Thus the last qualification act to kill game

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Thus, when the law of England declares murder to be felony without benefit of clergy, we must resort to the same law of England to learn what the benefit of clergy is: and when the common law censures simoniacal contracts, it affords great light to the subject to consider what the canon law has adjudged to be simony[11].

3. As to the *subject-matter*, words are always to be understood as having a regard thereto; for that is always supposed to be in the eye of the legislator, and all his expressions directed to that end. Thus, when a law of our Edward III. forbids all ecclesiastical persons to purchase *provisions* at Rome, it might seem to prohibit the buying of grain and other victuals; but when we consider that the statute was made to repress the usurpations of the papal see, and that the nominations to benefices by the pope
61 were called *provisions*, we shall see that the restraint is intended to be laid upon such provisions only.

4. As to the *effects* and *consequence*, the rule is, that where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them. Therefore the Bolognian law, mentioned by Puffendorf[p], which enacted "that whoever drew blood in the streets should be punished with the utmost severity," was held after a long debate not to extend to the surgeon, who opened the vein of a person that fell down in the street with a fit.

[p] *l.* 5. *c.* 12. §. 8.

11. So we must resort to the Common-Law of England to explain that part of the Constitution of the United States, which declares, that the benefit of the Writ of *Habeas Corpus*, shall not be suspended except in case of rebellion, or invasion.

(22 and 23 Car. 2. c. 25.) enacts, "that every person not having lands and tenements, or some other estate of inheritance, of the clear yearly value of 100*l.* or for life, or having lease or leases of ninety-nine years of the clear yearly value of 150*l.*" (except certain persons) shall not be allowed to kill game. Upon this statute a doubt arose, whether the words *or for life* should be refered to the 100*l.* or to the 150*l. per annum*. The court of king's bench having

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5. But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the *reason* and *spirit* of it; or the cause which moved the legislator to enact it. For when this reason ceases, the law itself ought likewise to cease with it. An instance of this is given in a case put by Cicero, or whoever was the author of the treatise inscribed to Herennius[q]. There was a law, that those who in a storm forsook the ship, should forfeit all property therein; and that the ship and lading should belong entirely to those who staid in it. In a dangerous tempest all the mariners forsook the ship, except only one sick passenger, who by reason of his disease was unable to get out and escape. By chance the ship came safe to port. The sick man kept possession, and claimed the benefit of the law. Now here all the learned agree, that the sick man is not within the reason of the law; for the reason of making it was, to give encouragement to such as should venture their lives to save the vessel: but this is a merit, which he could never pretend to, who neither staid in the ship upon that account, nor contributed any thing to its preservation[12].

From this method of interpreting laws, by the reason of them, arises what we call *equity*; which is thus defined by Grotius[r], "the correction of that, wherein the law (by reason of it's

q *l.* 1. *c.* 11. r *de aequitate*, §. 3.

12. On this subject of the interpretation of Laws in General, see Doctor Rutherforth's Inst. of Nat. Law, B. 2. c. 7.

looked into the former qualification acts, and having found that it was clear by the first qualification act (13 R. 1. st. 1. c.13.) that a layman should have 40*s.* a year, and a priest 10*l.* a year, and that by the 1 Ja. c. 27. the qualifications were clearly an estate of inheritance of 10*l.* a year, and an estate for life of 30*l.* a year they presumed that it still was the intention of the legislature to make the yearly value of an estate for life greater than that of an estate of inheritance, though the same proportions were not preserved; and thereupon decided, that clergymen, and all others possessed of a life estate only, must have 150*l.* a year to be qualified to kill game. *Lowndes* v. *Lewis*, *E.* 7. 22 *Geo.* 3.

The same rule to discover the intention of a testator is applied to wills, viz. he whole of a will shall be taken under consideration, in order to decypher the meaning of an obscure passage in it. CHRISTIAN.

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universality) is deficient." For since in laws all cases cannot be
62 foreseen or expressed, it is necessary, that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of defining those circumstances, which (had they been foreseen) the legislator himself would have expressed. And these are the cases which, according to Grotius, "*lex non exacte definit, sed arbitrio boni viri permittit.*"

Equity thus depending, essentially, upon the particular circumstances of each individual case, there can be no established rules and fixed precepts of equity laid down, without destroying its very essence, and reducing it to a positive law. And, on the other hand, the liberty of considering all cases in an equitable light, must not be indulged too far; lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge. And law, without equity, though hard and disagreeable, is much more desirable for the public good, than equity without law: which would make every judge a legislator, and introduce most infinite confusion; as there would then be almost as many different rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind.

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SECTION THE THIRD.

OF THE LAWS OF ENGLAND*.

THE municipal law of England, or the rule of civil conduct prescribed to the inhabitants of this kingdom, may with sufficient propriety be divided into two kinds; the *lex non scripta*, the unwritten or common law; and the *lex scripta*, the written or statute law.

The *lex non scripta*, or unwritten law, includes not only *general customs*, or the common law properly so called; but also the *particular customs* of certain parts of the kingdom; and likewise those *particular laws*, that are by custom observed only in certain courts and jurisdictions.[1]

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* Before we proceed with the Commentator to consider the subject of the ensuing Section, it will be proper to bestow some attention on those Acts of the PEOPLE OF THIS COMMONWEALTH, in particular, and of the UNITED STATES, in general, to which nothing similar occurs in the Constitution and Government of England, or of Great Britain; being Laws, not only to the individual, and to the other departments of the Government, but to the Legislature, also. These are, the CONSTITUTION *of the State of* VIRGINIA, for which we must refer the Student to the Appendix to this part, Note C; and the CONSTITUTION *of the* UNITED STATES, which will be treated of in the Appendix, Note D.

1 From what circumstance the *general* customs, or *common law* of England, properly so called, obtains authority in these states will be the subject of future enquiry: but, with respect to particular customs, these, with the single exception of the Custom of Merchants, being merely local, could not be translated by our Ancestors to their new settlements in this Western World; and consequently have no authority, or existence here: as to the third branch of the *lex non scripta*, or particular Laws observed by custom in particular courts, a very small portion of them, indeed, will be found in the civil establishments of Virginia, even before the revolution.

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When I call these parts of our law *leges non scriptae*, I would not be understood as if all those laws were at present merely *oral*, or communicated from the former ages to the present solely by word of mouth. It is true indeed that, in the profound ignorance of letters which formerly overspread the whole western world, all laws were entirely traditional; for this plain reason, because the nations among which they prevailed, had but little idea of writing. Thus the British as well as the Gallic druids committed all their laws as well as learning to memory[a]; and it is said of the primitive Saxons here, as well as their brethren on the continent, that *leges sola memoria et usu retinebant*[b]. But, with us at present, the monuments and evidences of our legal customs are contained in the records of the several courts of jus-
64 tice, in books of reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from the times of highest antiquity. However I therefore stile these parts of our law *leges non scriptae*, because their original institution and authority are not set down in writing, as acts of parliament are, but they receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom. In like manner as Aulus Gellius defines the *jus non scriptum* to be that, which is "*tacito et illiterato hominum consensu et moribus expressum.*"

Our antient lawyers, and particularly Fortescue[c], insist with abundance of warmth, that these customs are as old as the primitive Britons; and continued down, through the several mutations of government and inhabitants, to the present time, unchanged and unadulterated. This may be the case as to some: but in general, as Mr. Selden in his notes observes, this assertion must be understood with many grains of allowance; and ought only to signify, as the truth seems to be, that there never was any formal exchange of one system of laws for another: though doubtless by the intermixture of adventitious nations, the Romans, the Picts, the Saxons, the Danes, and the Normans, they must have insensibly introduced and incorporated many of their own customs with those that were before established; thereby

a Caes. *de b. G. lib.* 6. *c.* 13. b Spelm. *Gl.* 362. c *c.* 17.

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in all probability improving the texture and wisdom of the whole, by the accumulated wisdom of divers particular countries. Our laws, saith lord Bacon[d], are mixed as our language: and, as our language is so much the richer, the laws are the more complete.

And indeed our antiquaries and early historians do all positively assure us, that our body of laws is of this compounded nature. For they tell us, that in the time of Alfred, the local customs of the several provinces of the kingdom were grown so various, that he found it expedient to compile his *dome-book*, or *liber judicialis*, for the general use of the whole kingdom. This 65
book is said to have been extant so late as the reign of king Edward the fourth, but is now unfortunately lost. It contained, we may probably suppose, the principal maxims of the common law, the penalties for misdemesnors, and the forms of judicial proceedings. Thus much may at least be collected from that injunction to observe it, which we find in the laws of king Edward the elder, the son of Alfred[e]. "*Omnibus qui reipublicae* "*praesunt etiam atque etiam mando, ut omnibus aequos se prae-* "*beant judices, perinde ac in judiciali libro (Saxonice,* dom-bec) "*scriptum habeter: nec quicquam formident quin jus commune* "*(Saxonice,* folcryhte) *audacter libereque dicant.*"

But the irruption and establishment of the Danes in England, which followed soon after, introduced new customs, and caused this code of Alfred in many provinces to fall into disuse; or at least to be mixed and debased with other laws of a coarser alloy. So that about the beginning of the eleventh century there were three principal systems of laws, prevailing in different districts. 1. The *Mercen-Lage*, or Mercian laws which were observed in many of the midland counties, and those bordering on the principality of Wales, the retreat of the antient Britons; and therefore very probably intermixed with the British or Druidical customs. 2. The *West-Saxon-Lage*, or laws of the west Saxons, which obtained in the counties to the south and west of the island, from Kent to Devonshire. These were probably much the same with the laws of Alfred above-mentioned, being the municipal

d See his proposals of a digest. e c. 1.

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law of the far most considerable part of his dominions, and particularly including Berkshire, the seat of his peculiar residence. 3. The *Dane-Lage*, or Danish law, the very name of which speaks it's original and composition. This was principally maintained in the rest of the midland counties, and also on the eastern coast, the part most exposed to the visits of that piratical people. As for the very northern provinces, they were at that time under a distinct government[f].

66 Out of these three laws, Roger Hoveden[g] and Ranulphus Cestrensis[h] inform us, king Edward the confessor extracted one uniform law or digest of laws, to be observed throughout the whole kingdom; though Hoveden and the author of an old manuscript chronicle[i] assure us likewise, that this work was projected and begun by his grandfather king Edgar. And indeed a general digest of the same nature has been constantly found expedient, and therefore put in practice by other great nations, which were formed from an assemblage of little provinces, governed by peculiar customs. As in Portugal, under king Edward, about the beginning of the fifteenth century[k]: in Spain, under Alonzo X, who about the year 1250 executed the plan of his father St. Ferdinand, and collected all the provincial customs into one uniform law, in the celebrated code entitled *las partidas*[l]: and in Sweden, about the same aera; when a universal body of common law was compiled out of the particular customs established by the laghmen of every province, and entitled the *land's lagh*, being analogous to the *common law* of England[m].

Both these undertakings, of king Edgar and Edward the confessor, seem to have been no more than a new edition, or fresh promulgation, of Alfred's code or dome-book with such additions and improvements as the experience of a century and an half had suggested. For Alfred is generally stiled by the same historians the *legum Anglicanarum conditor*, as Edward

f Hal. Hist. 55.
g *in Hen. II.*
h *in Edw. Confessor.*
i *in Seld. ad Eadmer.* 6.
k. Mod. Un. Hist. xxii. 135.
l *Ibid.* xx. 211.
m *Ibid.* xxxiii, 21. 58.

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the confessor is the *restitutor*. These however are the laws which our histories so often mention under the name of the laws of Edward the confessor; which our ancestors struggled so hardly to maintain, under the first princes of the Norman line; and 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. These are the laws, that so vigorously withstood the repeated attacks of the 67
civil law; which established in the twelfth century a new Roman empire over most of the states of the continent: states that have lost, and perhaps upon that account, their political liberties; while the free constitution of England, perhaps upon the same account, has been rather improved than debased. These, in short, are the laws which gave rise and original to that collection of maxims and customs, which is now known by the name of the common law. A name either given to it, in contradistinction to other laws, as the statute law, the civil law, the law merchant, and the like; or, more probably, as a law common to all the realm, the *jus commune* or *folk-right* mentioned by king Edward the elder, after the abolition of the several provincial customs and particular laws before-mentioned.

But though this is the most likely foundation of this collection of maxims and customs, yet the maxims and customs, so collected, are of higher antiquity than memory or history can reach: nothing being more difficult than to ascertain the precise beginning and first spring of an antient and long established custom. Whence it is, that in our law, the goodness of a custom depends upon it's having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary[2]. This it is that gives it it's weight and authority: and of this nature are the maxims and customs which compose the common law, or *lex non scripta*, of this kingdom.

This unwritten, or common, law is properly distinguishable into three kinds: 1. General customs; which are the universal

2. That is from the reign of Richard the first.....See Black. Com. Vol. 2. p. 31.

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rule of the whole kingdom, and form the common law, in its stricter and more usual signification. 2. Particular customs; which for the most part affect only the inhabitants of particular districts. 3. Certain particular laws; which by custom are adopted and used by some particular courts, of pretty general and extensive jurisdiction.

68 I. As to general customs, or the common law, properly so called; this is that law, by which proceedings and determinations in the king's ordinary courts of justice are guided and directed. This, for the most part, settles the course in which lands descend by inheritance; the manner and form of acquiring and transferring property; the solemnities and obligation of contracts; the rules of expounding wills, deeds, and acts of parliament; the respective remedies of civil injuries; the several species of temporal offences, with the manner and degree of punishment; and an infinite number of minuter particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires. Thus, for example, that there shall be four superior courts of record; the chancery, the king's bench, the common pleas, and the exchequer....that the eldest son alone is heir to his ancestor....that property may be acquired and transferred by writing....that a deed is of no validity unless sealed and delivered....that wills shall be construed more favourably, and deeds more strictly....that money lent upon bond is recoverable by action of debt....that breaking the public peace is an offence, and punishable by fine and imprisonment....all these are doctrines that are not set down in any written statute or ordinance, but depend merely upon immemorial usage, that is, upon common law, for their support.

Some have divided the common law into two principal grounds or foundations: 1. Established customs; such as that, where there are three brothers, the eldest brother shall be heir to the second, in exclusion of the youngest: and 2. Established rules and maxims; as, "that the king can do no wrong, that no "man shall be bound to accuse himself," and the like. But I take these to be one and the same thing. For the authority of these maxims rests entirely upon general reception and usage:

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and the only method of proving, that this or that maxim is a rule of the common law, is by shewing that it hath been always the custom to observe it.

But here a very natural, and very material, question arises: 69
how are these customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depositaries of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. Their knowledge of that law is derived from experience and study; from the "*viginti annorum lucubrationes*," which Fortescue[n] mentions; and from being long personally accustomed to the judicial decisions of their predecessors. And indeed these judicial decisions are the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law. The judgment itself, and all the proceedings previous thereto, are carefully registered and preserved, under the name of *records*, in public repositories set apart for that particular purpose; and to them frequent recourse is had, when any critical question arises, in the determination of which former precedents may give light or assistance. And therefore, even so early as the conquest, we find the "*praeteritorum memoria eventorum*" reckoned up as one of the chief qualifications of those, who were held to be "*legibus patriae optime instituti*[o]." For it is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception,

n cap. 8.

o Seld. review of Tith. c. 8.

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where the former determination is most evidently contrary to
70 reason; much more if it be clearly contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined. And hence it is that our lawyers are with justice so copious in their encomiums on the reason of the common law; that they tell us, that the law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law. Not that the particular reason of every rule in the law can at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to be well founded[p]. And it hath been an antient observation in the laws of England, that whenever a standing rule of law, of which the reason perhaps could not be remembered or discerned, hath been wantonly broken in upon by statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation.

The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times, as not to suppose that they acted wholly without consideration. To illustrate this doctrine by examples. It has been determined, time out of mind, that a brother of the half blood shall never succeed as heir to the estate of his half brother, but it shall rather escheat to the king, or other superior lord. Now this is a positive law, fixed and established by custom, which custom is evidenced by judicial decisions; and therefore can never be departed from by any modern judge with-
71 out a breach of his oath and the law. For herein there is no-

p Herein agreeing with the civil law, *Ff.* 1. 3. 20, 21. "*Non omnium, quae* "*a majoribus nostris constituta sunt, ratio reddi potest. Et ideo rationes eorum,* "*quae constituuntur, inquiri non oportet: alioquin multa ex his, quae certa sunt, sub-* "*vertuntur.*"

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thing repugnant to natural justice*; though the artificial reason of it, drawn from the feodal law, may not be quite obvious to every body. And therefore, though a modern judge, on account of a supposed hardship upon the half brother, might wish it had been otherwise settled, yet it is not in his power to alter it. But if any court were now to determine, that an elder brother of the half blood might enter upon and seise any lands that were purchased by his younger brother, no subsequent judges would scruple to declare that such prior determination was unjust, was unreasonable, and therefore was *not law*. So that *the law*, and the *opinion of the judge*, are not always convertible terms, or one and the same thing; since it sometimes may happen, that the judge may *mistake* the law. Upon the whole, however, we may take it as a general rule, "that the decisions of courts of justice "are the evidence of what is common law:" in the same manner as, in the civil law, what the emperor had once determined, was to serve for a guide for the future[q].

The decisions therefore of courts are held in the highest regard, and are not only preserved as authentic records in the treasuries of the several courts, but are handed out to public view in the numerous volumes of *reports* which furnish the lawyer's library. These reports are histories of the several cases, with a short summary of the proceedings which are preserved at large in the record, the arguments on both sides, and the reasons the court gave for it's judgment; taken down in short notes by persons present at the determination. And these serve as indexes

q "*Si imperialis majestas causam cognitionaliter examinaverit, et partibus, cominus constitutis sententiam dixerit, omnes omnino judices, qui sub nostro imperio sunt, sciant hanc esse legem, non solum illi causae pro qua producta est, sed et in omnibus similibus.*" C. 1. 14. 12.

* But it is certainly repugnant to natural reason, where a father leaves two sons by two different mothers, and dies intestate, and a large estate descends to his eldest son, who dies a minor or intestate, that this estate should go to the lord of the manor or to the king, rather than to the younger son. When such a case happens in the family of a nobleman, or a man of great landed property, this law will then probably appear so absurd and unreasonable, that it will not be suffered to remain long afterwards a reproach to our system of jurisprudence. See vol. iii. p. 231. CHRISTIAN.

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to, and also to explain, the records; which always, in matters of consequence and nicety, the judges direct to be searched. The reports are extant in a regular series from the reign of king Edward the second inclusive; and from his time to that of Henry
72 the eighth were taken by the prothonotaries, or chief scribes of the court, at the expense of the crown, and published *annually*, whence they are known under the denomination of the *year books*. And it is much to be wished that this beneficial custom had, under proper regulations, been continued to this day: for, though king James the first at the instance of lord Bacon appointed two reporters[r] with a handsome stipend for this purpose, yet that wise institution was soon neglected; and, from the reign of Henry the eighth to the present time, this task has been executed by many private and contemporary hands; who sometimes through haste and inaccuracy, sometimes through mistake and want of skill, have published very crude and imperfect (perhaps contradictory) accounts of one and the same determination.[3] Some of the most valuable of the antient reports are those published by lord chief justice Coke; a man of infinite learning in his profession, though not a little infected with the pedantry and quaintness of the times he lived in, which appear strongly in all his works. However his writings are so highly esteemed, that they are generally cited without the author's name[s].

r *Pat.* 15 *Jac. I. p.* 18, 17 Rym. 26. s His reports, for instance, are stiled κατ' ἐξοχην *the reports;* and in quoting them we usually say, 1 or 2 Rep. not 1 or 2 Coke's Rep. as in citing other authors. The reports of judge Croke are also cited in a peculiar manner, by the name of those princes, in whose reigns the cases reported in his three volumes were determined; *viz.* queen Elizabeth, king James, and king Charles the first; as well as by the number of each volume. For sometimes we call them 1, 2, and 3 Cro. but more commonly Cro. Eliz. Cro. Jac. and Cro. Car.

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3. The only Reports that have hitherto been published in Virginia, are those of Mr. Wythe, the present Chancellor of the State, of such Cases, as have been decided in the High Court of Chancery, since he hath been the sole Judge of it; and those of Mr. Washington, and Mr. Call, of cases determined in the Court of Appeals. A continuance of such publications is most devoutly to be wished especially by those Judges, whose Judgments are subject to the revision and correction of the Court of Appeals. The

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Besides these reporters, there are also other authors, to whom great veneration and respect is paid by the students of the common law. Such are Glanvil and Bracton, Britton and Fleta, Hengham and Littleton, Statham, Brooke, Fitzherbert, and Staundforde, with some others of antient date; whose treatises are cited as authority, and are evidence that cases have formerly happened, in which such and such points were determined, which are now become settled and first principles. One of the last of these methodical writers in point of time, whose works are of any intrinsic authority in the courts of justice, and do not entirely depend on the strength of their quotations from old authors, is the same learned judge we have just mentioned, sir Edward Coke; who hath written four volumes of institutes, as he is pleased to call them, though they have little of the institutional method to warrant such a title. The first volume is a very extensive comment upon a little excellent treatise of tenures, compiled by judge Littleton in the reign of Edward the fourth. This comment is a rich mine of valuable common law learning, collected and heaped together from the antient reports and year books, but greatly defective in method.[s] The second volume is a comment upon many old acts of parliament, without any systematical order; the third a more methodical treatise of the pleas of the crown; and the fourth an account of the several species of courts[t]. 73

And thus much for the first ground and chief corner stone of the laws of England, which is general immemorial custom,

s It is usually cited either by the name of Co. Litt. or as 1 Inst.

t These are cited as 2, 3, or 4 Inst. without any author's name. An honorary distinction, which, we observed, is paid to the works of no other writer; the generality of reports and other tracts being quoted in the name of the compiler, as 2 Ventris, 4 Leonard, 1 Siderfin, and the like.

The Reports of Mr. Dallas, of Cases determined in the supreme Court of the United States, and in the Federal Courts held in Pennsylvania, are also extremely valuable, both in respect to the matter of which they treat, and the manner in which they are executed. See Dallas's reports vol. 2. and 3. The first volume comprehends only cases decided in the State Court of Pennsylvania.

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or common law, from time to time declared in the decisions of the courts of justice: which decisions are preserved among our public records, explained in our reports, and digested for general use in the authoritative writings of the venerable sages of the law.

The Roman law, as practiced in the times of it's liberty, paid also a great regard to custom; but not so much as our law: it only then adopting it, when the written law was deficient..... Though the reasons alledged in the digest[u] will fully justify our practice, in making it of equal authority with, when it is not contradicted by, the written law. "For since, says Julianus, the "written law binds us for no other reason but because it is ap-"proved by the judgment of the people, therefore those laws "which the people have approved without writing ought also to "bind every body. For where is the difference, whether the peo-
74 "ple declare their assent to a law by suffrage, or by a uniform "course of acting accordingly?" Thus did they reason while Rome had some remains of her freedom: but, when the imperial tyranny came to be fully established, the civil laws speak a very different language. "*Quod principi placuit legis habet* "*vigorem, cum populus ei et in eum omne suum imperium et po-*"*testatum conferat,*" says Ulpian[w]. "*Imperator solus et condi-*"*tor et interpres legis existimatur,*" says the code[x]: and again, "*sacrilegii instar est rescripto principis obviari*[y]." And indeed it is one of the characteristic marks of English liberty, that our common law depends upon custom; which carries this internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people[4].

II. The second branch of the unwritten laws of England are particular customs, or laws which affect only the inhabitants of particular districts.(4)

u *Ff.* 1. 3. 32,
x. *C.* 1. 14. 12.
w *Ff.* 1. 4. 1.
y *C.* 1. 23. 5.

4. See Appendix, Note E.
(4.) See the note, p. 63.

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These particular customs, or some of them, are without doubt the remains of that multitude of local customs beforementioned, out of which the common law, as it now stands, was collected at first by king Alfred, and afterwards by king Edgar and Edward the confessor: each district mutually sacrificing some of it's own special usages, in order that the whole kingdom might enjoy the benefit of one uniform and universal system of laws. But, for reasons that have been now long forgotten, particular counties[5], cities, towns, manors, and lordships, were very early indulged with the privilege of abiding by their customs, in contradistinction to the rest of the nation at large: which privilege is confirmed to them by several acts of parliament[z].

Such is the custom of gavelkind in Kent and some other parts of the kingdom (though perhaps it was also general till the Norman conquest) which ordains, among other things, that not 75
the eldest son only of the father shall succeed to his inheritance, but all the sons alike: and that, though the ancestor be attainted and hanged, yet the heir shall succeed to his estate, without any escheat to the lord....Such is the custom that prevails in divers antient boroughs, and therefore called borough-english, that the youngest son shall inherit the estate, in preference to all his elder brothers....Such is the custom in other boroughs that a widow shall be entitled, for her dower, to all her husband's lands; whereas at the common law she shall be endowed of one third part only. Such also are the special and particular customs of manors, of which every one has more or less, and which bind all the copyhold and customary tenants that hold of the said manors....Such likewise is the custom of holding divers inferior courts, with power of trying causes, in cities and trading towns; the right of holding which, when no royal grant can be shewn,

z *Mag. Chart.* 9 Hen. III. c. 9....1 Edw. III. st. 2. c. 9....14 Edw. III. st. 1. c. 1....and 2 Hen. IV. c. 1.

5. In Virginia, the Counties, and even parishes, were formerly authorized to make *bye laws*. This would in time have proved an abundant source of local usages and customs. But the act authorising them, 1662 c. 15. was repealed about seventeen years after it passed. 1679. c. 3. They may be found in Parvis's collection, 112. 237.

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depends entirely upon immemorial and established usage..... Such, lastly, are many particular customs within the city of London, with regard to trade, apprentices, widows, orphans, and a variety of other matters. All these are contrary to the general law of the land, and are good only by special usage; though the customs of London are also confirmed by act of parliament[a].

To this head may most properly be referred a particular system of customs used only among one set of the king's subjects, called the custom of merchants or *lex mercatoria:* which, however different from the general rules of the common law, is yet ingrafted into it, and made a part of it[b]; being allowed, for the benefit of trade, to be of the utmost validity in all commercial transactions: for it is a maxim of law, that "*cuilibet in sua* "*arte credendum est.*[6]"

The rules relating to particular customs regard either the *proof* of their existence; their *legality* when proved; or their usual method of *allowance.* And first we will consider the rules of *proof.*

76 As to gavelkind, and borough-english, the law takes particular notice of them[c], and there is no occasion to prove that

a 8 Rep. 126. Cro. Car. 347.
b Winch. 24.
c Co. Litt. 175.

6. The *lex mercatoria*, or general law and custom among Merchants, stands I presume upon the same authority in Virginia; what that law is, is to be ascertained and determined by judicial decisions and not by any local usages amongst Merchants and Traders; for these form no part of the common law of England, as the general law of Merchants doth. See Lord Mansfield's report, in the case of Edie and another against the East India Company; and Justice Foster's opinion in the same case....2 Burrow, 1222. and 1226.

But where the law is not settled, it would seem that evidence of local usages, which are so settled and established among merchants and traders, as to be clear and plain beyond a doubt is proper for the consideration of a Jury. Lord Mansfield....Ibid, 1221. 1222.

See the case of Branch v. Burnley, 1st. Calls Reports, 147. and the arguments and opinions of the Judges of the Court of Appeals therein.

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such customs actually exist, but only that the lands in question are subject thereto. All other private customs must be particularly pleaded[d], and as well the existence of such customs must be shewn, as that the thing in dispute is within the custom alleged. The trial in both cases (both to shew the existence of the custom, as, "that in the manor of Dale lands shall descend "only to the heirs male, and never to the heirs female;" and also to shew "that the lands in question are within that manor") is by a jury of twelve men, and not by the judges; except the same particular custom has been before tried, determined, and recorded in the same court[e].

The customs of London differ from all others in point of trial: for, if the existence of the custom be brought in question, it shall not be tried by a jury, but by certificate from the lord mayor and alderman by the mouth of their recorder[f], unless it be such a custom as the corporation is itself interested in, as a right of taking toll, &c. for then the law permits them not to certify on their own behalf[g].

When a custom is actually proved to exist, the next enquiry is into the *legality* of it; for, if it is not a good custom, it ought to be no longer used. "*Malus usus abolendus est*" is an established maxim of the law[h]. To make a particular custom good, the following are necessary requisites.

1. That it have been used so long, that the memory of man runneth not to the contrary[7]. So that, if any one can shew the

d Litt. §. 265. e Dr. & St. 1. 10. f Cro. Car. 516.
g Hob. 85. h Litt §. 212. 4 Inst. 274.

7. It may be therefore doubted whether any custom can be established in the United States of America. For, Time of memory hath been ascertained by the Law to commence from the reign of Richard I. and any custom, in England, may be destroyed by evidence of its non-existence, at any subsequent period. Now, the settlement of North America by the English did not take place 'till the reign of Queen Elizabeth, near four hundred years afterwards..... See 2. Vol. Black. Com. p. 31.

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beginning of it, it is no good custom. For which reason no custom can prevail against an express act of parliament; since the statute itself is a proof of a time when such a custom did not exist[j].

2. It must have been *continued*. Any interruption would cause a temporary ceasing: the revival gives it a new beginning, which will be within time of memory, and thereupon the custom will be void. But this must be understood with regard to an interruption of the *right;* for an interruption of the *possession* only, for ten or twenty years, will not destroy the custom[i]. As if the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is not destroyed, though they do not use it for ten years; it only becomes more difficult to prove: but if the *right* be any how discontinued for a day, the custom is quite at an end.

3. It must have been *peaceable*, and acquiesced in; not subject to contention and dispute[k]. For as customs owe their original to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting.

4. Customs must be *reasonable*[l]; or rather, taken negatively, they must not be unreasonable. Which is not always, as sir Edward Coke says[m], to be understood of every unlearned man's reason, but of artificial and legal reason, warranted by authority of law. Upon which account a custom may be good, though, the particular reason of it cannot be assigned; for it sufficeth, if no good legal reason can be assigned against it. Thus a custom in a parish, that no man shall put his beasts into the common till the third of October, would be good; and yet it would be hard to shew the reason why that day in particular is fixed upon, rather than the day before or after. But a custom, that no cattle shall be put in till the lord of the manor has first put in his, is unreasonable, and therefore bad: for peradventure the lord will never put in his; and then the tenants will lose all their profits[n].

j Co. Litt. 113.
i *Ibid.* 114.
k *Ibid.*
l Litt. §. 212
m 1 Inst. 62.
n Co. Copyh. §. 33.

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5. Customs ought to be *certain*. A custom, that lands shall descend to the most worthy of the owner's blood, is void; for how shall this worth be determined? but a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore good[o]. A custom to pay two pence an acre in lieu of tithes, is good; but to pay sometimes two pence and sometimes three pence, as the occupier of the land pleases, is bad for it's uncertainty. Yet a custom to pay a year's improved value for a fine on a copyhold estate, is good; though the value is a thing uncertain: for the value may at any time be ascertained; and the maxim of law is, *id certum est, quod certum reddi potest.*

6. Customs, though established by consent, must be (when established) *compulsory;* and not left to the option of every man, whether he will use them or no. Therefore a custom, that all the inhabitants shall be rated toward the maintenance of a bridge, will be good; but a custom, that every man is to contribute thereto at his own pleasure, is idle and absurd, and indeed no custom at all.

7. Lastly, customs must be *consistent* with each other: one custom cannot be set up in opposition to another. For if both are really customs, then both are of equal antiquity, and both established by mutual consent: which to say of contradictory customs is absurd. Therefore, if one man prescribes that by custom he has a right to have windows looking into another's garden; the other cannot claim a right by custom to stop up or obstruct those windows: for these two contradictory customs cannot both be good, nor both stand together. He ought rather to deny the existence of the former custom[p] (*a*).

Next, as to the *allowance* of special customs. Customs, in derogation of the common law, must be construed strictly. Thus, by the custom of gavelkind, an infant of fifteen years may 79
by one species of conveyance (called a deed of feoffment) con-

o 1 Roll. Abr. 565. p 9 Rep. 58.

(*a*) [See the case of Wiglesworth against Dallison and another, reported in Douglas, 190.]

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vey away his lands in fee simple, or for ever. Yet this custom does not empower him to use any other conveyance, or even to lease them for seven years: for the custom must be strictly pursued[q]. And, moreover, all special customs must submit to the king's prerogative. Therefore, if the king purchases lands of the nature of gavelkind, where all the sons inherit equally; yet, upon the king's demise, his eldest son shall succeed to those lands alone[r]. And thus much for the second part of the *leges non scriptae*, or those particular customs which affect particular persons or districts only.

III. The third branch of them are those peculiar laws, which by custom are adopted and used only in certain peculiar courts and jurisdictions. And by these I understand the civil and canon laws.

It may seem a little improper at first view to rank these laws under the head of *leges non scriptae*, or unwritten laws, seeing they are set forth by authority in their pandects, their codes, and their institutions; their councils, decrees, and decretals; and enforced by an immense number of expositions, decisions, and treatises of the learned in both branches of the law. But I do this, after the example of sir Matthew Hale[s], because it is most plain, that it is not on account of their being *written* laws, that either the canon law, or the civil law, have any obligation within this kingdom: neither do their force and efficacy depend upon their own intrinsic authority; which is the case of our written laws, or acts of parliament. They bind not the subjects of England, because their materials were collected from popes or emperors; were digested by Justinian, or declared to be authentic by Gregory. These considerations give them no authority here: for the legislature of England doth not, nor ever did, recognize any foreign power, as superior or equal to it in this kingdom; or as having the right to give law to any, the meanest, of it's subjects. But all the strength that either the papal or im-
80 perial laws have obtained in this realm (or indeed in any other

q Co. Cop. §. 33.
r Co. Litt. 15.
s Hist. C. L. c. 2.

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kingdom in Europe) is only because they have been admitted and received by immemorial usage and custom in some particular cases, and some particular courts; and then they form a branch of the *leges non scriptae*, or customary laws: or else, because they are in some other cases introduced by consent of parliament, and then they owe their validity to the *leges scriptae*, or statute law[8]. This is expressly declared in those remarkable words of the statute 25 Henry VIII. c. 21, addressed to the king's royal majesty....." This your grace's realm, recognizing " no superior under God but only your grace, hath been and is " free from subjection to any man's laws, but only to such as " have been devised, made, and ordained *within* this realm for " the wealth of the same; or to such other as, by sufferance of " your grace and your progenitors, the people of this your realm " have taken at their free liberty, by their own consent, to be " used among them: and have bound themselves by long use " and custom to the observance of the same: not as to the ob- " servance of the laws of any foreign prince, potentate, or pre- " late; but as to the *customed* and antient laws of this realm, ori- " ginally established as laws of the same, by the said sufferance, " consents, and custom; and none otherwise."

By the civil law, absolutely taken, is generally understood the civil or municipal law of the Roman empire, as comprized in the institutes, the code, and the digest of the emperor Justinian, and the novel constitutions of himself and some of his successors. Of which, as there will frequently be occasion to cite them, by way of illustrating our own laws, it may not be amiss to give a short and general account.

The Roman law (founded first upon the regal constitutions of their antient kings, next upon the twelve tables of the *decemviri*, then upon the laws or statutes enacted by the senate or people, the edicts of the praetor, and the *responsa prudentum* or opinions

8. The authority of the common law of England, and of certain particular Statutes made in aid of the common law, may now be considered as resting upon a nearly similar foundation in Virginia; and perhaps in most of the United States....See Edo. 1794. c. 147.

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of learned lawyers, and lastly upon the imperial decrees, or constitutions of successive emperors) had grown to so great a bulk, or, as Livy expresses it[t], "*tam immensus aliarum super alias acervatarum legum cumulus*," that they were computed to be many camels' load by an author who preceded Justinian[u]. This was in part remedied by the collections of three private lawyers, Gregorius, Hermogenes, and Papirius; and then by the emperor Theodosius the younger, by whose orders a code was compiled, *A. D.* 438, being a methodical collection of all the imperial constitutions then in force: which Theodosian code was the only book of civil law received as authentic in the western part of Europe, till many centuries after; and to this it is probable that the Franks and Goths might frequently pay some regard, in framing legal constitutions for their newly erected kingdoms. For Justinian commanded only in the eastern remains of the empire; and it was under his auspices, that the present body of civil law was compiled and finished by Tribonian and other lawyers, about the year 533.

This consists of, 1. The institutes; which contain the elements or first principles of the Roman law, in four books. 2. The digests, or pandects, in fifty books; containing the opinions and writings of eminent lawyers, digested in a systematical method. 3. A new code, or collection of imperial constitutions, in twelve books; the lapse of a whole century having rendered the former code, of Theodosius, imperfect. 4. The novels, or new constitutions, posterior in time to the other books, and amounting to a supplement to the code; containing new decrees of successive emperors, as new questions happened to arise. These form the body of Roman law, or *corpus juris civilis*, as published about the time of Justinian; which however fell soon into neglect and oblivion, till about the year 1130, when a copy of the digests was found at Amalfi in Italy: which accident, concurring with the policy of the Roman ecclesiastics[w], suddenly gave new vogue and authority to the civil law, introduced it into several
82 nations, and occasioned that mighty inundation of voluminous comments, with which this system of law, more than any other, is now loaded.

t *l.* 3. *c.* 34. u Taylor's elements of civil law 17. w See §. 1. p. 18.

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The canon law is a body of Roman ecclesiastical law, relative to such matters as that church either has, or pretends to have, the proper jurisdiction over[9]. This is compiled from the opinions of the antient Latin fathers, the decrees of general councils, and the decretal epistles and bulles of the holy see. All which lay in the same disorder and confusion as the Roman civil law: till, about the year 1151, one Gratian an Italian monk, animated by the discovery of Justinian's pandects, reduced the ecclesiastical constitutions also into some method, in three books; which he entitled *concordia discordantium canonum*, but which are generally known by the name of *decretum Gratiani*. These reached as low as the time of pope Alexander III. The subsequent papal decrees, to the pontificate of Gregory IX, were published in much the same method under the auspices of that pope, about the year 1230, in five books; entitled *decretalia Gregorii noni*. A sixth book was added by Boniface VIII, about the year 1298, which is called *sextus decretalium*. The Clementine constitutions, or decrees of Clement V, were in like manner authenticated in 1317 by his successor John XXII; who also published twenty constitutions of his own, called the *extravagantes Joannis:* all which in some measure answer to the novels of the civil law. To these have been since added some decrees of later popes in five books, called *extravagantes communes*. And all these together, Gratian's decree, Gregory's decretals, the sixth decretal, the Clementine constitutions, and the extravagants of John and his successors, form the *corpus juris canonici*, or body of the Roman canon law.

Besides these pontifical collections, which during the times of popery were received as authentic in this island, as well as in other parts of christendom, there is also a kind of national canon law, composed of *legatine* and *provincial* constitutions, and adapted only to the exigencies of this church and kingdom. The 83
legatine constitutions were ecclesiastical laws, enacted in national synods, held under the cardinals Otho and Othobon, legates from pope Gregory IX, and pope Clement IV, in the reign of

9. The authority of the Canon-law, in Virginia (except perhaps in some matrimonial causes) since the passing the act for establishing religious Freedom. 1785. c. 34. [Edo. 1794. c. 20.] may be considered as either utterly abolished, or, at least highly questionable.

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king Henry III, about the years 1220 and 1268. The *provincial* constitutions are principally the decrees of provincial synods, held under divers archbishops of Canterbury, from Stephen Langton in the reign of Henry III, to Henry Chichele in the reign of Henry V; and adopted also by the province of York[x], in the reign of Henry VI. At the dawn of the reformation, in the reign of king Henry VIII, it was enacted in parliament[y] that a review should be had of the canon law; and, till such review should be made, all canons, constitutions, ordinances, and synodals provincial, being then already made, and not repugnant to the law of the land or the king's prerogative, should still be used and executed. And, as no such review has yet been perfected, upon this statute now depends the authority of the canon law in England(9).

As for the canons enacted by the clergy under James I, in the year 1603, and never confirmed in parliament, it has been solemnly adjudged upon the principles of law and the constitution, that where they are not merely declaratory of the antient canon law, but are introductory of new regulations, they do not bind the laity[z]; whatever regard the clergy may think proper to pay them.

There are four species of courts, in which the civil and canon laws are permitted (under different restrictions) to be used. 1. The courts of the archbishops and bishops, and their derivative officers, usually called in our law courts christian, *curiae christianitatis*, or the ecclesiastical courts. 2. The military courts. 3. The courts of admiralty[10]. 4. The courts of the two universities. In all, their reception in general, and the dif-

x Burn's eccl. law, pref. viii.
y Statute 25 Hen. VIII, c. 19; revived and confirmed by 1 Eliz. c. 1.
z Stra. 1057.

(9) This Statute of 25. H. 8. c. 19. (as also that of 1. Eliza. c. 1.) is repealed, by the general repeal of all British Statutes, Edo. of 1794. c. 147.

10 Courts of admiralty are authorized by the C. U. S. art: 3. The District Courts of the U. S. are invested with their powers, in general: for which see L. U. S. 1. Cong: 1. Sess: c. 20. s. 9. 11.... 3. Cong: c. 50. The other Courts here mentioned are obsolete; at least in Virginia.

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ferent degrees of that reception, are grounded entirely upon custom; corroborated in the latter instance by act of parliament, 84
ratifying those charters which confirm the customary law of the universities. The more minute consideration of these will fall properly under that part of these commentaries which treats of the jurisdiction of courts. It will suffice at present to remark a few particulars relative to them all, which may serve to inculcate more strongly the doctrine laid down concerning them[a].

1. And, first, the courts of common law have the superintendency over these courts; to keep them within their jurisdictions, to determine wherein they exceed them, to restrain and prohibit such excess[11], and (in case of contumacy) to punish the officer who executes, and in some cases the judge who enforces, the sentence so declared to be illegal.

2. The common law has reserved to itself the exposition of all such acts of parliament, as concern either the extent of these courts, or the matters depending before them([11]). And therefore, if these courts either refuse to allow these acts of parliament, or will expound them in any other sense than what the common law puts upon them, the king's courts at Westminster will grant prohibitions to restrain and control them.

3. An appeal lies from all these courts to the king, in the last resort; which proves that the jurisdiction exercised in them is derived from the crown of England, and not from any foreign potentate, or intrinsic authority of their own. And, from these three strong marks and ensigns of superiority, it appears beyond a doubt, that the civil and canon laws, though admitted in some cases by custom in some courts, are only subordinate, and *leges sub graviori lege;* and that, thus admitted, restrained, altered,

a Hale Hist. c. 2.

11. The supreme Court of the United States hath power to issue writs of prohibition to the District Courts, when proceeding as Courts of Admiralty and Maritime Jurisdiction. L. U. S. 1. Cong: 1. Sess: c. 20 s. 13.

(11) Vide L. U. S. 1. Cong: 1. Sess: c. 20. s. 25. in what cases the Federal Government may grant a writ of error to a StateCourt.

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new-modelled, and amended, they are by no means with us a distinct independent species of laws, but are inferior branches of the customary or unwritten laws of England, properly called the king's ecclesiastical, the king's military, the king's maritime, or the king's academical, laws.

85 Let us next proceed to the *leges scriptae*, the written laws of the kingdom: which are statutes, acts, or edicts, made by the king's majesty, by and with the advice and consent of the lords spiritual and temporal and commons in parliament assembled[b]. The oldest of these now extant, and printed in our statute books, is the famous *magna charta*, as confirmed in parliament 9 Hen. III. though doubtless there were many acts before that time, the records of which are now lost, and the determinations of them perhaps at present currently received for the maxims of the old common law.

The manner of making these statutes will be better considered hereafter, when we examine the constitution of parliaments. At present we will only take notice of the different kinds of statutes; and of some general rules with regard to their construction[c].

b 8 Rep. 20.

c The method of citing these acts of parliament is various. Many of our antient statutes are called after the name of the place where the parliament was held that made them; as the statutes of Merton and Marleberge, of Westminster, Glocester, and Winchester. Others are denominated entirely from their subject; as the statutes of Wales and Ireland, the *articuli cleri*, and the *prærogativa regis*. Some are distinguished by their initial words, a method of citing very antient: being used by the Jews in denominating the books of the pentateuch; by the christian church in distinguishing their hymns and divine offices; by the Romanists in describing their papal bulles; and in short by the whole body of antient civilians and canonists, among whom this method of citation generally prevailed, not only with regard to chapters, but inferior sections also; in imitation of all which we still call some of our old statutes by their initial words, as the statute of *quia emptores*, and that of *circumspecte agatis*. But the most usual method of citing them, especially since the time of Edward the second, is by naming the year of the king's reign in which the statute was made, together with the chapter, or particular act, according to it's numeral order, as 9 Geo. II. c. 4. For all the acts of one session of parliament taken together make properly but one statute: and therefore when two ses-

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First, as to their several kinds. Statutes are either *general* or *special*, *public* or *private*. A general or public act is an universal rule, that regards the whole community: and of this the 86
courts of law are bound to take notice judicially and *ex officio*; without the statute being particularly pleaded, or formally set forth by the party who claims an advantage under it. Special or private acts are rather exceptions than rules, being those which only operate upon particular persons, and private concerns: such as the Romans entitled *senatus-decreta*, in contradistinction to the *senatus consulta*, which regarded the whole community[d]: and of these (which are not promulgated with the same notoriety as the former) the judges are not to take notice, unless they be formally shewn and pleaded[12]. Thus, to shew the distinction, the statute 13 Eliz. c. 10. to prevent spiritual persons from making leases for longer terms than twenty-one years, or three lives, is a public act; it being a rule prescribed to the whole body of spiritual persons in the nation: but an act to enable the bishop of Chester to make a lease to A. B. for sixty years, is an exception to this rule; it concerns only the parties and the bishop's successors; and is therefore a private act.

Statutes are also either *declaratory* of the common law, or *remedial* of some defects therein. Declaratory, where the old custom of the kingdom is almost fallen into disuse, or become disputable; in which case the parliament has thought proper, *in perpetuum rei testimonium*, and for avoiding all doubts and difficulties, to declare what the common law is and ever hath been. Thus the statute of treasons, 25 Edw. III. cap. 2, doth not make any new species of treasons; but only, for the benefit of the subject, declares and enumerates those several kinds of offence, which before were treason at the common law. Remedial sta-

sions have been held in one year, we usually mention stat. 1. or 2. Thus the bill of rights is cited, as 1 W. and M. st. 2. c. 2. signifiying that it is the second chapter or act, of the second statute, or the laws made in the second session of parliament, in the first year of king William and queen Mary.

d Gravin. *Orig.* 1. §. 24.

12. Private acts of Assembly may be given in evidence without pleading them specially. L. V. 1789. c. 28. [Edo. of 1794. 76. s.30.]

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tutes are those which are made to supply such defects, and abridge such superfluities, in the common law, as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned (or even learned) judges, or from any other cause whatsoever. And this being done, either by enlarging the common law where it was too narrow and circumscribed,
87 or by restraining it where it was too lax and luxuriant, hath occasioned another subordinate division of remedial acts of parliament into *enlarging* and *restraining* statutes. To instance again in the case of treason. Clipping the current coin of the kingdom was an offence not sufficiently guarded against by the common law: therefore it was thought expedient by statute 5 Eliz. c. 11. to make it high treason, which it was not at the common law: so that this was an *enlarging* statute. At common law also spiritual corporations might lease out their estates for any term of years, till prevented by the statute 13 Eliz. beforementioned: this was therefore a *restraining* statute[13].

Secondly, the rules to be observed with regard to the construction of statutes are principally these which follow.

1. There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy: that is, how the common law stood at the making of the act; what the mischief was, for which the common law did not provide; and what remedy the parliament hath provided to cure this mischief. And it is the business of the judges so to construe the act, as to suppress the mischief and advance the

13. Although these Statutes are mentioned here by way of illustration only, it may not be improper to apprize the Student that neither the Statute of 5. Eliza: c. 11. to prevent the clipping of the current Coin; nor the Stat: of 13. Eliza: c. 10. to restrain spiritual persons from making certain Leases, are in force in Virg. the first being virtually repealed by the act declaring what shall be Treason Octo: 1776. c. 3. [Edo. of 1794, c. 136.] and the latter by the act repealing all British Statutes, under certain restrictions. [Edo. 1794, c. 147.]

☞ And here it may not be improper to offer to the Student a view of the written laws of Virginia: for which see Appendix, note F.

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remedy[e]. Let us instance again in the same restraining statute of 13 Eliz. c. 10. By the common law, ecclesiastical corporations might let as long leases as they thought proper: the mischief was, that they let long and unreasonable leases, to the impoverishment of their successors: the remedy applied by the statute was by making void all leases by ecclesiastical bodies for longer terms than three lives or twenty-one years. Now in the construction of this statute it is held, that leases, though for a longer term, if made by a bishop, are not void during the bishop's continuance in his see; or, if made by a dean and chapter, they are not void during the continuance of the dean: for the act was made for the benefit and protection of the successor[f]. The mischief is therefore sufficiently suppressed by vacating them after the determination of the interest of the grantors; but 88
the leases, during their continuance, being not within the mischief, are not within the remedy.

2. A statute, which treats of things or persons of an inferior rank, cannot by any *general words* be extended to those of a superior. So a statute, treating of "deans, prebendaries, parsons, vicars, *and others having spiritual promotion*," is held not to extend to bishops, though they have spiritual promotion; deans being the highest persons named, and bishops being of a still higher order[g].

3. Penal statutes must be construed strictly[14]. Thus the statute 1 Edw. VI. c. 12. having enacted that those who are con-

e 3 Rep. 7. Co. Litt. 11. 42. f Co. Litt. 45. 3 Rep. 60. 10 Rep. 58.
g 2 Rep. 46.

14. A curious instance may be mentioned, where this rule was either not attended to, or the words of a penal statute were unknown in the highest Court of Judicature in Great Britain; viz. the House of Lords. The Statute of 1. Ja. 1. c. 11. upon which the Dutchess of Kingston was indicted, tried, found guilty, and received judgment in that court, (if we may credit the authority of the editors of the Statutes at large, and particularly Bill and Newcomb's, Lond. 1684, said to have been carefully examined with the Rolls of parliament) does not extend to the case of a woman marrying a second husband, during the life of a former. The words of the enacting clause are, "If

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victed of stealing *horses* should not have the benefit of clergy, the judges conceived that this did not extend to him that should steal but one *horse*, and therefore procured a new act for that pur-

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any person or persons being married, or which shall hereafter marry, do at any time marry any person or persons the former *wife* being alive &c." It is true that Sir Edward Coke, 3. Inst. p. 88. and after him, Sir Mathew Hale 1. H. P. C. 692. quote it in these words, "the former Husband or Wife being alive"....But not only Bill and Newcomb's but one or two other Editions of the Statutes which I have seen, omit the words "Husband or," from whence I am inclined to believe that the Error crept into the parliament roll itself; for it was evidently the intention of the Statute to take in both cases..... I have supposed it probable that Sir Edward Coke, who was (perhaps about that time) Attorney General, might have prepared the draught of the Statute, and that he inserted the extract from it which is given in his Institutes from that draught, without consulting the Roll, or a printed copy of the Statute.

"It is a fundamental rule of construction, that all *penal* Statutes "shall be construed strictly, and remedial Statutes [such as are mentioned in the next paragraph for prevention of frauds] "shall be con- "strued liberally. It was one of the laws of the twelve tables at "Rome, that whenever there was a question between liberty and "slavery, the presumption should be on the side of liberty. This "excellent principle the law of England has adopted in the con- "struction of penal Statutes: for whenever any ambiguity arises in "a Statute introducing a new penalty or punishment, the decision "shall be on the side of lenity and mercy; or, in favour of natural "right, and liberty: or, in other words the decision shall be accord- "ing to the strict letter in favour of the subject. And though the "Judges in such cases may frequently raise, and solve difficulties, "contrary to the intention of the legislature, yet no further inconve- "nience can result, than that the law remains as it was, before the "Statute. And it is more consonant to the principles of liberty, "that the judge should acquit whom the legislature intended to pun- "ish, than that he should punish whom the legislature intended to "discharge with impunity. But remedial Statutes, [or such as are made against Fraud] "must be construed according to the Spirit: "for in giving relief against fraud, or in the furtherance and ex- "tention of national right, and Justice, the Judge may safely go be- "yond even that which existed in the minds of those who framed "the law."..... *Christian.*

"And therefore it hath been held, that the same words in a Sta- "tute will bear different interpretations, according to the nature of "the suit or prosecution instituted upon them." As in the Statute

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pose in the following year[h]. And, to come nearer our own times, by the statute 14 Geo. II. c. 6. stealing sheep, *or other cattle*, was made felony without benefit of clergy. But these general words, "or other cattle," being looked upon as much too loose to create a capital offence, the act was held to extend to nothing but mere sheep. And therefore, in the next sessions, it was found necessary to make another statute, 15 Geo. II. c. 34. extending the former to bulls, cows, oxen, steers, bullocks, heifers, calves, and lambs by name[15].

4. Statutes against frauds are to be liberally and beneficially expounded. This may seem a contradiction to the last rule; most statutes against frauds being in their consequences penal. But this difference is here to be taken: where the statute acts upon the offender, and inflicts a penalty, as the pillory or a fine, it is then to be taken strictly: but when the statute acts upon the offence, by setting aside the fraudulent transaction, here it is to be construed liberally. Upon this footing the statute of 13 Eliz. c. 5[16]. which avoids all gifts of goods, &c. made to defraud creditors *and others*, was held to extend by the general words to a 89
gift made to defraud the queen of a forfeiture[i17].

h 2 & 3 Edw. VI. c. 33 Bac. Elem. c. 12. i 3 Rep. 82.

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against gaming, which is held to be remedial where the action is brought by the party losing at play, to recover back his money lost; but penal where it is brought by a common informer, who hath sustained no injury....*Christian*..... See the Case of Bones *vs.* Booth. 2. Black. rep. 1226.

15. The Statutes of 14. Geo. 2. c. 6. and 15. Geo: 2. c. 34. cited in this paragraph were never considered as in force in Virginia.

16. See L. V. 1785. c. 64. [Edo. 1794. c. 10.] accordant.

17 There being some variation between the words of the Statute 13. Eliza: c. 5. and the corresponding clause of our Act, to prevent frauds and perjuries, Edo. 1794. c. 10. s. 2. it may be questioned whether that act would extend to the case of a Gift or Conveyance made to defraud the commonwealth of a forfeiture or penalty, neither of which words although found in the British Statute, are inserted in that part of our Laws, which declares the Gift &c. void, only as against such persons, &c....But according to sir Edward Coke's opinion it would seem that the British Statute was declaratory of what the common Law was before; *ideo Quaere.*

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5. One part of a statute must be so construed by another, that the whole may (if possible) stand: *ut res magis valeat, quam pereat.* As if land be vested in the king and his heirs by act of parliament, saving the right of A; and A has at that time a lease of it for three years: here A shall hold it for his term of three years, and afterwards it shall go to the king. For this interpretation furnishes matter for every clause of the statute to work and operate upon. But,

6. A saving, totally repugnant to the body of the act, is void. If therefore an act of parliament vests land in the king and his heirs, saving the right of all persons whatsoever; or vests the land of A in the king, saving the right of A: in either of these cases the saving is totally repugnant to the body of the statute, and (if good) would render the statute of no effect or operation; and therefore the saving is void, and the land vests absolutely in the king[k].

7. Where the common law and a statute, differ, the common law gives place to the statute, and an old statute gives place to a new one. And this upon a general principle of universal law, that "*leges posteriores priores contrarias abro-*

k 1 Rep. 47.

18. But this maxim is to be understood as relating only to Laws made by a Legislature possessing equal, or superior powers, to that by which the first law was made. Thus Congress may alter, repeal or annul any of its own acts: and in some few cases they may even annul the acts of the state legislatures should they attempt to legislate upon any subjects which the constitution of the United States prohibits; if, for example, the legislature of a State should declare all contracts made before, or after a certain day to be void; Congress (should they deem it necessary) might I presume, pass a subsequent act repealing such unconstitutional act, though without any such repeal, the act being contrary to the constitution would be void of itself. But should Congress attempt to pass a law contrary to the constitution of the United States, or should the state legislature make a similar attempt against it, or against the State Constitution; such acts, though cloathed with all the forms of Law, would not be law, nor repeal in any measure what was established by a higher authority, to wit, that of the people. Yet the People whenever they see fit may make any alterations in the Constitution which they may deem necessary to their happiness, and the prosperity of the nation.

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gant[18]:" consonant to which it was laid down by a law of the twelve tables of Rome, that "*quod populus postremum jussit, id jus ratum esto.*" But this is to be understood, only when the latter statute is couched in negative terms, or where it's matter is so clearly repugnant, that it necssarily implies a negative.... As if a former act says, that a juror upon such a trial shall have twenty pounds a year; and a new statute afterwards enacts, that he shall have twenty marks: here the latter statute, though it does not express, yet necessarily implies a negative, and, virtually repeals the former. For if twenty marks be made qualification sufficient, the former statute which requires twenty pounds is at an end[l]. But if both acts be merely affirmative, and the 90
substance such that both may stand together, here the latter does not repeal the former, but they shall both have a concurrent efficacy. If by a former law an offence be indictable at the quarter-sessions, and a latter law makes the same offence indictable at the assises; here the jurisdiction of the sessions is not taken away, but both have a concurrent jurisdiction, and the offender may be prosecuted at either: unless the new statute subjoins express negative words, as, that the offence shall be indictable at the assises, *and not elsewhere*[m].

8. If a statute, that repeals another, is itself repealed afterwards, the first statute is hereby revived, without any formal words for that purpose. So when the statutes of 26 and 35 Hen. VIII, declaring the king to be the supreme head of the church, were repealed by a statute 1 and 2 Philip and Mary, and this latter statute was afterwards repealed by an act of 1 Eliz. there needed not any express words of revival in queen Elizabeth's statute, but these acts of king Henry were impliedly and virtually revived[n] [19].

l Jenk. Cent. 2. 73. m 11 Rep. 63. n 4 Inst. 325.

19. This rule of construction was altered in Virginia, by the act of 1789. c. 9. by which it is declared, "That whensoever one law, "which shall have repealed another, shall be itself repealed, the "former law shall not be revived without express words to that ef-"fect."

A second rule of construction prescribed by that act, is, "that "every act passed during any stated annual session, shall commence "in force on the first day of March, then next ensuing, unless in the

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9. Acts of parliament derogatory from the power of subsequent parliaments bind not. So the statute 11 Hen. VII. c. 1. which directs, that no person for assisting a king *de facto* shall

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" act itself, another day be particularly mentioned for the commence-
" ment thereof."

A third rule of construction prescribed by the same act, is, " that " as often as a question shall arise, whether a law passed during " any session, changes or repeals a former law, passed during the " same session, the same construction shall be made, as would have " been made, if the act entitled an act concerning elections of mem-
" bers of General Assembly, had never been passed."

This act commenced on the fifteenth day of January 1790. It was casually omitted in the Edition of 1794, being consolidated in a bill which did not pass. It is however still in force....The act referred to in the latter rule above mentioned, (passed in October 1785) containst his clause...." that all acts shall commence from their pas-
" sage, unless in the act itself another day is appointed for its com-
" mencement."

In the case of Proudfit *vs.* Maury, this act received an exposition in the Court of Appeals, which I presume settles the much agitated question relative to those laws passed in the session of 1792, which were suspended by an act of the same session, ch. 150. The case is thus stated by *Pendleton*, president:

" An act passed November 12, 1792, relative to protested Bills of Exchange, repealing all former acts on the subject; and to commence from the passing.

" The 28th of December 1792, an act passed, declaring the operation of this and many other alike circumstanced, to be suspended until October 1st. 1793,

" During this suspension, to wit, in February 1793, the Bill on which the suit was brought was drawn; and would within the saving of the new act of 1792, be considered as commencing in October 1793.

" But it is relied on, that the act of November was in force from its passage, 'till December the 28th. and therefore, that under the act of 1789. c. 9. the law of 1748, was effectually repealed, dead, and gone, for a month and sixteen days; and could only be revived by an express declaration of the Legislature. Because, since the act of 1789. c. 9. the repeal of a repealing law does not revive the repealed law, without a direction to that effect.

" The rule in England is the reverse; a repealed law is revived, by the repeal of that which has stopped its force. A rule certainly inconvenient; since old acts, long since forgotten, might be revived upon the community; affecting their persons and proper-

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be attainted of treason by act of parliament or otherwise, is held to be good only as to common prosecutions for high treason; but will not restrain or clog any parliamentary attainder[o]. Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if it's ordinances could bind a subsequent parliament. And upon the same principle Cicero, in his letters to Atticus, treats with a proper contempt these restraining clauses, which endeavour to tie up the hands of succeeding legislatures. "When you "repeal the law itself, says he, you at the same time repeal the 91
"prohibitory clause, which guards against such repeal[p]."

10. Lastly, acts of parliament that are impossible to be performed are of no validity: and if there arise out of them collaterally any absurd consequences, manifestly contradictory to

o 4 Inst. 43.

p *Cum lex abrogatur, illad ipsum abrogatur, quo non eam abrogari oporteut. l. ep.* 23.

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ty upon a legal fiction without notice that such was the case; which inconvenience was properly removed by the Act of 1789.

"But, as the inconvenience could not happen in the case of the repeal of an Act possed the same session (not gone forth among the citzens, but known only to the Legislature) I was struck with an impression, that to such Laws, the Legislature never meant their rule should extend; and doubted, whether this being a repealing Law, never repealed, but suspended, only, for a time, and yet in force, came within the letter or spirit of the act of 1789. However, we were relieved from all difficulty by recurring to the act itself, where the doubt is stated and solved. The president then proceeds to state the third rule of construction prescribed by the act of 1789, as above cited; as also that part of the act of October 1785. which is before mentioned, and then proceeds thus: This latter law being declared to have no operation on the question, what was the rule of construction before? Why, that all laws were considered as passed on the first day of the session. According to this rule then, the original act and that for it's suspension, commenced together." Call's rep. vol. 1. 401.

This very important decision may be considered as settling the law in an infinite number of cases of difficulty, arising under the various laws, enacted, suspended, and repealed, during the session of 1792.

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common reason, they are, with regard to those collateral consequences, void. I lay down the rule with these restrictions; though I know it is generally laid down more largely, that acts of parliament contrary to reason are void[20]. But if the parali-

20. One would imagine that it could not be deemed any great stretch of the freedom of opinion, to pronounce that any legislative act which prescribes a thing contrary to reason, is void; yet the caution of the learned commentator on this occasion is certainly conformable to the principles of the British government; in which, it seems to be agreed by all their Jurists, the authority of parliament is absolute and uncontrollable; insomuch that it may alter or change the Constitution itself. But, in America, the Constitutions, both of the individual States, and of the federal Government, being the acts of the people, and not of the Government, and the powers of Government being by those Constitutions, respectively, distributed into three distinct, and co-ordinate, branches; viz: the legislature, the executive, and the judiciary; all which are equally bound by Duty to their Constituents, the people; and by Oath, also, to support the Constitution; it follows, as has been already shewn [Appendix, Note A.] that the legislature can possess, no power, or obligation over the other Branches of Government, in any case, where the principles of the Constitution, may be in any degree infringed by an acquiescence under the authority of the legislative department. The examples supposed, and the authority cited in that note, sufficiently evince the Justice of the position here contended for; and will warrant us in extending the rule here laid down by the learned commentator, by adding thereto, That all acts of the Congress of the United States, impairing, infringing or violating the principles of the federal Constitution; and all acts of the legislature of this Commonwealth, which violate, infringe or impair the same, or any law of the United States made pursuant to the powers granted to the Congress by the federal Constitution, or any Treaty made under the authority of the United States, or the Bill of Rights, and Constitution of this Commonwealth, are not binding upon any other branch of the federal or State-government: and any Citizen of the Commonwealth, who may be aggrieved by any such unconstitutional Act, hath an undoubted right to redress, by application to the judicial Courts of the State, or of the United States according to the nature of the case. "The constitution and its laws," as Vattel justly observes, "are the basis of the public tranquility, "the firmest support of the public authority, and pledge of the liber- "ty of the citizens. But this Constitution is a vain phantom, and "the best Laws are useless, if they are not religiously observed. "The nation ought then to watch very attentively, in order to ren-

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ment will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution, that is vested with authority to control it: and the examples usually alleged in support of this sense of the rule do none of them prove, that, where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government. But where some collateral matter arises out of the general words, and happens to be unreasonable; there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it. Thus if an act of parliament gives a man power to try all causes, that arise within his manor of Dale; yet, if a cause should arise in which he himself is party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel[q]. But, if we could conceive it possible for the parliament to enact, that he should try as well his own causes as those of other persons, there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no.

These are the several grounds of the laws of England: over and above which, equity is also frequently called in to assist, to 92
moderate, and to explain them. What equity is, and how impossible in it's very essence to be reduced to stated rules, hath

[q] 8. Rep. 118.

" der them equally respected by those who govern, and by the peo-
" ple destined to obey. To attack the Constitution of the State, and
" to violate its laws is a capital crime against the society, and if
" those guilty of it are invested with authority, they add to this
" crime a perfidious abuse of the power with which they are en-
" trusted. The nation ought constantly to suppress these abuses,
" with its utmost vigor, and vigilance, as the importance of the case
" requires. It is very uncommon to see the Laws and Constitution of
" the State, openly and boldly opposed; it is against silent and slow
" attacks that a nation ought to be particularly on its guard." Vattel's Law of nations B: 1. 3. act: 30.

See also, the Federalist; vol: 2, no: 78.

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been shewn in the preceding section. I shall therefore only add, that (besides the liberality of sentiment with which our common law judges interpret acts of parliament, and such rules of the unwritten law as are not of a positive kind) there are also peculiar courts of equity established for the benefit of the subject; to detect latent frauds and concealments, which the process of the courts of law is not adapted to reach; to enforce the execution of such matters of trust and confidence, as are binding in conscience, though not cognizable in a court of law; to deliver from such dangers as are owing to misfortune or oversight; and to give a more specific relief, and more adapted to the circumstances of the case, than can always be obtained by the generality of the rules of the positive or common law. This is the business of our courts of equity, which however are only conversant in matters of property. For the freedom of our constitution will not permit, that in criminal cases a power should be lodged in any judge, to construe the law otherwise than according to the letter. This caution, while it admirably protects the public liberty, can never bear hard upon individuals. A man cannot suffer *more* punishment than the law assigns, but he may suffer *less*. The laws cannot be strained by partiality to inflict a penalty beyond what the letter will warrant; but, in cases where the letter induces any apparent hardship, the crown has the power to pardon.

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SECTION THE FOURTH.

OF THE COUNTRIES SUBJECT TO THE LAWS OF ENGLAND.

THE kingdom of England, over which our municipal laws have jurisdiction, includes not, by the common law, either Wales, Scotland, or Ireland, or any other part of the king's dominions, except the territory of England only. And yet the civil laws and local customs of this territory do now obtain, in part or in all, with more or less restrictions, in these and many other adjacent countries; of which it will be proper first to take a view, before we consider the kindom of England itself, the original and proper subject of these laws.

Wales had continued independent of England, unconquered and uncultivated, in the primitive pastoral state which Caesar and Tacitus ascribe to Britain in general, for many centuries; even from the time of the hostile invasions of the Saxons, when the ancient and christian inhabitants of the island retired to those natural intrenchments, for protection from their pagan visitants. But when these invaders themselves were converted to christianity, and settled into regular and potent governments, this retreat of the antient Britons grew every day narrower; they were over-run by little and little, gradually driven from one fastness to another, and by repeated losses abridged of their wild independence. Very early in our history we find their princes doing homage to the crown of England; till at length in the reign of Edward the first, who may justly be stiled the conqueror of Wales, the line of their antient princes was abo- 94
lished, and the king of England's eldest son became, as a matter of course, their titular prince; the territory of Wales being then entirely re-annexed (by a kind of feodal resumption) to the

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dominion of the crown of England[a]; or, as the statute of Rhudhlan[b] expresses it, "*terra Walliae cum incolis suis, prius* "*regi jure feodali subjecta*, (of which homage was the sign) *jam* "*in proprietatis dominium totaliter et cum integritate conversa* "*est, et coronae regni Angliae tanquam pars corporis ejusdem* "*annexa et unita.*" By the statute also of Wales[c] very material alterations were made in divers parts of their laws, so as to reduce them nearer to the English standard, especially in the forms of their judicial proceedings: but they still retained very much of their original polity; particularly their rule of inheritance, *viz.* that their lands were divided equally among all the issue male, and did not descend to the eldest son alone. By other subsequent statutes their provincial immunities were still farther abridged: but the finishing stroke to their independency was given by the statute 27 Hen. VIII. c. 26. which at the same time gave the utmost advancement to their civil prosperity, by admitting them to a thorough communication of laws with the subjects of England. Thus were this brave people gradually conquered into the enjoyment of true liberty; being insensibly put upon the same footing, and made fellow-citizens with their conquerors. A generous method of triumph, which the republic of Rome practised with great success; till she reduced all Italy to her obedience, by admitting the vanquished states to partake of the Roman privileges.

It is enacted by this statute 27 Hen. VIII, 1. That the dominion of Wales shall be for ever united to the kingdom of England. 2. That all Welshmen born shall have the same liberties as other the king's subjects. 3. That lands in Wales shall be inheritable according to the English tenures and rules of descent. 4. That the laws of England, and no other, shall
95 be used in Wales: besides many other regulations of the police of this principality. And the statute 34 and 35 Hen. VIII, c. 26. confirms the same, adds farther regulations, divides it into twelve shires, and, in short, reduces it into the same order in which it stands at this day; differing from the kingdom of England in only a few particulars, and those too of the nature of pri-

a Vaugh. 400.
b 10 Edw. I.
c 12 Edw. I.

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vileges, (such as having courts within itself, independent of the process of Westminster-hall,) and some other immaterial peculiarities, hardly more than are to be found in many counties of England itself.

The kingdom of Scotland, notwithstanding the union of the crowns on the accession of their king James VI. to that of England, continued an entirely separate and distinct kingdom for above a century more, though an union had been long projected; which was judged to be the more easy to be done, as both kingdoms were antiently under the same government, and still retained a very great resemblance, though far from an identity, in their laws. By an act of parliament 1 Jac. I. c. 1. it is declared, that these two mighty, famous, and antient kingdoms were formerly one. And sir Edward Coke observes[d], how marvellous a conformity there was, not only in the religion and language of the two nations, but also in their antient laws, the descent of the crown, their parliaments, their titles of nobility, their officers of state and of justice, their writs, their customs, and even the language of their laws. Upon which account he supposes the common law of each to have been originally the same; especially as their most antient and authentic book, called *regiam majestatem*, and containing the rules of *their* antient common law, is extremely similar to that of Glanvil, which contains the principles of *ours*, as it stood in the reign of Henry II. And the many diversities, subsisting between the two laws at present, may be well enough accounted for, from a diversity of practice in two large and uncommunicating jurisdictions, and from the acts of two distinct and independent parliaments, which have in many points altered and abrogated the old common law of both kingdoms.

However, sir Edward Coke, and the politicians of that time, 96
conceived great difficulties in carrying on the projected union: but these were at length overcome, and the great work was happily effected in 1707, 6 Anne; when twenty-five articles of union

d 4 Isnt. 345.

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were agreed to by the parliaments of both nations; the purport of the most considerable being as follows:

1. That on the first of May, 1707, and for ever after, the kingdoms of England and Scotland shall be united into one kingdom, by the name of Great Britain.

2. The succession to the monarchy of Great Britain shall be the same as was before settled with regard to that of England.

3. The united kingdom shall be represented by one parliament.

4. There shall be a communication of all rights and privileges between the subjects of both kingdoms, except where it is otherwise agreed.

9. When England raises 2,000,000*l.* by a land-tax, Scotland shall raise 48,000*l.*

16, 17. The standards of the coin, of weights, and of measures, shall be reduced to those of England, throughout the united kingdoms.

18. The laws relating to trade, customs, and the excise, shall be the same in Scotland as in England. But all the other laws of Scotland shall remain in force; though alterable by the parliament of Great Britain. Yet with this caution: that laws relating to public policy are alterable at the discretion of the parliament; laws relating to private right are not to be altered but for the evident utility of the people of Scotland.

97 22. Sixteen peers are to be chosen to represent the peerage of Scotland in parliament, and forty-five members to sit in the house of commons.

23. The sixteen peers of Scotland shall have all privileges of parliament: and all peers of Scotland shall be peers of Great

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Britain, and rank next after those of the same degree at the time of the union, and shall have all privileges of peers, except sitting in the house of lords and voting on the trial of a peer.

These are the principal of the twenty-five articles of union, which are ratified and confirmed by statute 5 Ann. c. 8. in which statute there are also two acts of parliament recited; the one of Scotland, whereby the church of Scotland and also the four universities of that kingdom, are established for ever, and all succeeding sovereigns are to take an oath inviolably to maintain the same: the other of England, 5 Ann. c. 6. whereby the acts of uniformity of 13 Eliz. and 13 Car. II. (except as the same had been altered by parliament at that time) and all other acts then in force for the preservation of the church of England, are declared perpetual; and it is stipulated, that every subsequent king and queen shall take an oath inviolably to maintain the same within England, Ireland, Wales, and the town of Berwick upon Tweed. And it is enacted, that these two acts "shall for "ever be observed as fundamental and essential conditions of "the union."

Upon these articles and act of union, it is to be observed, 1. That the two kingdoms are now so inseparably united, that nothing can ever disunite them again; except the mutual consent of both, or the successful resistance of either, upon apprehending an infringment of those points which, when they were separate and independent nations, it was mutually stipulated should be "fundamental and essential conditions of the union[e]. 2. That

e It may justly be doubted, whether even such an infringement (though a manifest breach of good faith, unless done upon the most pressing necessity) would of itself dissolve the union: for the bare idea of a state, without a power somewhere vested to alter every part of it's laws, is the height of political absurdity. The truth seems to be, that in such an *incorporate union* (which is well distinguished by a very learned prelate from a *foederate alliance*, where such an infringement would certainly rescind the compact) the two contracting states are totally annihilated, without any power of a revival; and a third arises from their conjunction, in which all the rights of sovereignty, and particularly that of legislation, must of necessity reside. (See Warburton's alliance, 195.) But the wanton or imprudent exertion of this right would probably raise a very alarming ferment in the minds of individuals; and therefore it is hinted above that such an attempt might *endanger* (though by no means *destroy*) the union.

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whatever else may be deemed "fundamental and essential con-"ditions," the preservation of the two churches, of England and Scotland, in the same state that they were in at the time of the union, and the maintenance of the acts of uniformity which establish our common prayer, are expressly declared so to be. 3. That therefore any alteration in the constitution of either of those churches, or in the liturgy of the church of England, (unless with the consent of the respective churches, collectively or representatively given,) would be an infringment of these "fun-"damental and essential conditions," and greatly endanger the union. 4. That the municipal laws of Scotland are ordained to be still observed in that part of the island, unless altered by parliament; and, as the parliament has not yet thought proper, except in a few instances, to alter them, they still (with regard to the particulars unaltered) continue in full force. Wherefore the municipal or common laws of England are, generally speaking, of no force or validity in Scotland; and of consequence, in the ensuing commentaries, we shall have very little occasion to mention, any farther than sometimes by way of illustration, the municipal laws of that part of the united kingdoms.

The town of Berwick upon Tweed was originally part of the
99 kingdom of Scotland; and, as such, was for a time reduced by king Edward I. into the possession of the crown of England: and, during such it's subjection, it received from that prince a charter, which (after its subsequent cession by Edward Balliol, to be for ever united to the crown and realm of England) was

To illustrate this matter a little farther: an act of parliament to repeal or alter the act of uniformity in England, or to establish episcopacy in Scotland, would doubtless in point of authority be sufficiently valid and binding; and, notwithstanding such an act, the union would continue unbroken. Nay, each of these measures might be safely and honourably pursued, if respectively agreeable to the sentiments of the English church, or the kirk in Scotland. But it should seem neither prudent, nor perhaps consistent with good faith, to venture upon either of those steps, by a spontaneous exertion of the inherent powers of parliament, or at the instance of mere individuals....So sacred indeed are the laws abovementioned (for protecting each church and the English liturgy) esteemed, that in the regency acts both of 1751 and 1765 the regents are expressly disabled from assenting to the repeal or alteration of either these, or the act of settlement.

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confirmed by king Edward III, with some additions; particularly that it should be governed by the laws and usages which it enjoyed during the time of king Alexander, that is before it's reduction by Edward I. It's constitution was new-modelled, and put upon an English footing by a charter of king James I: and all it's liberties, franchises, and customs, were confirmed in parliament by the statutes 22 Edw. IV. c. 8. and 2 Jac. I. c. 28. Though therefore it hath some local peculiarities, derived from the antient laws of Scotland[f], yet it is clearly part of the realm of England, being represented by burgesses in the house of commons, and bound by all acts of the British parliament, whether specially named or otherwise. And therefore it was (perhaps superfluously) declared by statute 20 Geo. II. c. 42. that, where England only is mentioned in any act of parliament, the same notwithstanding hath and shall be deemed to comprehend the dominion of Wales and town of Berwick upon Tweed. And though certain of the king's writs or processes of the courts of Westminster do not usually run into Berwick, any more than the principality of Wales, yet it hath been solemnly adjudged[g] that all prerogative writs (as those of *mandamus*, prohibition, *habeas corpus*, *certiorari*, &c.) may issue to Berwick as well as to every other of the dominions of the crown of England, and that indictments and other local matters arising in the town of Berwick may be tried by a jury of the county of Northumberland.

As to Ireland, that is still a distinct kingdom; though a dependent subordinate kingdom. It was only entitled the dominion or lordship of Ireland[h] and the king's stile was no other 100
than *dominus Hiberniae*, lord of Ireland, till the thirty-third year of king Henry the eighth; when he assumed the title of king, which is recognized by act of parliament 35 Hen. VIII. c. 3. But, as Scotland and England are now one and the same kingdom, and yet differ in their municipal laws; so England and Ireland are, on the other hand, distinct kingdoms, and yet in general agree in their laws. The inhabitants of Ireland are, for

f Hale Hist. C. L. 183. 1 Sid. 382. 462. 2 Show. 365.
g Cro. Jac. 543. 2 Roll. abr. 292. Stat. 11 Geo. I. c. 4. 4 Burr. 834.
h *Stat. Hiberniae.* 14 Hen. III.

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the most part, descended from the English, who planted it as a kind of colony, after the conquest of it by king Henry the second: and the laws of England were then received and sworn to by the Irish nation, assembled at the council of Lismore[i]..... And as Ireland, thus conquered, planted, and governed, still continues in a state of dependence, it must necessarily conform to, and be obliged by, such laws as the superior state thinks proper to prescribe.

At the time of this conquest the Irish were governed by what they call the Brehon law, so stiled from the Irish name of judges, who were denominated Brehons[k]. But king John in the twelfth year of his reign went into Ireland and carried over with him many able sages of the law; and there by his letters patent, in right of the dominion of conquest, is said to have ordained and established that Ireland should be governed by the laws of England[l]: which letters patent sir Edward Coke[m] apprehends to have been there confirmed in parliament. But to this ordinance many of the Irish were averse to conform, and still stuck to their Brehon law: so that both Henry the third[n] and Edward the first[o] were obliged to renew the injunction; and at length in a parliament holden at Kilkenny, 40 Edw. III. under Lionel the duke of Clarence, then lieutenant of Ireland, the Brehon law was formally abolished, it being unanimously declared to be indeed no law, but a lewd custom crept in of later
101 times. And yet, even in the reign of queen Elizabeth, the wild natives still kept and preserved their Brehon law; which is described[q] to have been "a rule of right unwritten, but delivered "by tradition from one to another, in which oftentimes there ap- "peared great shew of equity in determining the right between "party and party, but in many things repugnant quite both to

i Pryn. on 4 inst. 249.

k 4 Inst. 358. Edm. Spenser's state of Ireland. p. 1513. edit. Hughes.

l Vaugh. 294. 2. Pryn. Rec. 85. 7 Rep. 23. m 1 Inst. 141.

n *A. R.* 30. 1 Rym. *Feod.* 442.

o *A. R.* 5.—*pro eo quod leges quibus utuntur Hybernici Deo detestabiles existunt, et omni juri dissonant, adeo, quod leges censeri non debeant; nobis et consilio nostro satis videtur expediens, eisdem utendas concedere leges Anglicanas.* 3 Pryn. Rec. 1218.

p Edm. Spenser, *ibid.*

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"God's laws and man's." The latter part of this character is alone ascribed to it, by the laws before-cited of Edward the first and his grandson.

But as Ireland was a distinct dominion, and had parliaments of it's own, it is to be observed, that though the immemorial customs, or common law, of England were made the rule of justice in Ireland also, yet no acts of the English parliament, since the twelfth of king John, extended into that kingdom; unless it were specially named, or included under general words, such as, "within any of the king's dominions." And this is particularly expressed, and the reason given in the year books[q]: "a tax "granted by the parliament of England shall not bind those of "Ireland, because they are not summoned to our parliament;" and again, "Ireland hath a parliament of its own, and maketh "and altereth laws; and our statutes do not bind them, because "they do not send knights to our parliament: but their persons "are the king's subjects, like as the inhabitants of Calais, Gas-"coigne, and Guienne, while they continued under the king's "subjection." The general run of laws, enacted by the superior state, are supposed to be calculated for it's own internal government, and do not extend to it's distant dependent countries; which, bearing no part in the legislature, are not therefore in its ordinary and daily contemplation. But, when the sovereign legislative power sees it necessary to extend it's care to any of it's subordinate dominions, and mentions them expressly by name or includes them under general words, there can be no doubt but then they are bound by it's laws[r].

The original method of passing statutes in Ireland was nearly the same as in England, the chief governor holding parlia- 102
ments at his pleasure, which enacted such laws as they thought proper[s]. But an ill use being made of this liberty, particularly by lord Gormanstown, deputy-lieutenant in the reign of Edward IV[t], a set of statutes were there enacted in the 10 Hen. VII. (sir Edward Poynings being then lord deputy, whence they are

q 20 Hen. VI. 8. 2 Ric. III. 12.
r Yearbook 1 Hen. VII. 3. 7 Rep. 22 Calvin's case.
s Irish Stat. 11 Eliz. st. 3. c. 8.
t *Ibid.* 10 Hen. VII. c. 22.

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called Poyning's laws) one of which[u], in order to restrain the power as well of the deputy as the Irish parliament, provides, 1. That, before any parliament be summoned or holden, the chief governor and council of Ireland shall certify to the king under the great seal of Ireland the considerations and causes thereof, and the articles of the acts proposed to be passed therein. 2. That after the king, in his council of England, shall have considered, approved, or altered the said acts or any of them, and certified them back under the great seal of England, and shall have given licence to summon and hold a parliament, then the same shall be summoned and held; and therein the said acts so certified, and no other, shall be proposed, received, or rejected[w]. But as this precluded any law from being proposed, but such as were pre-conceived before the parliament was in being, which occasioned many inconveniences and made frequent dissolutions necessary, it was provided by the statute of Philip and Mary before-cited, that any new propositions might be certified to England in the usual forms, even after the summons and during the session of parliament. By this means however there was nothing left to the parliament in Ireland, but a bare negative or power of rejecting, not of proposing or altering, any law. But the usage now is, that bills are often framed in either house, under the denomination of "heads for a bill or bills:" and in that shape they are offered to the consideration of the lord lieutenant and privy council: who, upon such parliamentary intimation, or otherwise upon the application of private persons, receive and transmit such heads, or reject them without any transmission to England. And with regard to Poynings' law in particular, it cannot be
103 repealed or suspended, unless the bill for that purpose, before it be certified to England, be approved by both the houses[x].

But the Irish nation, being excluded from the benefit of the English statutes, were deprived of many good and profitable laws, made for the improvement of the common law: and the measure of justice in both kingdoms becoming thence no longer

u Cap. 4. expounded by 3 & 4 Ph. and M. c. 4.
w 4 Inst. 353.
x Irish Stat. 11 Eliz. st. 3. c. 38.

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uniform, it was therefore enacted by another of Poynings' laws[y], that all acts of parliament, before made in England, should be of force within the realm of Ireland[z]. But, by the same rule, that no laws made in England, between king John's time and Poynings' law, were then binding in Ireland, it follows that no acts of the English parliament made since the 10 Hen. VII. do now bind the people of Ireland, unless specially named or included under general words[a]. And on the other hand it is equally clear, that where Ireland is particularly named, or is included under general words, they are bound by such acts of parliament. For this follows from the very nature and constitution of a dependent state: dependence being very little else, but an obligation to conform to the will or law of that superior person or state, upon which the inferior depends. The original and true ground of this superiority, in the present case, is what we usually call, though somewhat improperly, the right of conquest: a right allowed by the law of nations, if not by that of nature; but which in reason and civil policy can mean nothing more, than that, in order to put an end to hostilities, a compact is either expressly or tacitly made between the conqueror and the conquered, that if they will acknowledge the victor for their master, he will treat them for the future as subjects, and not as enemies[b].

But this state of dependence being almost forgotten, and ready to be disputed by the Irish nation, it became necessary some years ago to declare how that matter really stood: and therefore by statute 6 Geo. I. c. 5. it is declared, that the kingdom of Ireland ought to be subordinate to, and dependent upon, 104
the imperial crown of Great Britain, as being inseparably united thereto; and that the king's majesty, with the consent of the lords and commons of Great Britain in parliament, hath power to make laws to bind the people of Ireland.

Thus we see how extensively the laws of Ireland communicate with those of England: and indeed such communication is highly necessary, as the ultimate resort from the courts of justice in Ireland is, as in Wales, to those in England; a writ of

y cap. 22.
z 4 Inst. 351.
a 12 Rep. 112.
b Puff. L. of N. viii. 6. 24.

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error (in the nature of an appeal) lying from the king's bench in Ireland to the king's bench in England[c], as the appeal from the chancery in Ireland lies immediately to the house of lords here; it being expressly declared, by the same statute 6 Geo. I. c. 5. that the peers of Ireland have no jurisdiction to affirm or reverse any judgments or decrees whatsoever. The propriety, and even necessity, in all inferior dominions, of this constitution, "that, "though justice be in general administered by courts of their "own, yet that the appeal in the last resort ought to be to the "courts of the superior state," is founded upon these two reasons. 1. Because otherwise the law, appointed or permitted to such inferior dominion, might be insensibly changed within itself, without the assent of the superior. 2. Because otherwise judgments might be given to the disadvantage or diminution of the superiority; or to make the dependence to be only of the person of the king, and not of the crown of England[d].

105 With regard to the other adjacent islands which are subject to the crown of Great Britain, some of them (as the isle of 106 Wight, of Portland, of Thanet, &c.) are comprized within some neighbouring county, and are therefore to be looked upon as annexed to the mother island, and part of the kingdom of England. But there are others which require a more particular consideration.

And, first, the isle of Man is a distinct territory from England, and is not governed by our laws: neither doth any act of parliament extend to it, unless it be particularly named therein: and then an act of parliament is binding there[e]. It was formerly a subordinate feudatory kingdom, subject to the kings of Norway; then to king John and Henry III. of England; afterward to the kings of Scotland; and then again to the crown of England: and at length we find king Henry IV. claiming the island by right of conquest, and disposing of it to the earl of Northumberland; upon whose attainder it was granted (by the name of the lordship of Man) to sir John de Stanley by letters patent

c This was law in the time of Hen. VIII; as appears by the ancient book, entituled, *diversity of courts, c. bank le roy.*

d Vaugh. 402. e 4 Inst. 284. 2 And. 116.

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7 Henry IV[f]. In his lineal descendants it continued for eight generations, till the death of Ferdinando earl of Derby, *A. D.* 1594: when a controversy arose concerning the inheritance thereof, between his daughters and William his surviving brother: upon which, and a doubt that was started concerning the validity of the original patents[g], the island was seised into the queen's hands, and afterwards various grants were made of it by king James the first; all which being expired or surrendered, it was granted afresh in 7 Jac I. to William earl of Derby, and the heirs male of his body, with remainder to his heirs general; which grant was the next year confirmed by act of parliament, with a restraint of the power of alienation by the said earl and his issue male. On the death of James earl of Derby, *A. D.* 1735, the male line of earl William failing, the duke of Atholl 107
succeeded to the island as heir general by a female branch. In the mean time, though the title of king had long been disused, the earls of Derby, as lords of Man, had maintained a sort of royal authority therein; by assenting or dissenting to laws, and exercising an appellate jurisdiction. Yet, though no English writ, or process from the courts of Westminster, was of any authority in Man, an appeal lay from a decree of the lord of the island to the king of Great Britain in council[h]. But the distinct jurisdiction of this little subordinate royalty being found inconvenient for the purposes of public justice, and for the revenue, (it affording a commodious asylum for debtors, outlaws, and smugglers,) authority was given to the treasury by statute 12 Geo. I. c. 28. to purchase the interest of the then proprietors for the use of the crown: which purchase was at length compleated in the year 1765, and confirmed by statutes 5 Geo. III. c. 26 and 39. whereby the whole island and all it's dependencies, so granted as aforesaid, (except the landed property of the Atholl family, their manerial rights and emoluments, and the patronage of the bishopric[i] and other ecclesiastical benefices,) are unalienably

f Selden. tit. hon. 1. 3.

g Camden. Eliz. *A. D.* 1594.

h 1 P. Wms. 329.

i The bishopric of Man, or Sodor, or Sodor and Man, was formerly within the province of Canterbury, but annexed to that of York by statute 33 Hen. VIII. c. 31.

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vested in the crown, and subjected to the regulations of the British excise and customs.

The islands of Jersey, Guernsey, Sark, Alderney, and their appendages, were parcel of the duchy of Normandy, and were united to the crown of England by the first princes of the Norman line. They are governed by their own laws, which are for the most part the ducal customs of Normandy, being collected in an antient book of very great authority, entituled, *le grand coustumier*. The king's writ, or process, from the courts of Westminster, is there of no force; but his commission is..... They are not bound by common acts of our parliaments, unless particularly named[k]. All causes are originally determined by their own officers, the bailiffs and jurats of the islands; but an appeal lies from them to the king and council, in the last resort.

108 Besides these adjacent islands, our more distant plantations in America, and elsewhere, are also in some respect subject to the English laws. Plantations or colonies, in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desart and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have either gained, by conquest, or ceded to us 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 these two species of colonies, with respect to the laws by which they are bound. For it hath been held[l], that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject[m], are immediately there in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law, as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries.... The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue, (such especially as are inforced by penalties) the mode of maintenance for the established clergy, the jurisdiction

k 4 Inst. 286. l Salk. 411. 666. m 2 P. Wms. 75.

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of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the revision and control of the king in council: the whole of their constitution being also liable to be new-modelled and reformed by the general superintending power of the legislature in the mother country. 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 antient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country[n]..... 109
Our American plantations are principally of this latter sort, being obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall not at present enquire) or by treaties. And therefore the common law of England, as such, has no allowance or authority there[1]; they being no part of the mother country, but distinct (though dependent) dominions. They are subject however to the controul of the parliament, though (like Ireland, Man, and the rest) not bound by any acts of parliament, unless particularly named.

With respect to their interior polity, our colonies are properly of three sorts. 1. Provincial establishments, the constitutions of which depend on the respective commissions issued by the crown to the governors, and the instructions which usually accompany those commissions; under the authority of which, provincial assemblies are constituted, with the power of making local ordinances, not repugnant to the laws of England. 2. Proprietary governments, granted out by the crown to individuals, in the nature of feudatory principalities, with all the inferior regalities, and subordinate powers of Legislation, which formerly belonged to the owners of counties palatine: yet still with these express conditions, that the ends for which the grant was

n 7 Rep. 17. Calvin's case. Show. Parl. C. 31. [*See also in the case of Campbell, v. Hall. Cowp. Rep.* 204. *a great and elaborate argument of Lord Mansfield, in delivering the judgment of the court of king's bench.*]

1. See Appendix, note E.

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made be substantially pursued, and that nothing be attempted which may derogate from the sovereignty of the mother-country. 3. Charter governments, in the nature of civil corporations, with the power of making bye-laws for their own interior regulation, not contrary to the laws of England: and with such rights and authorities as are specially given them in their several charters of incorporation. The form of government in most of them is borrowed from that of England. They have a governor named by the king, (or in some proprietary colonies by the proprietor,) who is his representative or deputy. They have courts of justice of their own, from whose decisions an appeal lies to the king and council here in England. Their general assemblies which are their
110 house of commons, together with their council of state being their upper house, with the concurrence of the king or his representative the governor, make laws suited to their own emergencies. But it is particularly declared by statute 7 and 8 W. III. c. 22. that all laws, bye-laws, usages, and customs, which shall be in practice in any of the plantations, repugnant to any law, made or to be made in this kingdom relative to the said plantations, shall be utterly void and of none effect. And, because several of the colonies had claimed the sole and exclusive right of imposing taxes upon themselves, the statute 6 Geo. III. c. 12. expressly declares, that all his majesty's colonies and plantations in America have been, are, and of right ought to be, subordinate to and dependent upon the imperial crown and parliament of Great Britain; who have full power and authority to make laws and statutes of sufficient validity to bind the colonies and people of America, subjects of the crown of Great Britain, in all cases whatsoever. And this authority has been since very forcibly exemplified, and carried into act, by the statute 7 Geo. III. c. 59. for suspending the legislation of New-York; and by several subsequent statutes (*c*).

(c) [However, in the year 1782, by statute 22 Geo. III. c. 46. his majesty was empowered to conclude a peace with the colonies of New-Hampshire, Massachusetts-Bay, Rhode-Island, Connecticut, New-York, New-Jersey, Pennsylvania, the three Lower Counties on Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, in North-America, then in rebellion against their mother-country; and for that purpose, to repeal, or to suspend, the operation of any acts of parliament so far as they related

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These are the several parts of the dominions of the crown of Great Britain, in which the municipal laws of England are not of force or authority, merely *as* the municipal laws of England. Most of them have probably copied the spirit of their own law from this original; but then it receives it's obligation, and authoritative force, from being the law of the country.

111 As to any foreign dominions which may belong to the person of the king by hereditary descent, by purchase, or other acquisition, as the territory of Hanover, and his majesty's other property in Germany; as these do not in any wise appertain to the crown of these kingdoms, they are entirely unconnected with the laws of England, and do not communicate with this nation in any respect whatsoever. The English legislature had wisely remarked the inconveniences that had formerly resulted from dominions on the continent of Europe; from the Norman territory which William the conqueror brought with him, and held in conjunction with the English throne; and from Anjou, and it's appendages, which fell to Henry the second by hereditary descent. They had seen the nation engaged for near four hundred years together in ruinous wars for defence of these foreign dominions; till, happily for this country, they were lost under the reign of Henry the sixth. They observed that, from that time, the maritime interests of England were better understood and more closely pursued: that, in consequence of this attention, the nation, as soon as she had rested from her civil wars, began at this period to flourish all at once; and became much more considerable in Europe, than when her princes were possessed of a larger territory, and her councils distracted by foreign interests. This experience and these considerations gave birth to a conditional clause in the act[o] of settlement, which vested the crown in his present majesty's illustrious house, "that in case "the crown and imperial dignity of this realm shall hereafter

o Stat. 12 & 13 Will. III c. 3.

to the said colonies. Accordingly a peace was soon after concluded and the independence which the above-mentioned colonies had before declared was allowed to them; so that now they are as much independent of and unconnected with, Great Britain, as any other foreign nation.

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"come to any person not being a native of this kingdom of Eng-
"land, this nation shall not be obliged to engage in any war for
"the defence of any dominions or territories which do not belong
"to the crown of England, without consent of parliament."

We come now to consider the kingdom of England in particular, the direct and immediate subject of those laws, concerning which we are to treat in the ensuing commentaries. And this comprehends not only Wales and Berwick, of which enough has been already said, but also part of the sea. The main or high
112 seas are part of the realm of England, for thereon our courts of admiralty have jurisdiction, as will be shewn hereafter; but they are not subject to the common law[p]. This main-sea begins at the low-water-mark. But between the high-water-mark, and the low-water-mark, where the sea ebbs and flows, the common law and the admiralty have *divisum imperium*, an alternate jurisdiction; one upon the water, when it is full sea; the other upon the land when it is an ebb[q].

The territory of England is liable to two divisions; the one ecclesiastical, the other civil.

1. The ecclesiastical division is, primarily, into two provinces, those of Canterbury and York. A province is the circuit of an archbishop's jurisdiction. Each province contains divers dioceses, or sees of suffragan bishops; whereof Canterbury includes twenty-one, and York three: besides the bishoprick of the isle of Man, which was annexed to the province of York by king Henry VIII. Every diocese is divided into archdeaconries, whereof there are sixty in all; each archdeaconry into rural deaneries, which are the circuit of the archdeacon's and rural dean's jurisdiction, of whom hereafter; and every deanery is divided into parishes[r].

A parish is that circuit of ground which is committed to the charge of one parson, or vicar, or other minister having cure of souls therein. These districts are computed to be near ten thousand in number[s]. How antient the division of parishes is, may

p Co. Litt. 260. q Finch. L. 78. r Co. Litt. 94.
s Gibson's *Britan.*

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at present be difficult to ascertain; for it seems to be agreed on, all hands, that in the early ages of christianity in this island, parishes were unknown, or at least signified the same that a diocese does now. There was then no appropriation of ecclesiastical dues to any particular church; but every man was at liberty to contribute his tithes to whatever priest or church he pleased, provided only that he did it to some: or, if he made no special appointment or appropriation thereof, they were paid into the hands of the bishop, whose duty it was to distribute them among the clergy, and for other pious purposes, according to his own discretion[t].

Mr. Camden[u] says, England was divided into parishes by archbishop Honorius about the year 630. Sir Henry Hobart[w] lays it down, that parishes were first erected by the council of Lateran, which was held *A. D.* 1179. Each widely differing from the other, and both of them perhaps from the truth; which will probably be found in the medium between the two extremes. For Mr. Selden has clearly shewn[x], that the clergy lived in common without any division of parishes, long after the time mentioned by Camden. And it appears from the Saxon laws, that parishes were in being long before the date of that council of Lateran, to which they are ascribed by Hobart.

We find the distinction of parishes, nay even of mother-churches, so early as in the laws of king Edgar, about the year 970. Before that time the consecration of tithes was in general *arbitrary;* that is, every man paid his own (as was before observed) to what church or parish he pleased. But this being liable to be attended with either fraud, or at least caprice, in the persons paying; and with either jealousies or mean compliances in such as were competitors for receiving them; it was now ordered by the law of king Edgar[y], that "*dentur omnes decimae "primariae ecclesiae ad quam parochia pertinet.*" However, if any thane, or great lord, had a church, within his own demesnes, distinct from the mother church, in the nature of a private chapel; then, provided such church had a coemetery or consecrated place of burial belonging to it, he might allot one third of

t Seld. of tith. 9. 4. 2 Inst. 646. Hob. 296.
u in his *Britannia.* w Hob. 29. x of tithes, c. 9. y c. 1.

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his tithes for the maintenance of the officiating minister: but, if it had no coemetery, the thane must himself have maintained his chaplain by some other means; for in such case *all* his tithes were ordained to be paid to the *primariae ecclesiae* or mother church[z].

114 This proves that the kingdom was then generally divided into parishes; which division happened probably not all at once, but by degrees. For it seems pretty clear and certain, that the boundaries of parishes were originally ascertained by those of a manor or manors: since it very seldom happens that a manor extends itself over more parishes than one, though there are often many manors in one parish. The lords, as christianity spread itself, began to build churches upon their own demesnes or wastes, to accommodate their tenants in one or two adjoining lordships; and, in order to have divine service regularly performed therein, obliged all their tenants to appropriate their tithes to the maintenance of the one officiating minister, instead of leaving them at liberty to distribute them among the clergy of the diocese in general; and this tract of land, the tithes whereof were so appropriated, formed a distinct parish. Which will well enough account for the frequent intermixture of parishes one with another. For, if a lord had a parcel of land detached from the main of his estate, but not sufficient to form a parish of itself, it was natural for him to endow his newly erected church with the tithes of those disjointed lands; especially if no church was then built in any lordship adjoining to those outlying parcels.

Thus parishes were gradually formed, and parish churches endowed with the tithes that arose within the circuit assigned. But some lands, either because they were in the hands of irreligious and careless owners, or were situate in forests and desart places, or for other now unsearchable reasons, were never united to any parish, and therefore continue to this day extra-parochial; and their tithes are now by immemorial custom payable to the king instead of the bishop, in trust and confidence

z *Ibid* c. 2. See also the laws of king Canute, c. 11. about the year 1030.

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that he will distribute them for the general good of the church[a]: yet extraparochial wastes and marsh-lands, when improved and drained, are by the statute 17 Geo. II. c. 37. to be assessed to all parochial rates in the parish next adjoining. And thus much for the ecclesiastical division of this kingdom.

2. The civil division of the territory of England is into coun- 115
ties, of those counties into hundreds, of those hundreds into tithings or towns. Which division, as it now stands, seem to owe it's original to king Alfred, who, to prevent the rapines and disorders which formerly prevailed in the realm, instituted tithings; so called, from the Saxon, because *ten* freeholders with their families composed one. These all dwelt together, and were sureties or free pledges to the king for the good behaviour of each other; and if any offence was committed in their district, they were bound to have the offender forthcoming[b]. And therefore antiently no man was suffered to abide in England above forty days, unless he were enrolled in some tithing or decennary[c]. One of the principal inhabitants of the tithing is annually appointed to preside over the rest, being called the tithing-man, the headborough, (words which speak their own etymology) and in some countries the borsholder, or borough's-ealder, being supposed the discreetest man in the borough, town, or tithing[d].

Tithings, towns, or vills, are of the same signification in law; and are said to have had, each of them, originally a church and celebration of divine service, sacraments, and burials[e]: though that seems to be rather an ecclesiastical, than a civil, distinction. The word *town* or *vill* is indeed, by the alteration of times and language, now become a generical term, comprehending under it the several species of cities, boroughs, and common towns. A city is a town incorporated, which is or hath been the see of a bishop: and though the bishoprick be dissolved, as at Westminster, yet still it remaineth a city[f]. A borough is now

a 2 Inst. 647. 2 Rep. 44. Cro. Eliz. 512.

b *Flet.* 1. 47. This the laws of king Edward the confessor, c. 20. very justly entitled, "*summa et maxima securitas, per quam omnes statu firmissimo sustinentur; quae hoc modo fiebat, quod sub decennali fidejussione debebant esse universi &c.*"

c Mirr. c. 1. §. 3.

d Finch. L. 8.

e 1 Inst. 115.

f Co. Litt. 109.

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understood to be a town, either corporate or not, that sendeth burgesses to parliament[g]. Other towns there are, to the num-
116 ber sir Edward Coke says[h] of 8803, which are neither cities nor boroughs; some of which have the privileges of markets, and others not; but both are equally towns in law. To several of these towns there are small appendages belonging, called hamlets; which are taken notice of in the statute of Exeter[i], which makes frequent mention of entire vills, demi-vills, and hamlets. Entire vills sir Henry Spelman[k] conjectures to have consisted of ten freemen, or frank-pledges, demi-vills of five, and hamlets of less than five. These little collections of houses are sometimes under the same administration as the town itself, sometimes governed by separate officers; in which last case they are, to some purposes in law, looked upon as distinct townships. These towns, as was before hinted, contained each originally but one parish, and one tithing; though many of them now, by the encrease of inhabitants, are divided into several parishes and tithings; and, sometimes, where there is but one parish there are two or more vills or tithings.

As ten families of freeholders made up a town or tithing, so ten tithings composed a superior division, called a hundred, as consisting of ten times ten families. The hundred is governed by an high constable or bailiff, and formerly there was regularly held in it the hundred court for the trial of causes, though now fallen into disuse. In some of the more northern counties these hundreds are called wapentakes[l].

The subdivision of hundreds into tithings seems to be most peculiarly the invention of Alfred: the institution of hundreds themselves he rather introduced than invented. For they seem to have obtained in Denmark[m]: and we find that in France a regulation of this sort was made above two hundred years before; set on foot by Clotharius and Childebert, with a view of obliging each district to answer for the robberies committed in it's own division. These divisions were, in that country, as well military as civil: and each contained a hundred freemen, who were sub-

g Litt §. 164. h 1 Inst. 116. i 14 Edw. I.
k Gloss. 274. l Seld. *in Fortesc.* c. 24. m. Seld. tit. of honour. 2. 5. 3.

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ject to an officer called the *centenarius*; a number of which *centenarii* were themselves subject to a superior officer called the 117
count or *comes*[n]. And indeed something like this institution of hundreds may be traced back as far as the antient Germans, from whom were derived both the Franks who became masters of Gaul, and the Saxons who settled in England: for both the thing and the name, as a territorial assemblage of persons, from which afterwards the territory itself might probably receive it's denomination, were well known to that warlike people. "*Centeni ex singulis pagis sunt, idque ipsum inter suos vocantur; et quod primo numerus fuit, jam nomen et honor est*[o] [2]."

An indefinite number of these hundreds make up a county or shire. Shire is a Saxon word signifying a division; but a county, *comitatus*, is plainly derived from *comes*, the count of the Franks; that is, the earl, or alderman (as the Saxons called him) of the shire, to whom the government of it was entrusted. This he usually exercised by his deputy, still called in Latin *vice-comes*, and in English, the sheriff, shrieve, or shire-reeve, signifying the officer of the shire; upon whom by process of time the civil administration of it is now totally devolved. In some counties there is an intermediate division, between the shire and the hundreds, as lathes in Kent, and rapes in Sussex, each of them containing about three or four hundreds apiece..... These had formerly their lathe-reeves and rape-reeves, acting in subordination to the shire-reeve. Where a county is divided into *three* of these intermediate jurisdictions, they are called trithings[p], which were antiently governed by a trithing-reeve.... These trithings still subsist in the large county of York, where by an easy corruption they are denominated ridings; the north, the east, and the west-riding. The number of counties in Eng-

n Montesq. Sp. L. 30. 17.
o Tacit. *de morib. German.* 6.
p *LL. Edw. c.* 34.

2. It is well deserving of legislative consideration whether a similar system of Jurisprudence is capable of being introduced into the Police of the Commonwealth. Especially that part of it, in which the number of slaves, and of free people of the same complexion with them, may render a more exact attention to the Police, and good order of the state, necessary.

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land and Wales have been different at different times: at present they are forty in England, and twelve in Wales.

Three of these counties, Chester, Durham, and Lancaster, are called counties palatine. The two former are such by prescription, or immemorial custom; or, at least as old as the Norman conquest[q]: the latter was created by king Edward III, in
118 favour of Henry Plantagenet, first earl and then duke of Lancaster[r]; whose heiress being married to John of Gant the king's son, the franchise was greatly enlarged and confirmed in parliament[s], to honour John of Gant himself, whom, on the death of his father-in-law, the king had also created duke of Lancaster[t]. Counties palatine are so called *a palatio;* because the owners thereof, the earl of Chester, the bishop of Durham, and the duke of Lancaster, had in those counties *jura regalia*, as fully as the king hath in his palace; *regalem potestatem in omnibus*, as Bracton expresses it[u]. They might pardon treasons, murders, and felonies; they appointed all judges and justices of the peace; all writs and indictments ran in their names, as in other counties in the king's; and all offences were said to be done against their peace, and not, as in other places, *contra pacem domini regis*[w]. And indeed by the antient law, in all peculiar jurisdictions, offences were said to be done against his peace in whose court they were tried: in a court-leet, *contra pacem domini;* in the court of a corporation, *contre pacem ballivorum;* in the sheriff's court or tourn, *contra pacem vice-comitis*[x]. These palatine privileges (so similar to the regal independent jurisdictions usurped by the great barons on the continent, during the weak and infant state of the first feodal kingdoms in Europe[y]) were in all probability originally granted to the counties of Chester and Durham, because they bordered upon inimical countries, Wales and Scotland: in order that the inhabitants, having justice administered at home, might not be obliged to go out of the

q Seld. tit. hon. 2. 5. 8.

r *Pat.* 25 *Edw. III. p.* 1. *m.* 18. Seld. *ibid.* Sandford's gen. hist. 112. 4. 204.

s *Cart.* 36 *Edw. III. n.* 9. 7. Rym. 138.

t *Pat.* 51 *Edw. III. m.* 33 Plowd. 215.

u *l.* 3. *c.* 8. §. 4.

w 4 Inst. 204.

x Seld. *in Heng. magn.* c. 2.

y Robertson. Cha. V. i. 60.

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country, and leave it open to the enemy's incursions; and that the owners, being encouraged by so large an authority, might be the more watchful in it's defence. And upon this account also there were formerly two other counties palatine, Pembrokeshire and Hexhamshire; the latter now united with Northumberland: but these were abolished by parliament, the former in 27 Hen. VIII, the latter in 14 Eliz. And in 27 Hen. VIII, likewise, the powers before mentioned of owners of counties palatine were abridged; the reason for their continuance in a manner ceasing: though still all writs are witnessed in their names, and all forfeitures for treason by the common law accrue to them[z]. 119

Of these three, the county of Durham is now the only one remaining in the hands of a subject. For the earldom of Chester, as Camden testifies, was united to the crown by Henry III, and has ever since given title to the king's eldest son. And the county palatine, or duchy, of Lancaster, was the property of Henry of Bolingbroke, the son of John of Gant, at the time when he wrested the crown from king Richard II, and assumed the stile of king Henry IV. But he was too prudent to suffer this to be united to the crown; lest if he lost one, he should lose the other also. For, as Plowden[a] and sir Edward Coke[b] observe, "he knew he had the duchy of Lancaster by sure and indefeasible title, but that his title to the crown was not so assured: for that after the decease of Richard II, the right of the crown was in the heir of Lionel duke of Clarence, *second* son of Edward III; John of Gant, father to this Henry IV, being but the *fourth* son." And therefore he procured an act of parliament, in the first year of his reign, ordaining that the duchy of Lancaster, and all other his hereditary estates, with all their royalties and franchises, should remain to him and his heirs for ever; and should remain, descend, be administered, and governed, in like manner, as if he never had attained the regal dignity: and thus they descended to his son and grandson, Henry V and Henry VI; many new territories and privileges being annexed to the duchy by the former[c]. Henry VI. being at-

z 4 Inst. 205. a 215. b 4 Inst. 205.
c *Parl.* 2 *Hen. V. n.* 30. 3 *Hen. V. n.* 15.

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tainted in 1 Edw. IV, this duchy was declared in parliament to have become forfeited to the crown[d], and at the same time an act was made to incorporate the duchy of Lancaster, to continue the county palatine (which might otherwise have determined by the attainder[e]) and to make the same parcel of the duchy: and, farther, to vest the whole in king Edward IV and his heirs, *kings*
120 *of England*, for ever; but under a separate guiding and governance from the other inheritances of the crown. And in 1 Hen. VII another act was made, to resume such part of the duchy lands as had been dismembered from it in the reign of Edward IV, and to vest the inheritance of the whole in the king and his heirs for ever, as amply and largely, and in like manner, form, and condition, separate from the crown of England and possession of the same, as the three Henries and Edward IV, or any of them, had and held the same[f].

The isle of Ely is not a county palatine, though sometimes erroneously called so, but only a royal franchise: the bishop having, by grant of king Henry the first, *jura regalia* within the isle of Ely; whereby he exercises a jurisdiction over all causes, as well criminal as civil[g].

d 1 Ventr. 155. e 1 Ventr. 157.

f Some have entertained an opinion (Plowd. 220, 1, 2. Lamb. *Archeion.* 233. 4 Inst. 206.) that by this act the right of the duchy vested only in the *natural*, and not in the *political* person of king Henry VII, as formerly in that of Henry IV; and was descendible to his natural heirs, independent of the succession to the crown. And, if this notion were well founded, it might have become a very curious question at the time of the revolution in 1688, in whom the right of the duchy remained after king James's abdication, and previous to the attainder of the pretended prince of Wales. But it is observable, that in the same act the duchy of Cornwall is also vested in king Henry VII and his heirs; which could never be intended in any event to be separated from the inheritance of the crown. And indeed it seems to have been understood very early after the statute of Henry VII, that the duchy of Lancaster was by no means thereby made a separate inheritance from the rest of the royal patrimony; since it descended, with the crown, to the half-blood in the instances of queen Mary and queen Elizabeth: which it could not have done, as the estate of a mere duke of Lancaster, in the common course of legal descent. The better opinion therefore seems to be that of those judges, who held (Plowd. 221) that notwithstanding the statute of Hen. VII (which was only an act of resumption) the duchy still remained as established by the act of Edward IV; separate from the other possessions of the crown in order and government, but united in point of inheritance.

g 4 Inst. 220.

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There are also counties *corporate:* which are certain cities and towns, some with more, some with less territory annexed to them ; to which out of special grace and favour the kings of England have granted the privilege to be counties of themselves, and not to be comprized in any other county ; but to be governed by their own sheriffs and other magistrates, so that no officers of the county at large have any power to intermeddle therein. Such are London, York, Bristol, Norwich, Coventry, and many others[3]. And thus much of the countries subject to the laws of England.

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3. The civil division of the territory of Virginia is primarily into Counties. Formerly, there were one or more parishes in every county: in each of which a minister was established with a salary, &c. The case of the poor was another object of the parochial division, which seems now to be virtually discontinued in all,(a) as it is actually in the new-made counties. The poor are now committed to the care of the Overseers of the Poor of the District, of whom the act of 1787, chap. 48. directs that there shall be not more than four in every county.(b). There are ninety-two counties at this day.

Every county is by the constitution entitled to send two representatives to the General Assembly(c): in every county there is also held a monthly court for the trial of all causes not exceeding twenty dollars or 800 pounds of Tobacco, and for other purposes, such as the proving and recording wills, deeds, granting letters of administration &c. and generally for the regulation of the business of the county ; as also, a quarterly court for the trial and decision of all causes of a civil nature, both at common law, and in equity to any amount(d) they have also cognizance of pleas of the commonwealth in all cases where the punishment doth not extend to life or member, or to disqualification from office....The justices of the county are judges of the courts, and the sheriff, or in case of his disability, the coroner, is the ministerial officer of the Court and County. The county lieutenants heretofore had the military arrangements of the county committed to their care, each county composing one or two separate regiments of militia, commanded by proper officers. But their office seems now to be discontinued(e). The

(a) Acts of 1785. c. 34. 1794. c. 102.
(b) Edition of 1794. c. 102.
(c) C. V. Art. 5.
(d) V. L. Edi. 1794. c. 67.
(e) V. L. Edi. 1794 c. 146. 152.

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The counties are by the constitution distributed into twenty-four senatorial districts, each district being entitled to send one senator(f) The arrangement of the counties into districts for this purpose was made by the same convention which established the Constitution(g) it has not since been altered, the new-made counties having uniformly been arranged to the same district as the county or counties from which they were taken.

The adoption of the constitution of the United States made it necessary to arrange the counties into several districts for two other purposes; the first for the choice of representatives to congress, which before the census were limited to ten(h), only, including Kentucky. The second for the appointment of electors to choose a president of the United States, whose number by the constitution is to be equal to the whole number of senators and representatives, which the State is entitled to. The arrangement for these purposes was made by the acts of 1788. chap. 1. and 2....But the census being completed, it was found that the State was not adequately represented in Congress; the act for apportioning the number of representatives among the States having assigned nineteen to Virginia, a new arrangement of the counties was made by the acts of 1792. chap. 1. and 30. The second census made a further arrangement necessary; at present it is as follows; viz:

Twenty-four senatorial districts.

Twenty-one electoral districts: no new act upon this subject having been made since the last census(*); and,

Twenty-two representatives, or congressional districts(†).

There are a great many towns, or more properly speaking sites for towns established by act of Assembly in Virginia. Scarce a Session of the Assembly passes, in which, to use the emphatical expression of Mr. Jefferson the law does not say "there shall be towns where Nature hath said there shall not."....These towns have no other privileges that I know of, except conferring upon the freehold possessor of a lot therein, with a house thereon of twelve feet square, the right of suffrage (i).

There are also several corporate towns, which possess the privilege of making bye-laws for the regulation of their own police, with the further privilege of holding courts, but no other privilege, be-

(f) C. V. Art. 6.

(g) May, 1776. c. 6. Edi. 1794. c. 61.

(h) C. U. S. Art. 1. §. 2.

(*) See V. L. 1799. c. 1.

(†) V. L. 1801. c. 24.

(i) Act of 1785. c. 53. Edi. 1794. c. 17. As to the mode of supplying Vacancies if the Trustees and Directors of these unincorporated towns.... See L. V. Edi. 1794. c. 5 Sess. Acts, 1797. c. 65.

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yond the common towns above mentioned. Of these Fredericksburg, Alexandria, Petersburg, Winchester, Staunton, and York, are either the whole, or the most considerable....Norfolk is a corporate borough and is by the constitution (k) entitled to a representative in the Assembly. Williamsburg and Richmond are cities, a title which they seem to have derived from having been respectively the seat of government....Both are entitled to a representative in the General Assembly; the former by the Constitution, (l) and the latter by an act passed in the year 1788 (m). In all the corporate towns, as well as in Richmond, Williamsburg and Norfolk the jurisdiction of the courts is somewhat more limited than that of the county courts (n).

(k.) Art. 5. (l.) Ibid. (m.) c. 63.
(n.) V. L. 1787. c. 97. Edi. 1794. c. 67.

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APPENDIX

TO

VOLUME FIRST. PART FIRST.

OF THE EDITION

OF BLACKSTONE'S COMMENTARIES.

BY

ST. GEORGE TUCKER.

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APPENDIX

TO

VOLUME FIRST. PART FIRST.

OF

BLACKSTONE'S COMMENTARIES.

NOTE A.

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 where-"ever that power resides, all others must conform to and be di-"rected by it, whatever appearance the outward form and admi-"nistration 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*."

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†."

* Blackstone's Commentaries, p. 49. † Ibid. 47.

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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 hath 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 endeavour to shew, 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, &c.* so on the other they are clearly limited and restrained; as that no tax

* C. U. S. Art. 1. §. 8.

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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, &c.* 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 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†.

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 deter-

* C. U. S. Art. 1. §. 9.

† 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."

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minate objects, being no more than emanations from the former, where, and *where only*, that legislative essence which constitutes sovereignty can be found.

" 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 behaviour;" 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 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 ;* 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

* Vattel B. 1. c. 1.

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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.*

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, irresistable, absolute, uncontrollable authority, which by political writers in gen-

* See Rousseau's Social Compact.

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eral, is denominated the SOVEREIGNTY*; 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†.

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

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.

* 1. Blacks. Com. 49.

† "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.

‡ Paine's Rights of Man, part I. p. 42. Albany Edition.

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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, &c.

As the sovereign power hath no limits to its authority, so hath 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

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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 hath 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, 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

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unjust upon whatever pretence 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*.

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†. 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‡.

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 hath, on the most important occasion, which hath ever occured 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 Crea- "tor with certain unalienable rights; that among these are life, li- "berty, 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 go- "vernment, laying its foundations upon such principles, and or- "ganizing its powers in such form, as to them shall seem most

* Hutchinson's Mor. Phil. vol. 2. 221.
† Ibid. 226. 227.
‡ Ibid. 232

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"likely to effect their safety and happiness."* Such is the language of that congress which dissolved the union betwen Great Britain and America. Few are the governments of the world, antient 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 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.

* Declaration of American Independence.

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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 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.

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SECTION II.

"How the several forms of government we now see "in the world at first actually began," says the learned commentator,* "is matter of great uncertainty, and has occasion- "ed infinite disputes." The celebrated author of the Rights of Man observes† 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 priest-craft, through the medium of oracles; the second being founded in power, the sword assumed the name of a sceptre; 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 political writer in England,‡ 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.

* 1. Vol. 48. † Page 40. Albany Edition.

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

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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.*

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 hath been established upon the principles of democracy. The various revolutions in the antient 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.

* Vattel, B. 1. c. 3. §. 27.

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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, vieing 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, and became independent and sovereign republics, under a democratic form of government. When they became members of a confederacy, united for their mutual defence 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

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to exercise the supreme power. In the third case likewise, it is in general, merely constructive; each party contending for whatever power it hath not expressly yielded up to the other; or which it thinks it hath 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 apprised 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 presumption 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 tranferred 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

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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 chuse, 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. For it has been well observed by the author of the Rights of Man*, "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 consti-"tution. 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 esta-"blished, the manner in which it shall be organized; the powers "it shall have; the mode of elections; the duration of the le-"gislative body, &c." †Hence every attempt in any government

* Page 42. Albany Edition.

† 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

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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 apprise 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 re-

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.

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spectively. 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 hath 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, 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

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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 stiled 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.

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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 neighbours; 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*. 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 depositaries 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 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 mea-

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sures. 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, &c.

Were we not (after the example of the antient 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. Consquently 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.

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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 instability 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 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

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time by themselves, and removeable from the trust reposed in them whenever they cease to possess the public confidence, in their wisdom, integrity, or patriotism*.

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 appre-

* 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 "chuse 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 may, with the strictest propriety, be called a representative democracy.

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hended 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 pow-

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ers, without fear of punishment, the right of one man is at the mercy of another, and freedom 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 labour, 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 labour 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 indispensible 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 sub-

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stitute 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 indispensible 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 indispensible 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 *; 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 ordinarily, on stated days, and also on extraordinary occasions. By the constitution

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

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it proved 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

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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 favourite of historians, both antient 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.* 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 antient 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 favour popular commotions, 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,

* Robertson's History of Greece.

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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 martius*, 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 antient 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

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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 expences out of his private fortune, or private gains, by paying taxes, as the state of the people will admit. These two branches of power 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

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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 behaviour, who are stiled 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.

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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 defence 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 behaviour, 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, overwhelming and sweeping away whatever it encounters in its passage.

This analysis and separation is perfectly impracticable in a simple democracy, and is equally irreconcileable to the principles of monarchy; for in both these the sovereign power seems to be indivisible, and exerts itself every where, and on all occa-

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sions: 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 en-

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croachment, 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 and 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 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

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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 chuse 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 stiled 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

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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, vousque 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 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

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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 burthens 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 emi-

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nent domain, (or in other words, absolute power,) in all governments; these, with the stale pretence 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*, whose enquires 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 hath 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."

* Travels into Italy.

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Should it be enquired 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.* 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 encrease 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 shew 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 "*ap-*

* P. 186. 187. 188. Phila. Edi.

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probation, 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 slipt into a law; the consequence of which was to render the magistrates absolute masters of the legislature. So watchful, so active, so perserving, 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*, the republic is in the body of the nobles; and the people are 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†. Submission constitutes the only security which the people enjoy: and the safety of the tyrant is alike the result of their tenors, and their ignorance.

In this government the will of the prince is the only law, manners and customs, says Montesquieu, supply the place of

* B. 8. c. 5.

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

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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 intrusted 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 enquiry.

Baron Montesquieu distinguishes that species of monarchy in which there are intermediate, subordinate, and dependent powers, likewise, from the absolute or despotic kind, abovementioned: 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*, necessarily "suppose the intermediate channels through which the power "flows. The most natural, intermediate, and subordinate

* B. 2. c. 4.

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" 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 mixt 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 burthens 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 mixt 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 monarch, this was also the case. In all these countries the prince is supposed to govern by fixt 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 stiled, a limited monarchy, but more properly a mixt 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 main-

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tained 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 hath 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 hath been acquired by gradual usurpations, or, violent exertions, made at particular epochs, to suppress those branches of the government, which, in mixt 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 antient 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 stiled, 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 antient feudal governments, the prince having by degrees usurped, and annihilated all

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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 Cæsar, after he 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,

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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 burthens 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 favourable 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*.

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 honour; 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 honour, thus understood, conveys no very favourable impression to the ear of a republican.

* St. Estienne.

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As, in a simple monarchy, the nation is as it were concentrated in the person of the prince, the lustre 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 neighbours 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; doth he carry fire and sword into every quarter; doth 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 hath arrived at the pinnacle of glory: and his frauds, avarice, injustice, cruelties, usurpation, and tyranny, are lost amidst the lustre 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 mixt 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 mixt, 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

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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 mixt 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*, 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 chuse 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

* Hutch. Moral Phil. vol. 2. 244.

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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 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, including 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*, to bring forward every spe-

* See 1 Black. Com. p. 308.

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cific proposition for a tax that may be made in the house of commons; to whom the initiative right, 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* 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 mixt 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 at-

* Hutch. Mor. Phil. vol. 2. 258.

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tachment 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 burthen 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 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 burthens 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.

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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 counsellors, 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 favour 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 favour 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

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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 chusing such an executive body would probably be, by electors chosen from among the people, in several convenient districts, whose power 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 mixt form of government, whatsoever.

But such a government would be a REPRESENTATIVE DEMOCRACY, and not a MIXT 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 en- "trusted to three distinct powers, entirely independent of each "other; viz. the king, in whom the supreme executive power

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" is also lodged; the house of lords, composed of an aristocratical " assembly of persons, selected for their piety, their birth, their " wisdom, their valour, 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 dispo- " sal 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*."

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 lustre, the British constitution may be selected, not only as the most perfect model of these kinds of mixt 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.

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

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"It is perhaps susceptible of proof," says this nervous writer*, "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 longer exist. That this is the state of England, the most superficial observation must evince. The great proprietors, titled and untitled, possess the whole force of both houses of parliament, that is not immediately dependent on the crown†. 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‡, "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 admir-

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

† Ibid. 337.

‡ "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.

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ers 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 empyricism 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 honours, which the most zealous partizans 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 seve-

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ral 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 enquire and determine,) the epoch can not be far distant, which Judge Blackstone hints at in the introduction to his commentaries*. "If ever it should happen" says that enlightened author "that "the independence of any one of the three branches of the legis- "lature 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†, the subjects of that kingdom are left without all manner of remedy.

Such, then, being the history of the British constitution, the most perfect model of these mixt 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‡ 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

* Blacks. Com. vol. 1. 51. † Of Parliaments, 49.

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

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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*, from whom I have borrowed several passages in the preceding part of this essay.

"In a democratical 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 free-

* T. T. T. formerly a delegate in congress from South Carolina, and afterwards a member of the house of representatives in congress, from the same state.

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dom; and of course they have a right to reclaim it, whenever more favourable 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, theprince 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 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 revolution....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 defence, 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

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true in all mixt 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 honoured with the confidence of their fellow-citizens, betray their trust, grasp at power, and endeavour 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 humour 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 admit-

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ted, 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 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.

"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 *apriori* 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.

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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 hath 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*.

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†.

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‡: 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 antient laws and usages in many respects, they are as effectually united and

* Hutcheson's Moral Phil. vol. 2. 239. Vattel. B. 1. c. 1. § 4.
† Ibid. Vattel. Ib. § 10. ‡ Ibid.

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incorporated, as the several petty kingdoms, which composed the heptarchy, were before that period*.

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, 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 defence, 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†. 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

* 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.

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

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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*. 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 antient 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, its magistrates and judges; and every state sent deputies to the general convention, and had equal weight in all determinations. And most of the neighbouring states, which, moved, by fear of danger, acceded to this confederacy, had reason

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

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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, 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*.

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

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

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well as other matters that were to be laid before the states-general*.

It is very probable, says the president Montesquieu†, 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 chuse 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

* Guthrie's Geography, article Netherlands.

† B. 9. c. 12.

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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*. Such was the treaty of alliance between America and France in the year 1778, by which among other 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 defence, shall engage themselves not to exercise certain parts of their sovereign power, otherwise than by a common agreement, and approbation†. 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

* Puffendorf's L. n. & b. B. 7. c. 5.
† Ibid. B. 7. c. 5.

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war, or letters of marque and reprisal, except after a declaration of war, by the United States in congress assembled; with several others*: 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†. 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 man- "ner of our attacking the enemy shall be concerted by our com- "mon advice; nor will we desist from the war, till the particu- "lar 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‡. 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, hath a joint dependence, these says Puffendorf, ought in reason to be adjusted by a common constitution||. This does not, however, says Barbeyrac§, hinder but each confederated state may provide for

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

† Ibidem, Art. 2.

‡ Puffendorf, B. 7. c. 5.

|| Puffendorf B. 7. c. 5.

§ Ibidem, in notis.

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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*. 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 Puffendorf, 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 unconcerned shall immediately interpose their mediation, and not suffer the controversy to come to blows†. 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 hath 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 Puffendorf reckons negotiations of traffick, 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

* C. U. S. Art. 4. & 2.
† Puffendorf, B. 7. c. 5.

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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*. 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 hath 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

* Puffendorf, B. 7. c. 5.

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proper authority, as an ambassador is to command and govern his master*.

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†, 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 af- "terwards 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

* Puffendorf, B. 7. c. 5. † Article 13.

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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 endeavouring 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*. Nor must we forget that solemn declaration to which every one of the confederate states assented†....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 shewn 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

* See Vattel, B. 1. c. 2. and the other writers on government, generally.
† Declaration of Independence.

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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*. 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.

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 chuse 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

* Declaration of Independence.

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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* 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†, 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 con-

* On civil government. c. 19.

† Federalist No. 6.

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quered states to the others, for, says Puffendorf*, the allianc must always be presumed to expire, when any one people a brought under a foreign yoke, or are made an accession of an ther 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 hath the advantage of 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†. 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 dis-

* B. 7. c 5. † Ibid.

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olved. I shall add a few words only concerning the dissolu-
on of *civil* government, which, according to Mr. Locke*, and
her writers, may happen either by conquest, and tearing up the
oots 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, endeavouring 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, is is the right of the people to alter, or
"to abolish it, and to institute new government, laying its foun-
"dation on such principles, and organizing its powers in such
"form, as to them shall seem most likely to effect their happi-
"ness and safety. Prudence indeed will dictate that govern-
"ments long established, should not be changed for light, or
"transient causes. But when a long train of abuses and usur-
"pations, pursuing invariably the same object, evinces a de-
"sign 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.

* 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 antient 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 stiled 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 vigour and success, they carefully lopt off from it every germ of monarchy, and feudal aristocracy. The framers of the constitution were well aware, that the splendour 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 transmit-

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ting to future ages, whilst scenes of tumult, oppression, bloodshed, and desolation, gratify both the historian and the eager curiosity of his reader, at the expence 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 ca- "pable of producing the greatest degree of happiness and "safety*." 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 de- "partments 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†." 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

* Bill of Rights, art. 3.

† Constitution of Virginia, art. 3.

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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 pre- "tence, exercise any power or prerogative, by virtue of any law, "statute, or custom of England*." But "that he shall, with "the advice of the council of state, exercise the executive powers "of government according to the laws of the commonwealth†." This declaration instantly levelled 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, hath left both the executive and judiciary departments, in the opinion of Mr. Jefferson‡, dependant 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§." 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¶. 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

* Constitution of Virginia, art. 9.

† Ibidem.

‡ Notes on Virginia.....215, Paris edition.

§ Ibidem.

¶ 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.

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themselves, as arising from that source, some of which he has pointed out, as happening within his own observation and experience*, are of such a magnitude, as to render it a matter of serious enquiry 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† 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 favour 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

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

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

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the latter*. 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. 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†," 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

* Notes on Virginia, p. 215.

† Ibidem, p. 217.

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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 dis-

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cussed 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 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*;" that which met in May, 1776, might be considered as already instructed in the course they were to pursue†. 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

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

† 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.

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there an occasion when those motives could have a more powerful operation; since the moment of disunion would certainly 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 indispensibly 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 authorsed by nor known to the constitutional government; bodies, on the contrary, which the officers of the constitutional 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

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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*, declaring, "That by the 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 exi- "gencies of government in a constitutional way, are altogether "obstructed; for which reason it has become indispensably ne- "cessary for the oppressed people of this country, at a crisis so "alarming, to adopt such other mode of *consulting and provid-* "*ing 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 constitu-

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

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tional 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 Williamsburgh. 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 subverted by the king, lords, and commons of Great Bri- "tain, and consequently *dissolved*, they *unanimously dissolved* "themselves accordingly*." 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 adminis- "tration 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."

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

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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 endeavours of the united colonies, by " the most decent representations 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 vindic- " tive administration, increased insult, oppression, and a vigo- " rous 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, com- " pelled 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 rais- " ed, and the aid of foreign troops engaged to assist their de- " structive purposes. The kings representative in this colony, " hath not only withheld the powers of government from oper- " ating 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 TO- " TAL SEPARATION, from the crown and government of Great " Britain, uniting and exerting the strength of all America for " defence and *forming alliances with foreign powers for com-* " *merce and aid in war*. Wherefore, appealing to the searcher " of hearts for the sincerity of former declarations, expressing " our desire to preserve the connexion with that nation, and " that we are driven from that inclination by their wicked coun- " cils and the eternal laws of self-preservation;

" *Resolved unanimously;* that the delegates appointed to re- " present this colony in general congress, be instructed to pro- " pose to that respectable body to declare the united colonies,

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" 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 neces- " sary by congress, for forming foreign alliance, and a *confede-* " *racy* of the colonies at such time and in such manner, as to " them shall seem best; provided that the power of forming go- " vernments 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 colo- " ny, and secure substantial and equal liberty to the people*."

A committee was thereupon immediately appointed, consisting of twenty-eight members, by which draughts 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†.

* 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 assem- " blies 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."

† 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.

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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 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*, was not a defeazance 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†." 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

* Vol. 1. 211.

† Defence of the French revolution. p. 60.

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intentions of their constituents, and that this was in fact the case, we need only advert to the circumstance of their unaminous 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 favour 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 Potowmac 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 Alleganey mountains.*"

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

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" 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* 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

* See the second section of the constitution.

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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.

"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.

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" 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*."

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†: 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.

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

† 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. 32. 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. 23. 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, 1788. 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.

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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*.

The right of suffrage, in the election of members of both houses, is to *remain as then exercised*†, 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 chusing 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

* 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.

† 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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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 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*.

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 negroe, mulattoe, or Indian whatsoever, shall thereafter have any vote at the election of burgesses, or any other election whatsoever.

The act of 1736. c. 1. after reciting, that divers frauds had of late been practised 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 hath 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

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

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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 colour 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 hath 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*, 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, &c. 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

* Edi. 1769. p. 122.

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therein, twelve months next 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*.

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†: 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 enquiry of the legislature, whether the elections of members to the general assembly, may not be authorised 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 taxgatherers‡." 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

* Edi. 1769. p. 287.
† See V. L. Edi. 1785, p. 3.
‡ Notes on Virginia, p. 211.

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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 one dollars and twenty-six cents only to the public revenue. If Lou-

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don 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*. 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 labour; 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. Jef-

* 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.

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ferson's table*) 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 of ten 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

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

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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 of the state pays three shillings, or one nearer the centre 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 shew 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*, will shew 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.

* 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.

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CLASSES.	Number of counties.	Actual number of Delegates.	Free white males, between sixteen and forty-five 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 combined proportion 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	23 1-2
4th Class.	18	36	13,845	4,635	6,332	26	7	16 1-2
TOTAL.	92	187	98,609	129797	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*.

* 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 flatters 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.

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

2. Let each district be entitled to chuse two senators in the manner hereafter mentioned; but in chusing 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.

3. Let each district be likewise entitled to chuse as many members of the house of delegates, as their several proportions of the whole number of militia

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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

(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 chusing 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 chusing 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 chuse one additional number of the house of delegates for the same*.

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

* *To ascertain the whole number of delegates which any district may be entitled to chuse, 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.*

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the representatives from the eastern and western extremes, to turn the scale against either which may shew 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 chuse representatives to congress. As congress possesses the power of taxation even more extensively than the state legisla-

ber 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 chuse, 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 chuse a member of the house of delegates, be likewise entitled to chuse 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 fractions) 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.

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ture, 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 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*.

* TABLE....SHEWING THE MILITIA, AND TAXES, IN EACH DISTRICT.

DISTRICTS.	COUNTIES.	MILITIA.	TAXES. DOLLARS.
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	2211
7.	Loudon, Fairfax, and Prince William	5505	6770
8.	Westmoreland, Richmond, Lancastar, Northumberland, King George and Stafford	3664	6708
9.	Fauquier and Culpeper	4163	4952
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
14.	Halifax, Pittsylvania and Campbell	4900	6117
15.	Prince Edward, Charlotte, Buckingham, Cumberland	4262	7460
16.	Powhatan, Goochland, Amelia, Chesterfield	3183	8657
17.	Brunswick, Lunenburg, and Mecklenburg	3829	7202
18.	Dinwiddie, Prince George, Greensville and Nottoway	3366	7568
19.	Sussex, Southampton, Surry and Isle of Wight	4029	7564
20.	Norfolk, Princess Anne, and Nausemond	5556	5849
21.	Albermale, Amherst and Fluvanna	4004	5876
22.	Henrico, Charles City, New Kent and Hanover	3637	8564

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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 *, 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 †.

According to the table given by Mr. Jefferson ‡, one half of the number of senators are chosen from the counties, between

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

† C. V. Art. 6.

‡ Notes on Virginia....212

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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 Alleganey; and the remaining twelfth part between the Alleganey and the Ohio..... This disproportion is daily encreasing, 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, 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 shew, 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*; and

* 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 inadvertance, 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.

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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 enquiry, 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*, "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

* Notes on Virginia, 213.

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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 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, &c. 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

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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 chuses 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*.

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†: on these heads some remarks have already been made.

5. Either house of the general assembly may adjourn themselves, respectively‡. 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.

* C. V. art. 7.

† Ibidem art. 10.

‡ Ibidem art. 8.

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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*.

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 by the governor and continue in office during good behaviour†. 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‡. All officers which have been created by law, have also generally been filled by the general assembly§.

* C. V. art. 10. † Ibidem art. 13. 14. ‡ Ibidem. art. 13.

§ 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 pu-

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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 reconcileable 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*, 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 †: 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 ba-

nishment. 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 chuse 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 chuse 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.

* C. V. art. 9. 11. 19.

† Ibidem art. 16. 17.

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lanced 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*. 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†. *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 offences under the grade of felony‡ 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

* Notes on Virginia, p. 214, to 225. Paris Edi.

† C. V. art. 3.

‡ 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*.

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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 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*.

* 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.

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Mr. Jefferson in his draught 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 commonwealth 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*. 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 favour, 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

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

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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 govenor 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 pretence 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 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*.

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

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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 chuse 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*.

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 posseses 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†." How far such a qualified negative upon all their proceedings as that which is confided to the president of the United States‡, an

* C. V. art. 11.

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

‡ 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 counsellors 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.

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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 encreased or diminished during his continuance in office*, 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 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 phrenzy, anarchy and confusion; from which it recovers only to submit to a single tyrant instead of an host of despots†. 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

* See Mr. Jefferson's draught of a constitution, art. 2. Title *Governor*.

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

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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 alledged? 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*.

* 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.

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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*. 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†.

The governor, with the advice of council, we may remember hath 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‡. The committee of revisors, appointed by the general assembly in the year 1776§, to prepare a code of laws adapted to a republican government, proposed 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 trans-

* C. V. art. 11. † L. V. Edi. 1794. c. 62. ‡ C. V. art. 9.

§ 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.

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fer it, in effect, to juries, whose lenity might too often interest them in favour 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*, 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†. 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‡ 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 shew 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

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

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

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

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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 defence 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 may be 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*. 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 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, atten-

* Notes on Virginia, 228.

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tion, 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 draught for a constitution of this state, prepared by Mr. Jefferson*, 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†; 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‡. The judges of the court of appeals and of all the superior courts hold their offices during good behaviour; 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", authorises the executive upon complaint against any justice of the peace *then in commission* of misfeazance in office or disaffection to the commonwealth, to remove him from his office, if they shall be of opinion that the complaint is just§. An act nearly similar was also made in October, 1778,

* Notes on Virginia....*ad finem.*

† C. V. Art. 14. 15.

‡ See V. L. 1788, c. 71. Sess. Acts.

§ Ibidem, Edi. 1785, p. 37.

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c. 5*. 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†. 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 removeable from office on impeachment by the house of delegates, and conviction of corruption or other misfeazance 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 be tried in the *general court*‡.

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 favourite 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 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

* See V. L.Edi. 1785, p. 81.
† C. V. Art. 14.
‡ C. V. Art. 16, 17.

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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 behaviour for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern 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.

"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 honours 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 take 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.

"This simple view of the matter suggests several important consequences. It proves incontestibly that the judiciary is beyond comparison the weakest of the three departments of power*; 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,

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

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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*." 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.

"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, 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

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

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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 consruction 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 irreconcileable 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

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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 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.

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" It can be of no weight to say, that the courts on the pretence 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-humours, 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-humours in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust

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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 moderate 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 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.

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"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 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

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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** salaries should be established for the judges; but the experiment has in some instances shewn, 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."

"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.

"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.

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

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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*, 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 colour 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 happens, by whatever means it may be effected (whether *fear* or favour) 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 favour, or corruption; and a thorough knowledge of the constitution of his country, the rights of his fellow citizens, and the

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

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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 favour 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 expence of their attendance on the courts, will be the sole candidates for the imaginary independence annexed to a scanty salary. The bench, instead of com-

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manding 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 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*. The choice

* The judges of the court of appeals, high court of chancery, and general court might assemble, and by joint ballot, recommend three persons to fill 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 tothe general assembly, and that body by joint ballot of both houses, chuse one.

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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*.

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

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.

* 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 behaviour, or during the existence of their courts.

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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 Alleganey* "*mountains**." Under this clause of the constitution the cessions of territory heretofore made in congress, and the erection of Kentucky into an independant state, were fully authorized†. 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 Alleganey 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 Alleganey 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.

* C. V. art. 21

† 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.

VIEW OF THE CONSTITUTION OF THE UNITED STATES.

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 enquire into the connexion established between the several states in the union by the constitution of the United States. To assist him in this enquiry, I shall now proceed to consider: First, the nature of that instrument, with the manner in which it hath 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.

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1. 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 defence, 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*.

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†. 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‡. 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§, but they are constituent and

* Preamble to the C. U. S.

† Vattel, B. 1. c. 1. §. 10.

‡ Federalist, vol. 1. p. 51. 52.

§ Amendments to C. U. S. art. 12.

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necessary parts of the federal government; and without their agency in their politic character, there could be 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*.

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†, as hath been mentioned elsewhere‡. 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 jurisdic-

* C. U. S. art. 1. 2.

† Spirit of Laws, vol. 1. B. 9. c. 1.

‡ See Note B. Title Federal Government.

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tions*. 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 pro- "hibited by it to the states, are reserved to the states respectively, "or to the people." This article was added "to prevent mis- construction or abuse" of the powers granted by the constitution†, 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 be 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 be 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 be delivered up, on demand of the executive authority of the state from which he fled; that 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; that the United States shall guarantee to every state in the union a republican form of

* 2 Federalist, p. 32. 33.

† Preamble to the amendments.

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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; 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; 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 be 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 be 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 defence 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*. 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 be deemed somewhat extraordinary, that in the establishment of a federal republic, it should have been thought necessary to ex-

* Vattel, B. 1. c. 2. § 15. 16.

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tend 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 be 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 be 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 expence, 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 expence; 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

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of establishing a national, or consolidated government, upon the ruins of the old federal republic.

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 compos- "ing the distinct and independent states, to which they respec- "tively belong. It is to be the assent and ratification of the seve- "ral 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 na- "tional 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 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 ordi- "nary 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 ma- "jority must be determined either by a comparison of the indi- "vidual votes; or by considering the will of the majority of "the states, as evidence of the will of the majority of the peo- "ple of the United States. Neither of these rules have "been adopted. Each state in ratifying the constitution, is con- "sidered 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 re- "presentatives will derive its powers from the people of Ame- "rica, and the people will be represented in the same propor- "tion, 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 be derived from a "very compound source. The immediate election of the pre- "sident 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 indivi- "dual delegations, from so many distinct and co-equal bodies "politic. From this aspect of the government it appears to be "of a mixt character, presenting at least as many federal, as "national features*.

"The difference between a federal and national government, "as it relates to the operation of the government, is, by the ad- "versaries 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 cha- "racter, though perhaps not so completely as has been under- "stood. In several cases, and particularly in the trial of con- "troversies to which states may be parties, they must be viewed "and proceeded against in their collective and political capacities "only†." "In some instances the powers of the federal go-

* Federalist, vol. II. p. 23. 24. 25. † Ibidem p. 25.

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" vernment, established by the confederation, act immediately " on individuals: in cases of capture, of piracy, of the post-of- " fice, of coins, weights, and measures, of trade with the In- " dians, 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 inter- " vention 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 confede- " ration itself authorises 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*. The operation of the new government on the people " in their individual capacities, in its ordinary and most essen- " tial proceedings, will, on the whole, in the sense of its oppo- " nents, designate it, in this relation, a national government.

" But if the government be national with regard to the ope- " ration of its powers, it changes its aspect again when we con- " template 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 per- " sons and things, so far as they are objects of lawful govern- " ment. Among a people consolidated into one nation, this su- " premacy is completely vested in the national legislature. " Among communities united for particular purposes, it is vest- " ed partly in the general, and partly in the municipal legisla- " tures. 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 authori- " ties 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 cer- " tain enumerated objects, only, and leaves to the several states " a residuary and inviolable sovereignty over all other objects.

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

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" It is true that in controversies relating to the boundary between " the two jurisdictions, the tribunal which is ultimately to de- " cide, 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 consti- " tution; 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 autho- " rity 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 compe- " tent 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 con- " vention is not founded on either of these principles. In requir- " ing more than a majority, and particularly in computing the " proportion by states, not by citizens, it departs from the nati- " onal, and advances towards the federal character; in rendering " the concurrence of less than the whole number of states suffi- " cient, 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 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 ope- " ration of those powers, it is national, not federal; in the ex- " tent of them, it is federal, not national; and finally, in the au- " thoritative mode of introducing amendments, it is neither " wholly federal, nor wholly national*."

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

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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*. 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 as-

* Federalist, vol. II. p. 33.

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sent 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*; 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†. 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 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 ex-

* Vattel, B. 2. c. 17. §. 305, 308. amendments to the C. U. S. art. 12.
† Vattel, ibid. amendments, C. U. S. art. 11. 12.

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pressly 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 each 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 be considered as the common rule, or measure of justice in the courts of the federal republic; neither hath 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 be a standard for the proceedings of this, unless previously made its own by legislative adoption*: which, not being permited by the original compact, by which the government is *created*, any attempt to introduce it, in that or any other mode, would be a manifest breach of the terms of that compact.

Another light in which this subject may be 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 be considered as special, inasmuch as it derogates from the antecedent rights and jurisdiction of the state making the concession, and therefore ought to be construed strictly, upon the grounds already mentioned. Now, the cases falling under the head of *municipal law*, to which the authority of the federal go-

* Federalist, p. 50.

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vernment 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 be 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*: 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.

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†. 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

* Federalist vol. 2. 74.

† 1. Blacks. Com. 47.

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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*. 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†. 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

* Amendments to C. U. S. art 12. † Ibidem. art. 11

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capacities, and incompatable 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 hence, the union of these powers in the parliament hath 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 states, 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

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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*; 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†; and congress, as far as in them lay, endeavoured 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 burthen-

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

† 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 unextinguishable debt of gratitude upon it, to all posterity.

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some 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 clamours 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. The whale and cod-fisheries 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 furr-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 every 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

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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 expences of the federal government, gave rise to a proposition*, 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†, 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

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

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

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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*, 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 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 in-"terests, and their permanent harmony; and to report to the "several states such an act, relative to that object, as when una-"nimously 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 repesented 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

* Acts of 1784, c. 31.

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appointed by other states, to assemble, as recommended, and join in "devising and discussing, all such alterations, and fur- "ther 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*." 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 favour. 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 favourite plan, from an apprehension that no other change was practicable. In several of the states, the question was decided in favour 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†.

* Acts of 1786, c. 8.

† 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 pre-

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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 indi-

pared, 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*:

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

* To this ratification was annexed a copy of the new constitution.

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vidual 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.

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.

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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,

VIII. That in all capital and criminal prosecutions, a man hath 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 favour; 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 ap-

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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

prehend 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 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 defence 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 no particular religious sect or society ought to be favoured or established by law in preference to others.

AMENDMENTS

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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.

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

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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

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 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

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the 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 favour of the constitution, the opinions of the candidates being generally previously

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 oper-

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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

ation, 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.

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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 favour 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 shewn 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

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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 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 perpose, 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*.

The constitution of the United States, then being that instrument by which the federal government hath been created; its powers defined, and limited; and the duties, and functions of its several departments prescribed; the government, thus established,

* C. U. S. Art. 2. §. 1. and Art. 6.

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may be pronounced to be a confederate republic, composed of several independent, and sovereign democratic staes, united for their common defence, 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*, 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†.

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 shew it in its true and most enticing form. Whilst we contemplate with a laudable

* C. U. S. Art. 6. † Ibidem, Art. 5.

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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 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?

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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.

II. I shall now proceed to the second branch of our enquiry; 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.

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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 stiled 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 defence 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, hath been shewn to be the act of the people*. 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†. This is the principle of democracy.

By the establishment of this constitution, without any dependence upon any foreign power, Virginia became an independent

* See Note C. p. 79.

† Bill of Rights, Art. 15.

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and sovereign state*: 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†.

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‡. The constraints put upon the exercise of that sovereignty, by those articles, did not destroy its existence§.

We have already shewn that this system was defective in not providing the means, for a certain and regular revenue; and, that the inefficiency of the system, in that, and perhaps in some other respects, gave rise to the new constitution||. 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**; 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

* Vattel, B. 1. c. 1. §. 4.

† Vattel. Introduction, §. 18.. 19.

‡ Confederation, §. 2.

§ Vattel, B. 1. c. 1. §. 10.

|| Ante. Note D. page 140.

** Ibidem, page 140.

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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*." 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 vigour, is not only a theoretical consequence of that division, but is clearly admitted by the whole tenor of the instrument†." 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 enquiry.

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

† Ibidem, p. 199. 200.

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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 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 mannner very nearly approaching a popular election,

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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*".

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 cases 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 an eminent writer, are, first, to provide for the necessities of the nation.

To encourage labour 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

* Speech of the late Patrick Henry, Esq. in the Virginia convention.

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nations, may be considered as forming the aggregate of the political laws of a nation*. 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 jurisdiction and control of the state governments.

Thus have we endeavoured 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 controlable by congress.

* Vattel. passim.

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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,

1. 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
   1. With foreign nations;
   2. Among the several states; and
   3. 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,
   1. Piracies;
   2. Felonies on the high seas;
   3. Offences 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.]

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It is at least doubtful whether any such power as that last mentioned, was intended to be entsusted to the government, except in case of eminent danger of hostility: at least beyond the necessary guards for forts, magazines, arsenals, &c. 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.

2. 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.

3. 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.

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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 offences against the constitution, or laws 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*, and lesser offences 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,

1. The legislature hath 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.

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

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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 defence.

8. To train and keep troops, 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:

1. In controversies between the state, and
   1. The citizens of another state,
   2. Foreign citizens, or subjects*.
2. Between citizens of different states; if the defendant reside within the state claiming jurisdiction.
3. 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

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

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the federal courts; and, perhaps in all these cases to removal in the manner pointed out by the act of congress*.

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.

1. 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 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 shewn. 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 inter-

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

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nal 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.

2. 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*.

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.

* Federalist, vol. I. p. 196.

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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.
7. Nor any expost 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 abovementioned, consistent with the fundamental laws, nature, and principle of a democratic state, are therefore reserved to the state governments*.

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 be 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

* 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, negociation 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.

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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*. 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†, 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 constitution, are distributed under three heads, the Legislative, Executive, and Judiciary; and these three departments the state

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

† See Vattel, page 18.

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constitution* 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, &c. 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 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 enquire 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 of 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†, that is to say, every se-

* C. V. Art. 3.

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

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cond 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*.

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 [a]: but the number of representatives is limited to one for every thirty thousand persons†.

This mode of ascertaining the number of representatives, and the inseperable connection thereby established between the benefits and burthens of the state, seems to be more consonant with the true principles of representation than any other which has hitherto been suggested‡. For every man, in his individual capacity, has an equal right to vote in matters which con-

* 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, mullattoes, 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.

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

‡ The student is referred to the Federalist, No. 54.

a 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

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cern 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

STATES.	Representation under the Constitution.	Representation according to the First Census.	Representation according to the Second Census.
New Hampshire	3	4	5
Massachussetts	8	14	17
Rhode Island	1	2	2
Connecticut	5	7	7
New-York	6	10	17
New-Jersey	4	5	6
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 Tenessee	5	10	
North-Carolina, exclusive of Tenessee			12
South-Carolina	5	6	8
Georgia	3	2	4
THE NEW STATES, viz.			
Vermont	-	2	4
Kentucky	-	2	6
Tenessee	-	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.

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how far 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*, 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 expence which secures the opposite party from the abuse of it in the imposition of burthens 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†.

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‡, 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

* Spavan's Puffendorf, p. 10.

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

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

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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*. 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 publickly 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*l*, and the poll book under a similar penalty are to be retured 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

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

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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* 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 an 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 principles of the fundamental laws of the state, they have no control†. It will be answered, that the

* 1 Black. Com. 159.

† "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 be 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

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power of removing and punishing is not denied by this doctrine. I answer, that the power of preventing offences 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 chuse 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 be 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*.

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†.

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.

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

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

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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*. 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 burthen 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 be 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, &c....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.

* Vattel, 9. 16.

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This body is not, like the former, dissolved at the end of the period for which it's members were elected; 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*. The perpetuity of the body is favorable to every stride it may be disposed to make towards extending it's own 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†. 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 skilful mechanic. Their success and perfection must, however, still

* See Federalist, No. 62. † Ibidem.

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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 be 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*.

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†, 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‡: 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§; 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||.

So much for the qualifications of the members of congress, to which we may subjoin their incapacities, as individuals, during

* C. U. S. Art. 1. §. 3.
† Ibid. §. 2 & 3.
‡ V. L. Acts of 1788, c. 2. 1792, c. 1.
§ C. U. S. Art. 1. Sec. 2 and 3.
|| Ibidem. Sec. 6.

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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 created or the emoluments thereof increased during their time*. 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†, 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 favour of militia officers, and county court magistrates.

5. Senators and representatives during their attendance in congress, as also in travelling to and returning from the place of their session, are privileged from arrest in all cases, except treason, felony, and breach of the peace‡; 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||.

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 cer-

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

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

‡ C. U. S. Art. 1. Sec. 6.

|| 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.

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"tainly 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 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, limitted.

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 chuse their own speaker, and other officers*.
2. To originate all bills for raising a revenue; but the senate may propose, or concur with amendments, as on other bills †.
3. This house also possesses the sole power of impeachment ‡. 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 §.

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 then ecessity of leaving it, as seldom as possible, to it's full scope||.

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

† Ibid. s 7.

‡ C. U. S. Art. 1. s 2.

§ Ibid. s 3.

|| 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 momently expected, being absent, the question was put, and carried by the decision of the vice president against the bill. If ever a case could be named under the constitution which seemed to belong solely to the representatives to determine, it was this.

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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 persident pro tempore....they have also a right of choosing all their other officers *.

2. The senate have the sole power of trying impeachments †. 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 ‡....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 behaviour; and of expulsion, provided two-thirds concur therein §.

* C. U. S. Art. 1. s 3. † Ibid. ‡ Ibid. Art. 2. s 2.

§ What further powers or privileges the several houses of congress may constitutionally possess, has now become a question of no small importance. The great Bacon observes 1, "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 favour a constructive extension of

1 On the advancement of learning, page 440.

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Each house is moreover the judge of the elections, returns, and qualifications of it's own members*, 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

the powers of the federal government, or any department thereof; yet a case has occurred, which shews 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 serjeant at arms attending this house, commanding him to take into custody, wherever 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 serjeant, with order forthwith to execute the same, and make due return 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.

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

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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

" The previous question thereon was called for by five mem-
" bers, to wit....shall the main question, to agree to the said reso-
" lution, 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 mem-
" bers, 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 serjeant 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 re-
" manded in custody of the serjeant 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 im-
" prisonment to which he is subject, by the order of this house,
" which lay on the table: whereupon,

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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

"Resolved, That Robert Randall be discharged from the custody of the serjeant 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 1, 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, &c. 2 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, 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 com-

1 2 Inst. p. 50, 2 C. U. S. Art. 3.

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house of representatives, or the senate, to do the business of the nation, a smaller number may adjourn from day to day*, and compel the attendance of absent members.

Each house is moreover required to keep a journal of its proceedings†, and from time to time to publish the same; ex-

* C. U. S. Art. 1. Sect. 5. † Ibid.

missioned by the president of the United States, and holding their offices during good behaviour, and not by the unstable tenure of biennial elections.

3. The amendments to the constitution 1 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 2 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 defence; 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 3.

1 Art. 6. 2 Art. 7. 3 Art. 3.

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cepting 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*. 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

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 1 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*.

1 C. U. S. Art. 1. Sect. 5. 2 Art. 8.

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here spoken of. But to prevent a call of the yeas and nays too frequently, as is said to have been practised 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 inconveniencies 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*, 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†.

Lastly, to prevent the evils which might result from the want of a proper concert and good understanding between the houses, it is provided‡, 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||, that in such case the president may adjourn 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,

* Art. 1. S. 4. † Art. 2. S. 3. ‡ Art. 1. S. 5.
|| C. U. S. Art. 2. sect. 3.

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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*, 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, &c. 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 &c.

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 favourite 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 com-

* C. U. S. Art. 1. Sect. 7.

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parison at different periods of our enquiry, 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.

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 democratical 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 mea- "sure his own governor, and therefore a branch at least of the "legislative power should reside in the whole body of the peo- "ple. In so large a state as Britain, therefore, it is very wisely "contrived that the people should do that by their representa- "tives, which it is impracticable to perform in person; repre- "sentatives, chosen by a number of minute and separate dis-

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tricts, wherein all the voters are, or easily may be, distingtished*. He adds, elsewhere, " In a democray 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 suf- " frages are to be collected. In England where the people do " not debate in a collective body, but by representation, the exer- " cise of this sovereignty consists in the choice of representa- " tives†"

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‡, 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

* 1. Blacks. Com. p. 158. 159. † 1. Blacks. Com. p. 170.

‡ 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.

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number of electors in the counties were equal; and, that the boroughs were 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

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the right 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 con-"stitutions of the respective places, which has occasioned infi-"nite 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*l.* sterling, per annum, and a member for a 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

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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 expences do not exceed the requiste 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*l.* 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*l.* 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;

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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 burthens 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 be 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 distict 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 favour 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 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 incapaciated 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

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years at the time of his election*: 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†. 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‡. 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||? 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 Statess, 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

* 1. Black. Com. p. 162 † Ibid.....175, 176.

‡ The number mentioned in Burgh's pol. disq. vol. 2. p. 44.

|| Mackintosh's defence of the Fr. revolution p. 262. to 269 334. to, 340

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have been created, or the emoluments thereof increased during such time*. 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 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

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

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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 honours 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 burthen 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*."

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 honours 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 be 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 mixt governments is the distinction of of orders, possessing, both collectively and individually, different rights, privileges or prerogatives. In an absolute monarchy,

* 1. B. C. 157, 158.

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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 vigour 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 mixt 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 modelled by the national assembly, and ratified by the king; or, in the blending 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 vigour, 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 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 burthen to the community; nothing can be more false than such a supposition. If the distinction be personal, only, it must be created at the expence 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

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trodden under foot*. 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 Cæsar in authority.

"A titled nobility," says a late distinguished English writer†, "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 honours by the multitude, who have inherited, "but not acquired them, engrosses and depreciates these in-"centives and rewards of virtue‡." If these are the genuine fruits of that laudable ardour, and generous emulation, which give life and vigour to the community, and sets all the wheels of government in motion, heaven protect those whom it encounters in it's progress.

But is their no stimulous to that laudable ardour 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

* George Nevil, duke of Bedford, was degraded by act of parliament, because of his poverty, 12, Rep. 107.

† Mackintosh on the French Revolution. p. 77.

‡ Mackintosh on the French Revolution, p. 82. 339.

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which, examples will be quoted by posterity so long as the remembrance of American liberty shall continue among men..... "Virtue," says Montesquieu*, in a republic is a most simple "thing; it is a love of the republic. Love of the republic in a de- "mocracy 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 dis- "tinctions 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 reconcileable to the genius and principle of a pure republic, is, if we may reason from effect to cause†, the most powerful incentive to good gogernment 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 Cæsar or a Cataline. A Franklin, or a Washington, need not the pageentry of honours, 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 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 lustre of it far transcended the brightest diadem.

* Esprit des Loix, lib. 1. c. 2. 3.

† 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.

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But even where it conceded that distinctions of rank and honours were necessary to good government, it would by no means follow that they should be hereditary; the same laudable ardour 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 shewn that the same vigour 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 favour 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*. 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 honours to the well government of a state, the commentator himself† hath 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‡, who informs us, that the principle of a democracy is corrupted, when the spirit of equality is extinct. The same admirable writer§ 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 honour 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‖, for the following distinguished features of aristocracy: "If the reigning families "observe the laws, aristocracy is a monarchy with several mo-

* Paine's Rights of Man, 45.

† 1 Vol. p. 157.

‡ 1 Vol. p. 159.

§ 1 Vol. p. 168.

‖ 1 Vol. p. 164.

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"narchs: 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 here-"ditary; 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 honours. 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 Janizaries of the state, supporting and insulting the throne by turns, but still threatening and enslaving the people*.

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 are 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 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 honour of a peer, on several occasions, being equipollent with the oath of a commoner. The exemption from personal arrests in civil cases is extended as well to his servant,

* 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 from their state of annihilation. Montesquieu, Vol. 1. p. 16.

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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* and the genius of her people, equally secure her against the introduction of such a pernicious and destructive class of men†.

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 favour 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 be 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

* C. U. S. Art. 1. Sec. 9, 10.

† 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 nobibility, 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.

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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 favour 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*.

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† 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 encreased, at the will of the prince, to any number‡.....The sena-

* 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 sceptre was transmitted to the race of Judah: the first born of Jesse, appeared worthy in the sight of the prophet, but he, with six of his brethren, was rejected in favour of David the youngest: and the first born of that same David, was by the same providence set aside in favour of Solomon his youngest son.

† Mackintosh.

‡ The temporal peers of Great-Britain are said to amount to two hundred and twenty at this time.

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tors 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 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*, 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 †.

The lord chancellor, or any other person appointed by the king's commission is speaker of the house of lords ‡; 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 ||. 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.

* 1. Black. Com. p. 168.

† C. U. S. Art. 1. s. 5.

‡ 1. Black. Com. p. 181.

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

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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 Coronæ* from the encroachments of the legislature, but this protection, says the Commentator*, 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†. 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 disolution is sure to pave the way for a

* Vol. I. p. 154.

† C. U. S. Art. 1. Sec. 7.

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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 *...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 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† of popular eminence, undertakes to prove that these governments of balance and controul 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

* 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.

† Mackintosh.

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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 sea-coast 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 burthens 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 unimpared. 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

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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~~ in 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* 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†, and of it's members, are indefinite, and depend upon 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‡; 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§." 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||; 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

* 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 favour of the former....2. Cong. 1. Sess. 1792.

† Black. Com. p. 160, 164, 165.

‡ C. U. S. Art. 1. Sec. 6.

§ 1. Black. Com. p. 161.

|| C. U. S. Art. 5.

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of the people. The most frequent elections of parliaments in England have been triennial....they have been protracted to seven years, professedly says Blackstone*, to prevent the great and continued expences 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 expences. 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 favour of that period are at least equal to those against it†. 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 controul 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‡.

* Vol. 1. p. 189. † Federalist Vol. 2. p. 124, to 135.

‡ 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

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We shall now resume our enquiry 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

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*. 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 be 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.† If the president approve the bill, he signs it‡; 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.|| The manner of proceeding in case a bill be not approved and signed by the president, has been already fully mentioned, in this Appendix.

* *See De Lolme, B. 2. c. 4. and 5.*

† *Rules and Orders of the House of Representatives.*

‡ *C. U. S. Article 1. Sect. 7.*

|| *L. U. S. 1. Congress. 1. Session, c. 14.*

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examination we shall now resume more at large; another object of our further enquiry 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 enquiries 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 authorised to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence, and general welfare of the United States*: but all duties, imposts, and excise 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†.

The principle upon which the right of taxation is founded, is here shortly expressed; viz. "To pay the debts and provide for the common defence, 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‡. On the other hand, since the citizen is on no other account obliged to pay taxes, or undergo any other public burthen, but as they are necessary to defray the expences of the state, it ought to be the singular care of the government to draw no further supplies than the exigences of the public require; and to see likewise that the citizens be as little as possible incom-

* C. U. S. Art. 1. Sec. 8. † C. U. S. Art. 1. Sec. 9.
‡ Spavan's Puffendorf, vol. II. p. 330.

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moded with the charges they are forced to put them to; and moreover, that the public impositions be laid in just and fair proportions, without favouring and exempting of one, to the defrauding or oppression of another*. 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 enquiry 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†." He adds; "this definition may include, in general, all kinds of burthens which can possibly be imposed, whether under the name of tribute, tythe, tally, impost, duty, gabel, custom, subsidy, excise, or any other.

As this definition includes the several species of burthens 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, &c.

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.

* Spavan's Puffendorf, vol. II. p. 283.

† Stuart's Political Economy, vol. II. p. 485.

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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 manne 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 labour, 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*.

Examples of cumulative taxes, are land taxes, poll taxes, window taxes, duties upon coaches, servants, &c.

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†.

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

* Stuart's Political Economy, vol. II. p. 485. † Ibid. p. 496.

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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*.

Supposing this to be the true distinction to be taken between dirict 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 wheelright, 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†.

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 quota, at the time re-

* 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.

† The preceeding 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.

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"quired 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*. 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 favour. 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 col-

* 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. Happy 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. 5. See Note 33. p. 315. of the first Book of the Commentaries....part 2.

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lectors, 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 be doubly burthened. 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 alledged, 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 burthen, 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 burthensome in the mode of collection, on the other hand it may be remarked, that the increase of burthen 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 burthens, resulting from indirect taxes, which it should be the object of direct taxation to avoid. Indeed, if equality of taxation be desirable,

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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, 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 burthens 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*. But congress, by their act of April 18, 1783, 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†; but whether the proposal was favourably 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 labour, 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‡.

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

* Confederation, Art. 8.

† May, 1784, c. 31.

‡ See Federalist, No. 54.

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several states in the first instance. What motive, then, could a 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 be 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*. The inequality of indirect taxes, among states, as well as among individuals, is perfectly unavoidable†. It may in time become so great as to shift all the burthens 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 burthen 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 favoured, 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‡: this species of tax, though advanced by the manufacturer, is paid by the consumer, as has been already shewn: consequently, the duty upon every excised

* See Federalist, No. 36. † Ibid. No. 35.

‡ 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.

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commodity is in fact paid by that state where it is consumed, whilst the manufacturing state is not only exempt from the burthen, but enriched by it. This inequality is no otherwise to be avoided but by direct taxes. The same disproportion also 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 burthens, 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 burthen 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 burthens 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 burthens 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*, be 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 suc

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cess, and each succeeding generation undergo the like additional burthens, 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 burthen arose, and would be led to enquire 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*. 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†.

* "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 controled, yet "a law for abrogating or preventing the collection of a tax laid by the authori- "ty 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 uncontrolable 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.

† "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.

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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 constitution, are defined to be an inland imposition, usually paid upon the retail sale of a commodity*. It appears, however, that they are generally imposed on manufactures, and paid by the manufacturer†, who advances the price of his commodity in proportion. The author of the commentaries on the laws of England acknowledges, that the rigour and arbitrary proceedings of excise laws, seems hardly compatible with the temper of a free nation‡..... 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 clamours 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 favour of this, as an economical mode of taxation, abstractedly considered, appear to be much in its favour; it being alledged, that the charges of levying, collecting, and managing the excise duties in England, are considerably less in

* 1 Blacks. Com 318. † Ibid. 320. ‡ Ibid.

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proportion, than in any other branches of the revenue*. 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 per centage 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†. 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 burthensome species of impost, on those parts of the union, where consumption takes place.

* Blacks. Com. 318, which appears however to be a mistatement. See Christian's Edi. in a note to p. 318. 1. Blacks. Com.

† 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 expences of collec- "tion on merchandize 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 dis- "persed 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 extention, and the total "amount of revenue shall remain inconsiderable."

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Duties and imposts, in their common acceptation mean those taxes which merchants are compelled to pay upon merchandize 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*. Frequent instances have occurred 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, &c†.

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 merchandizes, (such as wines and ardent spirits, &c.) 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‡. Several of the states as was afterwards alledged, neglected to pass similar laws, and their unanimous consent was requisite§, under the existing articles of

* C. U. S. Art. 1. §. 10.

† See L. U. S. 5. Cong. c. 38, and 39, with many others.

‡ May 1781, c. 2. the title occurs in the chancellor's revisal, p. 140.

§ Articles of confederation and perpetual union, Art. 13.

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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 *, 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 common-"wealth 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 repealed 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 modelled 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 †. 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 honourable 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 ‡,) that the

* L. V. November, 1781. c. 9. Sessions Acts.

† Ibid. October, 1783. c. 218. Ibid.

‡ L. V. October, 1783. c. 5.

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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 Potowmac, 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, likewise, the inefficiency of the federal govenment began to excite loud clamours, 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*, by which means the principle of equality,

* C. U. S. Art. 1, Sec. 8.

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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*.

2. Congress have power to borrow money on the credit of the United States†; 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 burthen and expence 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 burthensome mode of contracting a debt is by a loan: in case of a maritime war, the revenues arising from duties upon merchandize 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

* 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.

† C. U. S. Art. 1. Sec. 8.

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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 defence, it gives energy, vigour 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 burthen 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 burthen 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 expence of the nation, in general, or of strengthening the hands of government, (or more properly those of 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 re-payment. 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*.

* C. U. S. Art. 1, Sec. 8.

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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 authorise 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 favour 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

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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 burthens 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 irreconcileable 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*.

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

* C. U. S. Art. 1. §. 10.

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the saving of expence. Nothing could be more favourable to the practice of smuggling; and consequently the revenue was frequently defrauded with impunity. Nothing could be more unfavourable 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 these things, and in the year 1784, (May session, c. 32.) passed an act, whereby ships 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 wholesome regulations respecting river craft: but these appear to have been 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*, 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

* The constitution of the United States does not authorise 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 be 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 be detected in giving aid or assistance to any fradulent commerce, either with foreign parts, or between the states; they may also prescribe, or limit the terms and conditions, upon which vessels may be permitted to trade with foreign parts, or with other states: but they seem to have no constitutional right to control the intercourse between any two or more parts of the same state. See Amendments to C. U. S. Art. 12.

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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 Potowmac, 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 favourable 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 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

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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 authorised 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 harbouring 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 harbour 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 hath 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

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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 mem- "bers of the senate.....And, that no navigation law, or law re- "gulating commerce should be passed without the consent of "two-thirds of the members present in both houses*." 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 "should be binding upon the United States, which was not ra- "tified by law," had been made in the general convention at Philadelphia, and rejected†. 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 ob-

* Amendments proposed by the convention of Virginia, Art. 7, 8.

† Message from the President of the U. S. to the House of Representatives, March 30, 1796.

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scure, 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*.

4. Congress have power to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies, throughout the United States†.

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, &c‡. 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 under 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

* Federalist, No. 42.

† C. U. S. Art. 1. Sec. 8.

‡ Confederation, Art. 4.

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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 anywhom 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*. 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†.

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 en-"joy a concurrent jurisdiction upon the subject of naturaliza-

* Federalist, No. 42.

† L. U. S. 1 Cong. 2 Sess. c. 3. 7 Cong. c. 28.

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" tion: 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*."

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 pre- " scribed 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†. " 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

* 2 Dallas's Reports, 296.

† See a letter of George Nicholas, Esq. on the Alien and Sedition laws.

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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 shall 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 inconveniencies 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."

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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 hath an absolute, and uncontrolable power over this subject, if disposed to exercise it. For every state must be presumed 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 be 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 hath 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

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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 favour 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 pretence 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* !

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

* See Beccaria, on Crimes and Punishments, c. 34.

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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 ground to suspect fraud, or insolvency. But the farmer has generally a visible capital*, 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, unfavourable 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 practise 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 lie, 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.

* In Virginia, farmers generally cultivate their own lands. It may be otherwise in the northern states.

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5. Congress have power to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures*.

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 authortiy, or by that of the respective states; and fixing the standard of weights and measures throughout the United States†. By the present constitution the respective states are interdicted from coining money‡. 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||, 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 expence of the coinage, as is likewise frequently practised, 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§.

* C. U. S. Art. 1. sect. 8.

† Confederation, Art. 9.

‡ C. U. S. Art. 1. sect. 9.

|| See Hale's Hist. p. C. v. 1. p. 198.

§ 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-

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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.

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*.

This power seems to be a natural incident to two others, of which we have before taken notice: the power of borrowing

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.

* C. U. S. Art. 1. sec. 8.

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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. 78, 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 authorise 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,

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it seems difficult to assign a reason why the other should not have been treated in the same manner*.

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-steping the limits of the constitution, more than the act which we have just noticed. It shews that the most unauthorised 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 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 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 shew how far the exercise of these concurrent powers may be reconciled: it is much to be desired that

* 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.

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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 extention of its benefits, until they shall completely pervade every part of the union*.

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. 55, declares, that "where any state before it's adoption of the present form of government shall have granted an exclu-

* 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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sive 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 7 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*; 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†; 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 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

* See the report of Mr. Secretary Hamilton on this subject.

† 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.

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authorise congress, to adopt any other mode which they might think proper.

9. Congress is moreover authorised 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 intollerable burthen 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 judges for the trial of state offences, must be, in any country, and under any possible form of government. In these cases, the offence 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 judges, he selects, and from their hands expects

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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 behaviour 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 authorise 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 seperates 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 subject a fuller consideration elsewhere.

10. Congress have power to define and punish piracies and felonies committed on the high seas, and offences 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 regu-

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lation 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 offences 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 offences are selected from the great mass of crimes with which society may be infested, upon which, only, congress are authorised to prescribe the punishment, or define the offence. All felonies and offences 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*.

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†; 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 calamites of mankind, resulting from the ambition, usurpation, animosities, resentments, piques, intrigues, avarice, rapacity, oppressions, murders, assassinations, and other crimes, of the few possessing

* 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.

† C. U. S. Art. 1. Sec. 8.

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power! How rare are the instances of a just war*! 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 where 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†. 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 determination; so that it may be in the power of the executive to prevent, but not to make, a declaration of war‡.

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§. 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 favour of the interests of humanity. Upon

* Vattel, Lib. 3. Ch. 3. † Vattel, 439.

‡ 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.

§ C. U. S. Art. 1, Sec. 10.

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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*. 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 defence as it's resources will enable it to do. The prohibition to emit bills of credit†, 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‡, 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§.

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

* 1. Blacks. Com. 258.

† C. U. S. Art. 1, Sec. 9.

‡ Confederation, Art. 9.

§ Ibidem, Art. 6.

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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*." 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†. 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, 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,

* Journals of the Virginia Convention, Art. 9, 10.

† 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 arm for any period they may think proper, even in times of peace.

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" that a well regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence 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 bear 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 defence, 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 defence of a free government is certainly desirable, and must be attended with beneficial effects, 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

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contributed to swell the national debt, to an enormous size, by a fruitless expence. By authorising 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 defence 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 authorising the president of the United States, to enlist and organize volunteers, or special corps of militia, whose officers HE was authorised 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, or of any state, and from every fine, 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*, and the president was authorised to sell or lend them artillery, small-arms, accoutrements, 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

* They were afterwards limited to 75,000 men. 5 cong. c. 137.

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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

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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 pretence 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, 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 gave to it. 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*; 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.

* Amendments proposed by Virginia, Art. 12, by New-York, Art. 11, and 12, by North-Carolina, Art. 13.

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I agree with the author of the Federalist*, 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 many 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 Potowmac, 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†. It has been said, that it was in contemplation to

* Federalist, Vol. 2. No. 43.

† 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,

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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 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

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.

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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 north-west 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*.

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

* L. U. S. 7 Cong. c. 40.....The act authorises 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 lake 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 of their state.

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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, &c. that they shall pay a part of the federal debt, and a proportional part of the expences 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 high-ways, 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

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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 persons of full age, until the governor and judges should adopt other laws, as therein authorised. 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

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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 behaviour. 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 authorised 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, authorising the establishment of a government in the Missisippi territory, the president of the United States is authorised 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 favourable 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 favoured, perhaps, than discountenanced. Yet it is difficult to suppress a sigh, whenever we discover any measure which seems to favour the continuance of slavery among us.

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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 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*. 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†, 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

* Virginia laws, Edi. 1785, p. 214. Edi. 1794. p 47.

† Report of the Secretary of the Treasury, Dec. 18, 1801.

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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*. 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*l.* 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 far as he seems to have thought advisable, it might not lay the foundation of so large a revenue, independent of the people, as to be formidable in the hands of any government. To amass immense riches to defray the expences 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 favourable to the liberty of the nation, by rendering the government less independent of the people†. 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

* Report of Mr. Secretary Hamilton, to congress, January 19, 1795.

† See Price's Observations on the American Revolution, p. 10, and 1 Blacks. Com. p. 306.

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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, 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 encreasing 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, authorises 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

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to have made a cession of lands to the United States*. The territory ceded by North-Carolina now constitutes the state of Tennessee†. The acts of 5 Cong c. 45, and 6 Cong. c. 50, authorise 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 Missisippi 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‡.

17. To give efficacy to these powers, congress is authorised 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||, 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

* L. U. S. 5 Cong. c. 45.

† See L. U. S. 1 Cong. 1 Sess. c. 6. and 4 Cong. c. 47.

‡ 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.

|| See the Federalist, No. 33, and 44.

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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*.

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 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 authorised by this clause, to pass a law for that

* Witness, the act for establishing a bank; the act authorising 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 seve-"ral 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.

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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 enquiry 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*.

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

* 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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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 instances these powers have been guarded by wise provisions, and restraints; some of 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

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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.

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 importation being now prohibited by the laws of all the states in the union. But should any of them shew an inclination to rescind the present prohibitions, congress, after the year 1808, 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 di-

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rected to the person detaining another, commanding him to produce the body of the prisoner, with the day and cause of his caption 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 out 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*. And by the laws of the United States†, 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 enquiry 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 colour 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‡.

Here a question naturally occurs: if a person be illegally committed to prison in any state, under, or by colour 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 enquiry into the cause of his commitment? To which, I answer, that if he be committed or detained for any crime, unless it be for treason or felony, plainly expressed in the warrant of commitment, and be neither convicted thereof,

* L. V. Edi. 1794. c. 118.

† L. U. S. 1 Cong. 1 Sess. c. 20. §. 14.

‡ Of the nature and efficacy of the writ of *habeas corpus* the student may be informed. Blacks. Com. 1. 135. 3. 135. 4. 438.

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nor in execution by legal process, the writ (due requisites being observed) can not be refused him*: 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 hath 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†. They supply the want of legal forms, legal evidence‡.

* L. V. Edi. 1794. c. 118.

† 1. Hale's Hist. P. C. 82, 342, &c.

‡ 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.

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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 honour 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*,) 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 burthens, it is further provided,

* 1 Blacks. Com. 46.

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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 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 *.

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.

* 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 shewn before, page 197.

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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 vigour. 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 con-

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stitution, which on a former occasion is said to have been overlooked.

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*." 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 shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.....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 be 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 pretences 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

* Preamble to the amendments proposed by the 1 Cong. 1 Sess.

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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 enquire 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 speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it.

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Our state bill of rights declares, that the freedom of the press is one of the great bulwarks of liberty, and can never be 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*. 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 la-"mented; 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. How-"ever desirable those measures might be which correct without "enslaving the press, they have never yet been devised in Ame-"rica†."

It may be asked; is there no protection for any man in America from the wanton, malicious, and unfounded attacks of en-

* De Lolme on the English constitution. 317. Phila. printed.

† 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.

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venomed 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 savours of that stile of condescension, in which favours 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 persons, unless the matter thereof be approved by three justices of the peace, or a major part of the grand-jury in the

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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 defence 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 colour 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 authorise 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 burthensome to the people,

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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*. 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 authorising 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 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 licence from

* See 3 Burrows Rep. 1743. 1 Blacks. Reports, 555. 4 Blacks Com. 291.

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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 govern-"ment, as well as the particular organization, and positive pro-"visions 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 judgment 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*.

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

* Report of the committee of the general assembly of Virginia, on the alien and sedition laws, January 20, 1800.

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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 be 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*.

Among the reasons alledged 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 favour and permission; which may be withdrawn whenever the government may judge their further continuance dangerous†."

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‡." A doctrine so far from

* Report of the committee of the general assembly of Virginia, &c.

† Report of the committee of congress, on the petitions for the repeal of the alien and sedition laws; February 25, 1799.

‡ Report of the Virginia assembly....ut supra.

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being sound, that a jury, one half of which shall be aliens, is allowed, it is 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 offence 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 favour, and to have the assistance of counsel for his defence. 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 a liberal exposition, and confirma-

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tion 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 colour 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*"....for even a villein, as he tells us elsewhere, is comprehended under the term *liber Homo*, except against his lord†.

The common law maxim, that no man is to be brought in jeopardy of his life more than once for the same offence, 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 he shall have compulsory process for obtaining witnesses in his favour;....a benefit long denied by the courts in England: and that he shall have the assistance of counsel for his defence;....not as a matter of grace, but of right;...not for his partial defence, upon a point of law, but for his full defence, 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 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

* 2 Inst. 55. † Ibid. c. 45.

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uses, by impressment, as was too frequently practised 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 authorises the commitment of the offender in case of any illegal impressment*.

We have already noticed the act concerning aliens†, 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 offences 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 offence, 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 offences 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 offence, 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‡."

To these arguments the general assembly of Virginia replied; that it can never be admitted that the removal of aliens authorised by the act, is to be considered, not as a punishment for an offence, 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

* L. V. Edi. 1794, c. 121.

† L. U. S. 5 Cong. c. 75.

‡ Report of the committee of congress, February 25, 1799.

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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 shewn, 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 offence against the laws of the land, nor involved in any offence against the law of nations, charged on the foreign state of which they were members*.

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 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

* Report of the committee of the general assembly of Virginia, on the alien and sedition laws....January 20, 1800.

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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 shew, that a bill of rights was not only unnecessary, but would be dangerous*. 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

* Vol. II. 349.

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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 offences 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 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 defi-

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nite 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*; 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†.

3. No state shall grant letters of marque and reprisal‡.

As these measures ordinarily precede a declaration of war, the reasons for the total prohibition of the exercise of this pow-

* See Vattel, 296, 297.
† L. V. Edi. 1794, c. 18.
‡ C. U. S. Art. 1. §. 10.

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er, 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*.

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 neighbouring, 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 ardour 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 defence, 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 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†.

The right of coining, and regulating the value of coin, being vested in the federal government, a participation in those rights

* C. U. S. Art. 1. Sec. 10. † Ibidem.

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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 inconveniencies 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 depreciated 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.

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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 hath already been said, under the article which authorises 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 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

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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..... Restraints upon the power of the legislature, says De Lolme*, 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 be 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

* On the British constitution, p. 164.

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valid, than as they are authorised 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*. 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 colour 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 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, &c. and those for prohibiting riots: and for suppressing assemblies of free-masons, &c. 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

* 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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peaceable assemblies by them, for any purposes whatsoever, and in any number, whenever they may see occasion.

II. The second article of the federal constitution provides, that the executive power shall be 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 encreased 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*, 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 stiled the cabinet-council,

* De Lolme, p. 149.

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before they are communicated to the privy council*: 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 mandate, or obligation....But although the president may perhaps constitutionally decline the ratification of a treaty, or the appointment of

* 1 Blacks. Com. 229.

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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*.....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, and energetic, as it remains in their hands, is untramelled 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 ex-

* C. U. S. Art. 1, Sec. 3. Art. 2, Sec. 4.

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pected 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 favour 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 he 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*. 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 sceptre, or can it be entrusted to the raving Bedlamite? A president of the United States cannot be the first: it is highly improbable that he will ever be the second; the constitution has pro-

* C. U. S. Art. 2. L. U. S. 1 Cong. 1 Sess. c. 4, 7, 12, 20, Sec. 35. 5 Cong. c. 52.

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vided 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*. 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†. 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 honour, of office, and of privilege. Honours, 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‡. 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

* C. U. S. Art. 2, Sec. 1.
† L. U. S. 2 Cong. c. 8.
‡ C. U. S. Art. 2. Sec. 2.

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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 vigour: 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 favour 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, and dismiss him from their service. What nation governed by an hereditary monarch has an equal chance of happiness!

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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 extention of her territory, and to the fortefying 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

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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 be 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 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 continu-

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ance in office. To guard against avarice, corruption, and venality, it is also provided, that it shall not be encreased 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 defence of the constitution, is secured, not only by the limitations and restrictions which the constitution imposes upon the legislative 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*; 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†; 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 witholds 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, pro-

* 1 Blacks. Com. 154. De Lolme on the English Constitution, 171.
† 1 Blacks. Com. 308.

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vided 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 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-

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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*. 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

* C. U. S. Art. 2. L. U. S. 2 Cong. c. 8.

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had 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 seat of government: should any fraud be attempted, it must immediately be detected: whilst the constitution expressly incapacitates any man who may be presumed to labour 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 favour, 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 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 practised 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 coun-

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terbalancing four times their number*. 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 favour 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 favour? 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 favour, 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

* 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.

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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 of the militia of the several states, when called into the service of the United States*. 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†. But notwithstanding this provision in the constitution, the act of 5 Cong. c. 74, authorised the president to make and establish such rules for training and disciplining the corps of volunteers, authorised to be raised by that act, as should

* C. U. S. Art. 2. §. 2. † Ibid. Art. 1. §. 8.

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be thought necessary to prepare them for actual service..... Secondly; the president of the United States hath 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*. 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,

* 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 Honour, 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 marks of presidential favour, must produce correspondent effects? Men ambitious of distinctions, are rarely ungrateful to their patrons in power.

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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, authorising the president to accept companies of volunteers, and to appoint their officers, &c. 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 offences 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*. 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 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

* 4 Blacks. Com. 396, 397.

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vested, shall not have the power to remove that disqualification, which the guilt of the offender has brought upon himself*. In England, no pardon can be pleaded in bar of an impeachment; but the king may pardon after conviction upon an impeachment†. 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 hath 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 Puffendorf*, 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‖. 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.

* C. U. S. Art. 1. §. 3. Art. 2. §. 2.
† 4 Blacks. Com. 399, 400.
‡ Spaven's Puffendorf, vol. 2. 346.
‖ Grotius, 339, &c.

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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*. 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†. Nevertheless, it is said to have been in contemplation soon after the establishment of the federal government, to cede the right of pre-emption 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 authorised 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‡. 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 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 shews the collision which may possibly arise between the several branches of the congress, in consequence of this modifi-

* C. U. S. Art. 4. Sec. 4.
† L. V. Edi. 1794. c. 40.
‡ C. U. S. Art. 4. §. 3.

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cation 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*.

* On the 24th of March, 1796, the house of representatives came to the following resolution: "That the president of the United States be 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

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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 hath 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 honour 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*. 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 honour, 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

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."

* 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 impeachdd. January 7, and 10, 1799.

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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*. 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 zeal 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 represen-"tatives 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 "occasions be indispensable towards reconciling the people to "a decision that should happen to clash with an accusation "brought forward by their immediate representatives†." 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

* 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 calling in at least two members of the former majority of the senate.

† 2 Federalist, 210.

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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*. 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 behaviour; 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†. In the state of Virginia, the trial of impeachments is to be in the general court of the commonwealth, except when a

* 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.

† Amendments proposed by the convention of Virginia, Art. 19. New-York and North Carolina, proposed amendments to the like effect.

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judge of that court may happen to be 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 from 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*. 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 expence of a war: and yet, if through timidity, venality, or corruption, the president, and two thirds of a majority of the senate 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;

* Constitution of Virginia Art. 16. 17. L. V. Edi. 1794. c. 72.

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although it should appear to them, that the object for which the war hath been undertaken, hath 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 honour 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 honour 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

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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*. And this construction seems to be consonant with that resolution, of the house of representatives†, 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‡. 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 Stat s 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 appoint ambassadors, other public ministers, and consuls: and he shall receive ambassadors, and other public ministers. C. U. S. Art. 2. §. 2, 3.

* Debates on the treaty making power, p. 346

† Resolution of the house of representatives, April 6, 1796.

‡ 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.

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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 authorised in his discretion, to give existence. In the army, navy, and volunteer corps,

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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*. 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†. It is however, still more encreased 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, authorised 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 encreasing 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 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 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.

† 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 laws 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.

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the recess of the senate, and the vacancy were filled by a commission which should 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 extention. 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 partizans encreasing 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 favour, may suppose they owe to him, for the distinction.

Perhaps these inconveniencies 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 he 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

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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 inconveniencies 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*, as one of the favourable 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 measures to repel injury,

* On the English Constitution, B. 2. c. 4.

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or provide for defence: congress, only, is competent to these objects: the president may therefore convene them for that purpose. Or it may happen that an important treaty hath 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*. 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 shewn. The importance which the executive department derives from this share in the legislative, hath 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†."

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 repub-

* C. U. S. Art. 1. Sect. 7. † C. U. S. Art. 2. Sect. 1, 3.

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lic, but began to be disregarded as the nation approached to a state of debasement, that fitted them for slavery*. Among christian princes, they seem only to have been calculated for the worst, instead of the best purposes†: 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‡. 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

* Montesquieu's Spirit of Laws, Vol. 1. p. 173. Grotius, p. 313.

† Vattel, p. 348. &c. Grotius, 330.

‡ 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.

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citizens towards theirs; if a truce be 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 infringment of the constitution*. 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

* 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?

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may be 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,

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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 ævo.*

Under the former confederation, the United States in congress assembled, had authority to appoint 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 authorised 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*. 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 all 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

* Articles of confederation and perpetual union, Art. 9, and 10.

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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 inconveniencies 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.

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*. The unexceptionable mode of appointing the judges, and their constitutional independence† 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,

* 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.

† C. U. S. Art. 2. Sec. 2. Art. 3. Sec. 1.

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"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; *be-* "*tween 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 sub-* "*jects**." "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 con- "tests about jurisdiction, the federal court, as the most power- "ful, will ever prevail†." 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‡. 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 burthens 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§. 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 favour 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

* C. U. S. Art. 3, Sec. 2.

† Centinel, p. 15.

‡ See 3 Blacks. Com. p. 41, 55.

§ Amendments to C. U. S. Art. 6, 7, 8, 9, 10.

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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*. Nor was it till after several of the states† 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 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 favour, 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‡. For what

* The several conventions of Massachussetts, New Hampshire, Rhode-Island, New York, Virginia, and North Carolina, proposed amendments in this respect.

† Massachussetts, Virginia, and Georgia, were sued by individuals in the federal courts.

‡ By the constitution of the United States, "no money can be drawn from the treasury, but in consequence of appropriations made by law. How

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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 behaviour; 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 behaviour*. Secondly, by the independence of the judges, in respect to their salaries, which cannot be diminished.

shall an individual having a judgment against the United States, in his favour, recover his money, if the legislature chuse to keep him out of it? The case seems to be equally as bad in the state governments.

* 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 offices during good behaviour, 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.

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Thirdly, by the letter of the constitution which defines and limits the powers of the several co-ordinate 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 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*. But in the United States of America, the judicial power is a distinct, separate, independent, and *co-ordinate* branch of the government; expressly recognised 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

* 1 Blacks. Com. 229. 1 Inst. 110. 3 Inst. 125.

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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 favour 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

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practice there for more than a century, no instance can, I believe, be shewn, where a judge has been appointed to any other than a judicial office, unless it be the honorary post of privy counsellor, 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*. To this cause, not less than to the tenure of their offices *during good behaviour*, may we ascribe that pre-eminent integrity, which amidst surrounding corruption, beams with genuine lustre 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 favour 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 herein consists one of the great excellencies of our constitution: that no individual

* 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 honourable exile, the very officer whom the constitution expressly requires to preside at his trial, in case of his impeachment? To preserve the lustre of judicial 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 honours, or greater pre-eminence of station.

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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 hath 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 authorises 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.

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1. 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 favour*. 8. He shall not be compelled to be a witness against himself. 9. He shall not be subject, for the same offence, to be twice put in jeopardy of life or limb. 10. He shall have the aid of counsel for his defence. 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 convicted upon any charge of treason, unless on the testimony of two witnesses, at least, to the same overt act, or on confession in

* 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.

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open court. In all these respects, the constitution, by a positive injunction, prescribes the duty of the judiciary department*; 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 co-ordinate branches, who have the custody of the purse and sword of the confederacy; and as nothing can contribute so much to

† See C. U. S. Art. 3. Art. 1. §. 9. Amendments to C. U. S. Art. 6, 7, 8, 9, 10.

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it's firmness and independence as permanancy 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*. 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†. 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 behaviour, 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 authorise 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 behaviour*, this does not prevent the separation of the office from the officer, by putting down the office; but only secures to the officer

* Federalist, vol. 2 No. 78.

† See the act of 7 Cong. repealing the act of the preceeding congress for the more convenient organization of the courts of the United States, and the debates thereon.

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his station, upon the terms of good behaviour, 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 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*. 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 rules 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.

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.

* 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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All the expences 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 representaives 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*. 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 be 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 recompence. 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 pro-

* C. U. S. Art. 1, Sec. 9.

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ceed 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*. 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 claiment may have obtained a judgment, or decree, until the general assembly have passed a law making an appropriation, for that purpose, if no law authorising 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 happen to be disallowed by the auditor and comptroller of the treasury, shall be judicially examined†; nor

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

† It hath 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.

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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 enquired 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*. 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

* C. U. S. Art. 4.

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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*.

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 one 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†.

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 178-, 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 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

* C. U. S. Art. 4. † Ibid.

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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 flies, 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 labour, but shall be delivered up on claim of the party to whom such service is due*.

This necessary provision had not a place in the former articles of confederation; in consequence of which numberless inconveniencies 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. 51, prescribes the mode of proceeding in such cases; authorising 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 go-

* C. U. S. Art. 4.

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vernment 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 defence. 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 Amphictions*. 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†.

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 be amiss further to observe, that every pretext for intermeddling with the domestic concerns of any state, under colour 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 against it's 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.

* Spirit of Laws, B. 9. c. 1 and 2.

† On this subject, see Federalist, vol. 2. p. 60 to 64.

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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 and 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*: 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

* 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.

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advances a different opinion*: 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†.

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 objects as may be authorised by the constitution, would, under the true construction of this clause, be the supreme law of the land; but a law not li-

* See Federalist, vol. II. p. 66.

† C. U. S. Art. 6.

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mited 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*.

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†.

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,

* Federalist, Vol. I. No. 33. Vol. II. No. 44.

† C. U. S. Art. 6.

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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 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

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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*. 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 Wil-

* 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.

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liam 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 would 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 favour; 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.

The reasons for some further limitation of the judicial power of the United States have been repeatedly touched upon,

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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, &c. 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 defence 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.

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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 recal, 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; that 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*. 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 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,

* 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 expences paid, may serve as an instance of this practice.

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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 savour of monarchy, or aristocracy, or tend to a consolidated, instead of a federal, union of the states. I have been equally zealous in my endeavours 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 hath 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 labour of this attempt, if the defects of the constitution had been treated with equal candour, as the authors have manifested abilities in the developement of its eminent advantages. But, notwithstanding, those letters are not altogether free from

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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.

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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 independant 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 com- "mon 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 resolu- "tions 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 expres-

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sed 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 labour to enume- " rate and define the several objects of federal power, could in- " tend to introduce in the lump, in an indirect manner, and by a for- " ced 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 con- " stitution, as a system of limited, and specified powers."

My present purpose, therefore, is, in the compass of this note to enquire, how far the common law of England, is the law of the federal government of the United States? Should the enquiry 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*. 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 representa-

* 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.

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tives....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.

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 candour.

In the prosecution of this subject it will be necessary to enquire,

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.

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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 enquire, 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 desart 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 hath 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*."

* 1 Blackstone's Com. p. 106, 107, 108.

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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 at that time by the Dutch, the boundaries between the two colonies being not then established*. 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 Puffendorf 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*†. 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‡. 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

* 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.

† Spavin's Puffendorf Vol. II. p. 242.

‡ Grotius *de Jure Belli et pacis, lib.* 1. c. 3. Sec. 12.

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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*." 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 en- "couragement of those who would engage in the enterprize, 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†." 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

* Grotius *de Jure Belli et pacis, lib.* 2, *c.* 9, *Sec.* 10.

† Stith's History of Virginia, p. 4, 8.

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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, 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 enquire, 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 endeavour 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

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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

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the omission of those more general and extensive powers contained in some subsequent charters. These omissions the colonists themselves endeavoured 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*: an innovation, which was not confined to that colony, but, which was acquiesced in, and even sanctioned by the 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†. 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,

* 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.

† Minot's History of Massachusetts, page 20.

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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*, 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*†. And, secondly, the *jura coronæ*, or prerogatives of the *crown*, as contradistinguished 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.

* See Blackstone's Commentaries, Vol. I. p. 65, 66, 67.

† 1 Blackstone's Commentaries, 74.

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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 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*: 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 authorised 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 shew 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.

* Hutch. Hist. of Mass. Vol. I. p. 393, 394.

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The *jura coronæ*, 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*, 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 coronæ* 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 been at all applicable to the colonies. Upon this ground we may infer that all the rules

* Finch. 85. Blacks. Com. 239.

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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 offences 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 offences are among the first objects of civil polity. But this was the case only with regard to such offences 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, apostacy, 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 offences 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 offence in England which was punished with much severity, could not be deemed an offence in a colony, where universal toleration, or a different denomination of religion, was established; however it might continue to be deemed an offence 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 offences 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,

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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 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*. Now it was held, that those

* 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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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 Nether-

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lands, 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 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

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such an inquiry; from whence we may possibly be made sensible how fruitless would be the labour 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*, when they were expressly adopted by an act of the assembly, which declares, "that they had endeavoured, "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 acknow-"ledge 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 differ-"ence of condition, varying in small things†." 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‡.

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 1642, 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

* Jefferson's Notes on Virginia, 240.

† Laws of Virginia, 1661, c. 1 Edi. 1769.

‡ Jefferson's Notes, 197.

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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*. 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 im-"posed upon them; being for every month's absence, twenty "pounds sterling; and if they forbore a twelvemonth, then to "give security for their good behaviour, besides payment of the "before-mentioned fine. And all quakers, for assembling in un-"lawful assemblies, and conventicles, were farther subject to a "fine of two hundred pounds of tobacco, for each offence†." The like penalty was extended two years after to any other separatist whatsoever, and the third offence, made the offender liable to banishment‡. 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 vigour, established and adopted in Virginia.

But this general adoption of the laws of England was probably confined to the colony of Virginia, 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 lustre, and received new accession from the aspiring character of those, who being discontented with the established church, and with regal go-

* Laws of Virginia, Ed. 1769. p. 3.

† Purvis's collection of the Laws of Virginia, p. 6.

‡ Ibid. p. 115, 116.

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vernment, sought for freedom amidst those savage desarts*. 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†. 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‡. The first settlement at-

* 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.

† Laws of Virginia, Ed. 1733, p. 162, 156, 259, 260, 359, 360, 361, 363, 364, 385, 446, 448. Ed. 1769, p. 160, &c.

‡ Hutch. Hist. of Mass. Vol. I. preface.

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tempted 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*. 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†. 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‡. 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||. The principal characters in Massachusetts during this period were the intimate friends of the leading members of parliament, Pym, Hampden, &c. and whilst Cromwell was at the head of affairs, he shewed them all the indulgence they desired; from 1640 to 1660, they approached very near to an independent commonwealth.

* Hutch. Hist. of Mass. Vol. I. preface, p. 11, 12.

† Ibid. 19, 20. Minot's Hist. of Mass. 14. Belknap's Hist. of New-Hampshire, Vol. I. 67.

‡ Hutchinson, Vol. I. p. 384.

|| Ibid. 385, 386.

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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*. In that branch of law more especially, which is distinguised by the name of crown law, they professed to have no regard to the rules of the common law of England†. 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‡. High treason was not mentioned§, 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‖. 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 offences. 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 offences 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 offence, at the discretion of the court. Burglary and theft in a house, or

* Hutchinson, Vol. II. p. 10, 11. † Ibid. Vol. I. p. 387.

‡ Ibid. Vol. II. p. 12.

§ ‡ In 1678, when complaints were made against the colony, in England, it was made capital. Ibid. Vol. I. p. 390.

‖ Ibid. Vol. I. p. 390.

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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 labour according to their age and condition. Contempt of authority was punished with great severity, by fine, imprisonment, or corporal punishment. Lesser offences were punished at the discretion of the court*. Such are the outlines of their penal code: it would be mispending time to attempt to shew 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 wife, 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 re-

* Hutchinson's History of Mass. Vol. I. p. 383, to 392.

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fused 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 from taxes, on their persons, or estates, under their own improvement*. 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†. 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, extrinsi-"cal to such churches, which they ought to depend upon any "other sort of men for the exercise of‡." 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 brethern§. 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||: and non-conformity was attended with the deprivation of more civil privileges than in England**. 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

* Hutchinson's History Mass. Vol. I. p. 392, to 397.

† Ibid. 369.

‡ Ibid. 370, 371.

§ Ibid. 374.

|| Ibid. 379.

** Ibid. 380.

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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*. 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†. 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‡. 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 im- "possible 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 connexion with those which were disapprov-

* Hutch. Hist. Mass. Vol. II. p. 11, 12. † Ibid, 17.

‡ Ibid. 20, 21.

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ed, were allowed*. 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 offences, in many parts mitigating the penalties at common law; as also an act for the settlement of intestates' estates, which 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†.

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‡. 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 shew 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-

* Hutch. h. Mass. Vol. II. p. 63.

† Ibid. 66.

‡ Minots h. Mass. p. 23.

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Greenwich in the county of Kent. In Massachusetts this was interpreted to include all the properties and customs of gavelkind; 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 plough*. 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 favour 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 irreconcileable 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†. Toleration was preached against as a sin in rulers, which would bring down the judgments of heaven upon the land‡. 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,

* Hutch. h. Mass. Vol. I. 395.

† 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.

‡ Hutch. Vol. I. 75. Belknap, Vol. I. 84. Peters, 64, 65, 67.

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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 favoured, 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 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*. 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†. 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

* 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.

† History of Connecticut, 83.

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binding, have only considered it as auxilary 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*. 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 Coronæ* 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

* Swift's System of the Laws of Connecticut, Vol. I. 40 to 47.

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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.

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 connexion, 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*; 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

* *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.

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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 enquire what was actually done by the several states, in regard to the subject, here spoken of.

The constitution of Massachusetts*, declares, that, "the peo-
" ple of that commonwealth have the sole and exclusive right of
" governing themselves as a free, sovereign, and independent

* Established, March, 1780.

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" 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*: 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†. Secondly, when agreed upon, and ratified, they contained an express declaration, in conformity to the law of nations‖, " that each state retains its sovereignty, freedom and independ- " ence, 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 authorised 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 approv- " ed, in the province, colony, or state of Massachusetts-bay, and " usually practised 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 origi- " nally 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

* Vattel, p. 9.

† They were not finally agreed upon and ratified till the first day of March 1781.

‖ Vattel, p. 18.

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" the protection, safety, prosperity, and happiness of the people " and not for the profit, honour, or private interest of any one " man, family, or class of men."....And again; that, " the peo- " ple 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 practised 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.

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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 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 practised 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 practised by the courts, &c. except such as may be altered by acts of convention, or that declaration

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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, 1778, 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 shew, 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 endeavour to extract

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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 States.

It will be 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 uncontrolable 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 pro- "hibited 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 exer- "cise of it, in virtue of voluntary engagements*." And with

* Vattel, B. 1, C. 1, Sec. 10.

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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†." 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 defence, and welfare of the United States.

† Bacon, of the advancement of learning, fo. 440.

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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, 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*, being fetched from foreign nations. The grant of special authority, upon this branch of commercial polity, and of the English statute law, shews 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*, shew 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 offence 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†. But congress have not power to declare it to be treason in the United States‡: the special power hereby granted, shews that it was not intended to vest congress with the power of punishing offences of this nature, generally,

* 4. Inst. 277. † 1. Hale's Hist. P. C. 222. ‡ C. U. S. Art. 3. §. 3.

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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 offences *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**. 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

* See the Federalist, No. 33. and No. 44.

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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 enquiry 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 hath power to grant reprieves and pardons for offences 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 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 hath a qualified negative

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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 empyric 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 endeavour to analize 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

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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 labour 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 authorised 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 offence the state courts, and not the federal courts, possess 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 pay-

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ments 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 may be; and finally, treason against the U. States; piracies and felonies committed upon the high seas; and offences 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 en-

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suing 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, 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 con-

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strued 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*....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:

* 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.

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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 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*. 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

* See Vattel, Book the first.

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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.

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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 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

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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*. 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 enfored with severe penalties, notwithstanding they may have

* In F. N. B. p. 85. It is expressly said, "that by the common law every "man may go out of the realm, to merchandize, or on pilgrimage, or for what "other cause he pleaseth, without the king's leave, and he shall not be punish-"ed 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 discernement, 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.

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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 mischevous, 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 vigour 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 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.

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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 connexion 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

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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 offence, is also made an offence 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 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

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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 shewn, 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

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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 chattles, 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 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 bail 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:

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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 hath 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 Eng-

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land, 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*, which I had not before seen.

The defendant was charged with an attempt to bribe Tench Coxe, commissioner of the revenue; it was admitted that the offence 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 offence 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 Ststes.

* 2 Vol. Dallas's Reports, 384.

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" 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 offences, 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 offences 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 offences 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 offence 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

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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 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 offence 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 offence, without

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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 offences 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 offence aims at the subversion of any federal institution, or at the corruption of it's public officers, it is an offence 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 27, 1797, for accepting a commission under the French Republic, and under the authority thereof committing acts of hostility against Great-Britain, the defendant alledged, 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

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by two great principles; one is, that all the members of 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 defence. 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 crouded 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

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the prisoner offers to prove, in his defence, are totally irrelevant," &c. 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 pretentions 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 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

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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."

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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*.

* C. U. S. Art. 6.

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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 hath 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 favourite 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

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number of those that are preserved*. A thousand inconveniencies 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 1769. Nicolson and Prentis' in 1785; and Davis' in 1794. The sessions acts are usually sent out in 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† 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,

* 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.

† Mr. Jefferson, Mr. Wythe, Mr. Marshall, and some others.

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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*, we endeavoured to shew, 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,

* Some few acts of parliament prior to that period, were re-enacted in Virginia.

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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*. 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 king-"dom, so far as the same may consist with the several ordi-"nances, 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†."

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‡," 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 au-

* Note E.

† 1776, c. 5. See also, Vol. 2, p. 259, note .2

‡ Acts of 1786. c. 115.

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thorised 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*." Nineteen statutes were reported by that committee as proper to be re-enacted.

The assembly at the same session passed an act†, 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‡, 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 common-"wealth, and have not been enacted in the form of Virginia "laws." In pursuance of the directions of this act, the committee reported draughts 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 1789, c. 9.

† Ibid. c. 17.

‡ Acts of 1790, c. 20.

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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 offences com- "mitted against the same, at any time before the commence- "ment of this act, shall remain in the same condition in all re- "spects, as if this act had never been made." "Saving more- "over 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, reme- "dial 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, be- "fore the commencement of this act, in like manner, with the "like proceedings 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*".

* V. L. Edition of 1794, c. 147.

THE END.

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ERRATA.

Preface, p. 91, l. 17. *for* 'legislature', *read* legislative. p. 120, l. 4. of Note 3. *for* 'case', *read* care. *Appendix*, p. 18, l. 14. *for* 'presumption', *read* resumption. p. 30. l. 1. *for* 'proved,' *read* was provided. p. 39. l. 9. *for* 'vousque', *read* viresque. p. 43. l. 30. *for* 'tenors', *read* terrors. p. 80. l. 5. *for* 'concentrated', *read* consecrated. p. 87. l. 27. *for* 'on', *read* or. p. 92. l. 36. *for* 'Wilson', *read* Nelson. p. 103. l. 35. *for* 403. *read* 191. p. 105. l. 41. *for* 'Division,' *read* Divisor. p. 110. l. 24. *after* eastern, *add* or western. p. 145. l. 21. *for* 'the', *read* these. p. 150. l. 13. *for* 'legislature', *read* legislative. p. 151. l. 30. *for* 'are,' *read* may be. p. 176. l. 26. *for* 'constitution,' *read* construction. p. 193. l. 22. *for* 'confined,' *read* confirm'd. p. 203. l. 29. *after* 'legislative,' *strike out* and. p. 205. l. 23. *for* special *read* speedy. p. 213. l. 17. *for* 'distict,' *read* district. p. 225. l. 22. *for* 'can be *so* long', *read* can be long. p. 226. l. 7. *for* 'held', *read* withheld. p. 228. l. 4. *for* 'on,' *read* in. p. 233. l. 2. *for* 'imposts,' *read* imports. p. 241. l. 22. *after* debts, *insert* and. p. 243. l. 9. *for* 'the,' *read* this. p. 261. l. 19. *for* 'treatises', *read* treatise. p. 266. l. 9. *for* 'being', *read* be. p. 282. l. 24. *for* 'of felony', *read* or felony. p. 294. last line, *for* 194. *read* 252, 253, 254. p. 315. l. 11. *for* 'from,' *read* upon. p. 343. l. 3. *after* 'case', *insert* of. p. 353. l. 32. *for* '3 Cess.' *read* 3 Ass. (or Assise.) p. 361. l. 24. *after* also, *insert* it. p. 435. l. 24. *after* 'common,' *insert* law. p. 434. l. 15. *after* 'power', *insert* but about the exercise of the power. p. 444. l. 23. *after* 'committee,' *insert* and.

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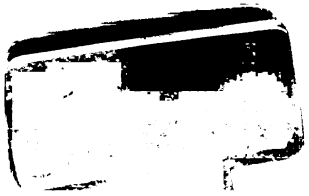
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