COMMENTARIES

ON THE

CONSTITUTION OF THE UNITED STATES

HISTORICAL AND JURIDICAL

WITH

OBSERVATIONS UPON THE ORDINARY PROVISIONS OF STATE CONSTITUTIONS AND A COMPARISON WITH THE CONSTITUTIONS OF OTHER COUNTRIES.

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VOLUME I.

BOSTON:
THE BOSTON BOOK COMPANY.
1895.

Typography and Presswork
BY CARL H. HEINTZEMANN, BOSTON, MASS.

TO

THE HONORABLE MELVILLE W. FULLER

CHIEF-JUSTICE OF THE UNITED STATES

AS A SLIGHT TRIBUTE

TO HIS LEARNING, PATIENCE AND COURTESY

THIS BOOK IS BY HIS PERMISSION

RESPECTFULLY DEDICATED

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COMMENTARIES

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CHAPTER I.

INTRODUCTION.

§ 1. Paper Constitutions.

PAPER constitutions have been the target for the ridicule of most writers during the present century who have thought themselves political philosophers. Unstable as water, they cannot excel, has been the judgment upon them by historians.[1] "Have you a copy of the French Constitution?" was asked of a bookseller during the second French Republic. "We do not deal in periodical literature," was the reply.[2] In the United States, and only in the United States, has a written constitution survived a hundred years, while during the same time the forms of the governments of all other nations have changed more often and more radically than have their respective boundaries. What are the

§ 1. [1] As late as 1814, even Gouverneur Morris was sceptical. He wrote, in a letter to Timothy Pickering, Dec. 22, 1814:—

"But, after all, what does it signify that men should have a written constitution, containing unequivocal provisions and limitations? The legislative lion will not be entangled in the meshes of a logical net. The legislature will always make the power which it wishes to exercise, unless it be so organized as to contain within itself the sufficient check. Attempts to restrain it from outrage, by other means, will only render it more outrageous. The idea of binding legislators by oaths is puerile. Having sworn to exercise the powers granted, according to their true intent and meaning, they will, when they feel a desire to go farther, avoid the shame, if not the guilt, of perjury, by swearing the true intent and meaning to be, according to their comprehension, that which suits their purpose."

[2] In the preceding century a similar question was answered by the offer of the Almanach Royal.

reasons for this phenomenon? How many of them are to be found in preceding history? How many in geographical position? How has the Constitution been affected by the origin of the colonists? How much by the subsequent immigration from all parts of the Old World? To what extent has the Constitution been altered, besides the acknowledged changes contained in the fifteen amendments? What are the advantages of this form of government? What benefits has it secured? What abuses has it perpetuated? What evils has it prevented? How far is it suitable to other countries? Why have its imitations failed in South and Central America? The answers to these questions should be of use to our own countrymen in order to show them what rules must be observed to preserve the stability of our institutions. In the constant remaking of the constitutions of Europe, South America, and even Asia, Africa, and the Pacific islands, they should teach statesmen the pitfalls to avoid and the paths to seek for the permanent security of both liberty and property. These can be found only by an exhaustive study of the precedents which are landmarks of the progress in the development of the Constitution of the United States before as well as since its adoption. They lead from the forests of Germany in the time of Tacitus, over the island of Runnymede and the rock at Plymouth, beyond the apple-tree at Appomatox into the old Senate Chamber at Washington, where Chief Justice Fuller sits with his associates. They were the result of conflicts with the sword, the pen, and the tongue, in the field, the press, the senate, and the court. Amongst their builders are enrolled the names of Simon de Montfort, Coke, Eliot, Hampden, Lilburne, Milton, Shaftesbury, Locke, Wilkes, Jefferson, Hamilton, Marshall, Webster, and Lincoln. They present the spectacle of the struggles of a people to obtain civil and religious liberty for themselves, to extend them to those of another and despised race, and now to combine them with the rights to ungoverned labor and complete security for private property. Dry as the account must be in a summary which omits a description of the battles, and does not contain the periods of eloquence and passion used by the combatants on either side of the disputes thus decided, the facts cannot fail to be of interest to all who take the pleasure of the antiquary in tracing the origin of present

customs, or who desire from the study of the past to shape the future for the advance of man.

§ 2. Hostility to the Federal Constitution.

It was well said by John Quincy Adams that the Constitution was "extorted from the grinding necessity of a reluctant nation."[1] It was accepted by a small majority as the only alternative to disruption and anarchy. Its ratification was the success of the men who were interested in the security of property, the maintenance of order, and the enforcement of obligations against those who desired communism, lawlessness and repudiation. It was a conflict between the cities and the backwoods, between the mountains and the plains.[2] And the opposition was led by those cliques and families who had learned to control for their private interests the state patronage of which the new government must necessarily deprive them.[3]

The battle was waged on the stump and by pamphleteering, and gave birth to that great repository of political science, The Federalist.[4]

Two States refused to agree until after it had gone into successful operation, and the rest threatened severe retaliation in order to compel their coalition. Five of the other nine ratified with expressions of disapproval of its terms and a demand for subsequent amendments.[5] In but three[6] was it adopted with-

§ 2. [1] Jubilee of the Constitution, by John Quincy Adams, p. 55.

[2] For an analysis of the vote on the ratification of the Constitution, see The Geographical Distribution of the vote on the Federal Constitution, by O. G. Libby; Bulletin of the University of Wisconsin, vol. i, No. 1.

[3] See Letters of a Landholder, by Oliver Ellsworth, afterwards Chief Justice of the United States, Letter ii. Ford's Essays on the Constitution, pp. 144, 176.

[4] Valuable collections are Pamphlets on the Constitution, and Essays on the Constitution, edited by Paul Leicester Ford. Others may be found in McMaster and Stone on Pennsylvania and The Federal Constitution. The latter contains one which seems to have had more influence than any except the Federalist: The New Roof, by Francis Hopkinson; an excellent imitation of Swift's Tale of a Tub.

[5] Massachusetts, South Carolina, New Hampshire, Virginia, New York.

[6] New Jersey, Delaware, and Georgia. The last needed protection from an Indian war then threatened; the others, relief from the State imposts at New York and Philadelphia. Delaware, moreover, which was even then a pocket borough, welcomed the political advantage of the permanent security of two seats in the Senate.

out a struggle. In several, success was only obtained by the application of force, threats, or stratagem. In Connecticut, they silenced with tar and feathers an anti-federalist delegate who tried to talk out the Convention.[7] A majority of the New Hampshire delegates were determined or instructed to vote against ratification, and at the first session the federalists considered a vote for an adjournment of three months a victory. At the second, while some of its opponents were "detained" at dinner, the Constitution was ratified by a snap vote, taken at sharp one o'clock.[8] The legislature of Pennsylvania obtained a quorum to call the State Convention by the unwilling presence of two members, dragged to the meeting by a mob who prevented their leaving the house.[9] In the State of New York, a majority of the Convention was anti-federal; and victory was won by the threat of Hamilton, that in case of defeat New York, Kings, and Westchester would ratify the Constitution as an independent state and leave the northern counties alone unprotected from foreign enemies, without any outlet for their commerce to the sea.[10] The charge was believed, if not

[7] My authority for this is that accomplished student of American history, Paul Leicester Ford, Esq., from whom I have also received other valuable information as to the history of this period.

[8] A contemporary undated indorsement on a letter of April 23, 1788, by Paine Wingate to John Sullivan, President of New Hampshire, says:

"You see that all the members did not vote, only 104. The others, Timothy Walker *detained* at *his* home in this city, after he had given them a *dinner*, to prevent them from voting —or a number of them." New Hampshire State Papers, vol. xxi, p. 851. The means of detention are unknown. According to tradition, Judge Walker refused to admit the messenger sent by the Convention to summon the absent members, and when the latter persisted, threatened to set the dogs on him. For this information the writer is indebted to the historian of the Convention, Hon. Joseph B. Walker. Daniel Webster's father, Capt. Pelatiah Webster, was a member of the Convention, and in his old age repeated to his family a speech which he claimed that he delivered when he voted for the Constitution (Curtis, Life of Webster, vol. i, p. 10, note). The records show, however, that his constituents instructed him to oppose ratification, and that he did not vote upon the question. (Walker, New Hampshire and the Federal Convention.)

[9] A report of the proceedings and debate is to be found in Proceedings and Debates of the General Assembly of Pennsylvania, taken in shorthand by Thomas Lloyd, Philadelphia, 1787, vol. i, p. 115; reprinted and corrected in Pennsylvania and the Federal Constitution, by John Bach McMaster and Frederick D. Stone, ch. ii, pp. 27–73.

[10] Letter of George Clinton to John

proved, that the Federalists prevented the circulation of the newspapers of the opposition with the mails.[11] And in Pennsylvania and Maryland they suppressed, by purchase and boycott, the reports of the debates in the State Conventions.[12]

The Federal Convention itself held its debates in secret for fear lest the public should become so excited that there would be no hope of any successful result of the deliberations. Twice at least was it on the point of breaking up in despair. So little hope did there seem of any practical result, that at last the sceptic Franklin advised his colleagues to take refuge in prayer.[13] Even at the end, it was the belief of the strongest supporters of the Constitution, that it could not hold the country together for more than a few years.[14]

Elements of discord abounded in that small assembly. The States which were prominent in wealth and population protested against the injustice of vesting the control elsewhere than in a majority of population or of property. The smaller States, which in the Continental Congress and under the Confederation had an equal vote, insisted that they would never surrender the right which they had thus obtained. The communities

Lamb, Clinton MSS., New York State Library.

[11] Pennsylvania and The Federal Constitution by McMaster and Stone.

[12] Ibid. My information as to Maryland is also derived from Mr. Ford.

[13] Madison Papers, Elliot's Debates, 2d ed., vol. v, p. 253.

[14] Gouverneur Morris wrote Walsh, Feb. 5, 1811: "Fond, however, as the founders of our national Constitution were of republican government they were not so much blinded by their attachment as not to discern the difficulty, perhaps impracticability, of raising a durable edifice from crumbling materials. History, the parent of political science, had told them that it was almost as vain to expect permanency from democracy as to construct a palace on the surface of the sea." In the same letter, Morris said of Hamilton: "General Hamilton had little share in forming the Constitution. He disliked it, believing all republican governments to be radically defective. He admired, nevertheless, the British Constitution, which I consider an aristocracy in fact, though a monarchy in name. . . . He heartily assented, nevertheless, to the Constitution, because he considered it as a bond which might hold us together for some time, and he knew that national sentiment is the offspring of national existence. He trusted, moreover, that in the changes and chances of time we should be involved in some war, which might strengthen our union and nerve the executive." See *infra*, § 8, note 2.

of slaveholders refused consent to any provisions which endangered their right of property in human chattels. The descendants of the Puritans in the North had conscientious scruples against the recognition of the legality of slavery. The recollection of the oppressions by the Stuarts and the Guelphs and the history of the fall of the republics of Greece and Italy caused a fear in some that any elements of strength which might be vested in the government of the whole would be used as instruments for the suppression of liberty in all its parts. The contemptible position of the United States at home and abroad; their inability to enforce obedience to their laws, to pay their debts, to collect revenues, to negotiate treaties of commerce with foreign governments, and to protect either the individual States or their own Congress from domestic violence, inspired in others the belief that liberty was of far less consequence than stability and security, and made them seek as far as possible to strengthen the central government and remove it from the control of the people. The Constitution was based on compromises, but the results of those compromises have proved so salutary, that but one of them has hitherto been overthrown.

§ 3. Anarchy preceding the Federal Convention.

The reaction from the patriotism which carried the Revolution to a successful termination left the people of the United States in the most contemptible position that they have ever occupied. The Articles of Confederation gave Congress power to incur debts, but no means of paying them, except such as might be derived from the voluntary contributions of the several States to meet the requisitions imposed which it could vote but not collect.[1] The result was a bankruptcy of the common treasury, due to a refusal of many States to supply the funds necessary to pay the arrears due to creditors at home and abroad, even to the soldiers who had

§ 3. [1] Between 1782 and 1787, New Hampshire, North Carolina, South Carolina and Georgia paid no taxes. Connecticut and Delaware one-third; Massachusetts, Rhode Island, and Maryland about one-half; Virginia three-fifths; Pennsylvania nearly the whole; and New York, which derived a large revenue from an impost, more than their respective quota. (Hamilton, in the New York legislature, in favor of a national impost, 1 American Museum, 445–448.)

risked their lives and wasted their estates in the struggle with Great Britain. The need of a federal judiciary had been painfully apparent throughout the war, from the technical inconveniences caused by the condemnation of prizes in State courts of admiralty, some of whom would not respect acts of Congress unless first adopted by the individual State legislatures. After the war, the observance of those articles of the Treaty of Peace which protected the property of the Tories and debts due British subjects, was prevented by acts passed by the State legislatures in opposition to them, which in many instances the State courts respected. This gave Great Britain an excuse for keeping garrisons in different posts of the United States and in refusing to conform to other articles by which she was bound. At the same time the debtor class, which had been such an important factor in the revolution,[2] manifested a similar desire to avoid payment of debts due citizens of the United States.[3] Stay laws which impeded the collection of judgments, tender laws which permitted debtors to meet their obligations in State bills of credit or land or commodities, at a valuation fixed by juries, and other impediments to creditors, were passed by different legislatures. Many debtors were not satisfied with these palliatives. They demanded nothing short of the cancellation of indebtedness and the destruction of all rights of property. Men re-echoed the doctrines of the levellers[4] in Cromwell's army and applauded the tale in Plutarch of the King of Lacedaemon who burned all promissory notes in the market-place of Sparta.[5] Conventions were held where it was claimed that all property ought to be held in common, because all

[2] See Sumner's Life of Hamilton, pp. 47–52. John Adams records that, on his return from Congress in 1774, an old client warmly congratulated him upon the glorious work of Congress in once more suspending the courts. Works, vol. ii, p. 420.

[3] When Andrew Jackson moved to West Tennessee in 1788, he found but one other lawyer there. The latter had been retained by the members of the debtor class, who were very powerful in that frontier community, so that the creditors could not use legal process to collect what was due them. Attempts were made to drive Jackson from the State for taking collection cases; but he was not to be intimidated, and so obtained an assured practice at his start. Kendall's Life of Jackson, pp. 89–90.

[4] The name was then in common use. See Letters of a Federal Farmer, by R. H. Lee, p. 37; Ford's Pamphlets on the Constitution, p. 32.

[5] Plutarch's Life of Agis.

had aided in saving it from confiscation by the power of England.[6] Taxes were voted to be needless burdens, courts of justice to be intolerable grievances, and lawyers a common nuisance.[7] These doctrines were embraced by at least twelve thousand men in the New England States, with correspondents in the South, prepared to enforce them by the ballot if that were practicable, otherwise by an appeal to arms.[8] Such an appeal was made in Massachusetts in the fall of 1786, by the outbreak known as Shay's Rebellion. Fifteen hundred men under the leadership of Captain Daniel Shay met in the counties of Worcester and Hampshire. The courts of justice were the first objects of their attack, and their sessions were forcibly closed. When the first body of militia met them on the field, many of the militiamen changed sides and joined the insurgents. Congress had no power under the Articles of Confederation to afford relief.[9] When the rebellion was threatened it refused even the loan of arms.[10] When the civil war broke out

[6] See Madison's remarks in the Federal Convention. Madison Papers, Elliot's Debates, 2d ed., vol. v, p. 463.

[7] Curtis' Constitutional History of the United States, vol. i, p. 181.

[8] This was the estimate of General Knox. See a letter from Washington to Madison, Washington's Works, 1st ed., p. 207, cited by Curtis, ibid., vol. i, p. 184. At about the same time attempts similar to that of Shay were made in New Hampshire, Vermont, Connecticut, and Maryland.

[9] "A power to interfere in the internal concerns of a State could only have been exercised by a broad construction of the third of the Articles of Confederation, which was in these words: 'The said States hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare; binding themselves to assist each other against all force offered to or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.' When this is compared with the clear and explicit provision in the Constitution, by which it is declared that 'the United States shall guarantee to every State in this Union a republican form of government,' there can be no wonder that a doubt was felt in the Congress of 1786-87 as to their powers upon this subject. It is true that the Massachusetts delegation, when they laid before Congress the measures which had been taken by the State government to suppress the insurrection, expressed the confidence of the legislature that the firmest support and most effectual aid would have been afforded by the United States, had it been necessary, and asserted that such support and aid were expressly and solemnly stipulated by the Articles of Confederation (Journals, xii, 20, March 8, 1787). But this was clearly not the case; and it was not generally supposed in Congress that the power existed by implication." Ibid., p. 178, note 1.

[10] When the insurrection was threat-

and it seemed as if Shay's followers would win in Massachusetts, and similar attempts were made by debtors to close the courts in other States, a vote passed to raise troops, avowedly for another purpose, who might be used to suppress the insurrection;[11] but the success of Governor Bowdoin and the State militia caused the abandonment of the attempt.[12]

It was small wonder that Congress hesitated to overleap its powers to afford protection to a State when it had found that it was unable to protect itself. Three years before, a squad of eighty mutineers, justly indignant at not having received their pay, had made the Congress of the United States flee from Philadelphia to Trenton.[13]

ened, Massachusetts had asked the loan of sixty pieces of field artillery. The application was refused by the negative vote of six States, one being divided, and the delegation from Massachusetts alone supported it. Journals, 65–67, April 19, 1787; Curtis, ibid., p. 182.

[11] When Congress received the news of the actual outbreak, taking the excuse of an alleged hostility on the part of certain Indian tribes, they unanimously resolved to raise one thousand three hundred and forty additional troops in the New England States, one-half of them by the State of Massachusetts, to serve for the term of three years, for the protection and support of the western States and the Mississippi settlements, and to secure and facilitate the surveying and selling of the public lands; but really for the purpose of aiding the State of Massachusetts in quelling the insurrection. Journals, xi, p. 258, Oct. 30, 1786. Ibid., p. 182. See also Madison Papers, Elliot's Debates, 2d ed., vol. v, p. 95.

[12] See Remarks on the Proposed Plan of a Federal Government, by Alexander Contee Hanson, afterwards chancellor of Maryland, Ford's Pamphlets on the Constitution, p. 244.

[13] Madison has given the following account of this occurrence: "On the 19th of June," 1783, "Congress received information from the Executive Council of Pennsylvania that eighty soldiers, who would probably be followed by others, were on the way from Lancaster to Philadelphia, in spite of the expostulations of their officers, declaring that they would proceed to the seat of Congress and demand justice, and intimating designs against the bank. A committee, of which Colonel Hamilton was chairman, was appointed to confer with the executive of Pennsylvania, and to take such measures as they should find necessary. After a conference, the committee reported that it was the opinion of the executive that the militia of Philadelphia would probably not be willing to take arms before they should be provoked by some actual outrage; that it would hazard the authority of government to make the attempt; and that it would be necessary to let the soldiers come into the city, if the officers who had gone out to meet them could not stop them. The next day the soldiers arrived in the city, led by their sergeants, and professing to have no other object than to obtain a settlement of ac-

Unable to command either the purse or the sword, Congress was abandoned by the ablest statesmen and politicians in the country. The State legislatures alone could raise by taxation the money which they appropriated, and in them and the offices which they created ambitious men preferred to seek employment. Congress was so much despised that it became almost impossible to collect a quorum, and more than twenty-five delegates were rarely found there.[14] At no time before the Federal Constitution were all the States represented at once.[15]

The ill effects resulting from the inability of the United States to regulate commerce were, however, those which were most se-

counts, which they supposed they had a better chance for at Philadelphia than at Lancaster. On the 21st they were drawn up in the street before the State House, where Congress were assembled. The Executive Council of the State, sitting under the same roof, was called on for the proper interposition. The president of the State (Dickinson) came in and explained the difficulty of bringing out the militia of the place for the suppression of the mutiny. He thought that, without some outrages on persons or property, the militia could not be relied on. General St. Clair, then in Philadelphia, was sent for, and desired to use his interposition, in order to prevail on the troops to return to the barracks. But his report gave no encouragement. In this posture of things it was proposed by Mr. Izard that Congress should adjourn. Colonel Hamilton proposed that General St. Clair, in concert with the Executive Council of the State, should take order for terminating the mutiny. Mr. Reed moved that the general should endeavor to withdraw the mutineers, by assuring them of the disposition of Congress to do them justice. Nothing, however, was done. The soldiers remained in their position, occasionally uttering offensive words and pointing their muskets at the windows of the hall of Congress. At the usual hour of adjournment the members went out, without obstruction, and the soldiers retired to their barracks. In the evening Congress reassembled, and appointed a committee to confer anew with the executive of the State. This conference produced nothing but a repetition of the doubts concerning the disposition of the militia to act, unless some actual outrage were offered to persons or property, the insult to Congress not being deemed a sufficient provocation. On the 24th, the efforts of the State authority being despaired of, Congress were summoned by the president to meet at Trenton." The mutiny was afterwards suppressed by marching troops into Pennsylvania under Major-General Howe. Journals, viii, 281. (Curtis' Constitutional History of the United States, vol. i, p. 149, note 1.) See also Madison Papers, Elliot's Debates, 2d ed., vol. v, pp. 92-94.

[14] Curtis' History of the Constitution, vol. i, pp. 153, 228.

[15] Report of a committee appointed to devise means for procuring a full representation in Congress, made Nov. 1, 1783. Journals, vol. viii, pp. 480-482, cited by Curtis, ibid., vol. i, p. 154, note.

verely felt. New York and Rhode Island, which contained the principal harbors, had refused, the latter absolutely, the former except on impracticable conditions, to consent to the amendment of the Articles of Confederation so as to permit Congress to tax imports.[16] Attempts to negotiate advantageous treaties of commerce were met by the ministers of foreign countries with the objection that the United States had no power to compel compliance with those promises which they made as a consideration for the stipulations binding upon the other parties.[17] The power to threaten as well as to promise was also out of their possession. Great Britain had excluded from her dependencies in the West Indies the fish and other principal exports of the United States; but Congress had no power to retaliate by discriminating duties upon the cargoes of British ships or an embargo. While Great Britain discriminated against the products of our commerce, Spain blocked the road by preventing the free navigation of the Mississippi. Congress, powerless to protect this, which was indispensable to the prosperity of the States west of the Alleghany Mountains, seemed on the point of conceding it in return for commercial advantages of minor importance.[18] Even the power to regulate trade upon waters wholly within the United States was vested nowhere, unless in a bay or river entirely within a single State. The States which had no ports for foreign commerce were oppressed by tolls levied upon them at the places where their goods were shipped. "New Jersey, placed between Philadelphia and New York, was likened to a cask tapped at both ends; and North Carolina, between Virginia and South Carolina, to a patient bleeding at both arms." [19]

[16] Curtis' Constitutional History, vol. i, pp. 116, 118, 167, 233, 243.

[17] See the letter written by the Duke of Dorset, English ambassador at Paris, to the commissioners sent to Europe to negotiate commercial treaties, March 26, 1785; Diplomatic Correspondence, vol. ii, p. 297, quoted in Curtis' Constitutional History of the United States, vol. i, p. 194, note 8.

[18] *Infra*, § 9, note 4.

[19] Madison's Introduction to the Debates in the Federal Convention. Elliot's Debates, 2d ed., vol. v, p. 112.

"The State systems are the accursed thing which will prevent our being a nation. The democracy might be managed, nay, it would remedy itself after being sufficiently fermented; but the vile State governments are sources of pollution which will contaminate the American name for ages, machines that must pro-

To the disgrace and suffering of those five years we owe our subsequent prosperity. Nothing but the burden of the evils which then oppressed them would have induced the people to place those brakes upon the exercise of their own wills and that machinery in the hands of the central government which have maintained our public and private financial credit and put down rebellion as well as repelled invasion. Had the men of that time not experienced the mischief of unbridled popular license, and State statutes passed in the free exercise of local jealousies, they would have rejected the Constitution as an instrument savoring of tyranny. Congress would have been denied the power of taxation. The States would have been engaged in constant quarrels over retaliatory legislation. Travellers and goods would have been stopped by custom-houses at the border of each State. Peace in the South after the close of our Civil War could have never been restored without a decimation of the leaders of the revolt. The national and State legislatures would have the power of taking property without due process of law; and credit would have been ruined by the enactment of laws which impaired the obligation of contracts.

§ 4. Previous Attempts at Union.

The thirteen colonies had in law no connection with each other except through the ties binding each to the mother country. Great Britain assumed the duty of protecting them against foreign foes, and in return hampered their commerce so that it might be confined to the exclusive advantage of English merchants. The need of some arrangement through which they could plan together for their common defence was early felt. But mutual jealousy as well as royal discouragement made the attempts abort. It was not until they felt the oppression of the central power that they all combined. The refusal of the others to allow the largest, Massachusetts, more than an equal voice in their deliberations kept the New England colonies from a treaty of alliance against their surrounding enemies, until the

duce ill, but cannot produce good; smite them in the name of God and the people." Gen. Knox to Rufus King, July 15, 1787. Rufus King's Life and Correspondence, vol. i, p. 228.

civil war made England abandon them to their own resources. Even then, the New England Confederation of 1643 [1] was too narrow for the admission of Rhode Island; was unable to always obtain the obedience to its requisitions by Massachusetts; [2] exercised little power after the restoration of Charles II; and did not survive his reign.

The deposition of James II defeated his project of uniting the New England, and, if possible, all the colonies, under a single governor-general. Under William and Mary, John Locke, whose philosophy could appreciate the benefit of freedom for Englishmen at home, but not in the colonies, suggested the appointment of a captain-general of North America, with arbitrary powers; [3]

§ 4. [1] The articles provided: — "VIII. It is also agreed that the Commissioners for this Confederacon hereafter at their meetings, whether ordinary or extraordinary, as they may have commission or opertunitie, do endeavoure to frame and establish agreements and orders in generall cases of a civill nature wherein all the plantacons are interested for preserving peace among themselues, and preventing as much as may bee all occations of warr or difference with others, as about the free and speedy passage of Justice in every Jurisdiccon, to all the Confederats equally as their owne, receiving those that remoue from one plantacon to another without due certefycats; how all the Jurisdiccons may carry it towards the Indians, that they neither grow insolent nor be injured without due satisfaccion, lest warr break in vpon the Confederates through such miscarryage. It is also agreed that if any servant runn away from his master into any other of these confederated Jurisdiccons, That in such Case, vpon the Certyficate of one Majistrate in the Jurisdiccon out of which the said servant fled, or upon other due proofe, the said servant shalbe deliured either to his Master or any other that pursues and brings such Certificate or proofe. And that vpon the escape of any prisoner whatsoever or fugitiue for any criminal cause, whether breaking prison or getting from the officer or otherwise escaping, upon the certificate of two Majistrates of the Jurisdiccon out of which the escape is made that he was a prisoner or such an offender at the tyme of the escape. The Majestrates or some of them of that Jurisdiccon where for the present the said prisoner or fugitive abideth shall forthwith graunt such a warrant as the case will beare for the apprehending of any such person, and the delivery of him into the hands of the officer or other person that pursues him. And if there be help required for the safe returneing of any such offender, then it shall be graunted to him that craves the same, he paying the charges thereof." Preston's Documents Illustrative of American History, pp. 92-93.

[2] See the remarks of Madison in the Virginia Convention of Ratification, Elliot's Debates, 2d ed., vol. iii, p. 133.

[3] "Mr. Locke, with other philosophers, solemnly advised that prince — William III — to appoint a cap-

and William Penn, the summons of a congress with two delegates from each colony, to sit in New York, under the presidency of the Governor as the King's High Commissioner, "after the manner of Scotland."[4] In 1721, the exigencies of the conflict with France for the control of North America brought forth a scheme, said to have been drafted by Lord Stairs, which combined the suggestions of Penn and Locke. All of these plans, however, remained in the pigeon-holes of the Board of Trade. A few conferences of colonial governors or commissioners, in at least one instance called a congress,[5] were held at the suggestion of the crown, to regulate treaties with the Indian tribes and to fix the men and money which each should contribute to the common defense.[6] Under George II, in 1754, the same cause led to a congress at Albany of representatives from seven colonies,[7] who made a treaty with the six nations and drafted a plan of union, to be set in operation by an act of Parliament. This, which was largely drawn by Franklin, vested the control of war, Indian affairs, the acquisition of new territory, and the government of new settlements, in a president-general appointed by the crown and a grand council chosen by the colonial legislatures; each colony to have

tain general over the colonies, with dictatorial power to levy and command an army without their own consent, or even the approbation of Parliament." Chalmers' Introduction to The Revolt in the Colonies, Book VII, ch. xxvii.

[4] Penn's Plan of Union, presented to the Board of Trade: —

"That their business shall be to hear and adjust all matters of Complaint or difference between Province and Province. As, 1st, where persons quit their own Province and goe to another, that they may avoid their just debts, tho they be able to pay them, 2nd, where offenders fly Justice, or Justice cannot well be had upon such offenders in the Provinces that entertaine them, 3dly, to prevent or cure injuries in point of Commerce, 4th, to consider of ways and means to support the union and safety of these Provinces against the publick enemies. In which Congresse the Quotas of men and charges will be much easier, and more equally sett, then it is possible for any establishment made here to do; for the Provinces, knowing their own condition and one another's can debate that matter with more freedome and satisfaction and better adjust and ballance their affairs in all respects for their common safety." Preston's Documents Illustrative of American History, p. 147.

[5] That called in 1711. Frothingham's Rise of the Republic, 3d ed., p. 119, note.

[6] A complete list of those held up to 1748 may be found in Frothingham's Rise of the Republic, 3d ed., note to pp. 118, 119. See also ibid., p. 150.

[7] New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, and Maryland.

two representatives, and none more than seven; the representation between those limits to be apportioned in accordance with the taxes paid by the constituencies. They might raise troops with officers nominated by the representatives of the crown, and confirmed by the grand council; but could not impress men in any colony without the consent of the legislature. They had the further power to make laws and levy "duties, imposts, or taxes"; the laws to be not repugnant to the laws of England, and to be subject to the veto of the King in council.

The scheme was rejected by all the colonial assemblies to which it was proposed, as strengthening too highly the prerogative. The Board of Trade refused approval because it was too democratic.[8]

The Stamp Act was the cause of the first actual step toward union. At the summons of Massachusetts,[9] an "American Congress," consisting of delegates from the popular assemblies of nine colonies, met at New York, in October, 1765.[10] Six of the colonies represented adopted a declaration of rights, and drew up petitions to King and Parliament which compelled the repeal of the obnoxious statute.

Seven years later, in imitation of a practice of Cromwell's army,[11] committees of correspondence were formed to secure co-operation between the different parts of the thirteen colonies, to resist the aggressions of Great Britain.[12]

[8] Frothingham's Rise of the Republic, 3d ed., pp. 146, 147. Curtis' Constitutional History of the United States, vol. i, p. 4, note 1. Subsequently, in 1788, Franklin said: "The different and contradictory reasons of dislike to my plan make me suspect that it was really the true medium; and I am still of opinion it would have been happy for both sides, if it had been adopted. The colonies so united would have been sufficiently strong to have defended themselves; there would have been no need of troops from England; of course the subsequent pretext for taxing America, and the bloody contest it occasioned, would have been avoided. But such mistakes are not new; history is full of the errors of states and princes." Life of Franklin by Sparks, vol. i, p. 178. The plan is republished in Preston's Documents Illustrative of American History, pp. 170–187.

[9] The resolution was moved by James Otis in the House of Representatives.

[10] Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, and South Carolina. The delegates of New York, South Carolina, and Connecticut were not authorized to join in the declaration and petitions.

[11] See Lilburne's advice to the army, *infra*, Appendix to this chapter, page 54.

[12] The first suggestion reported is

The first Continental Congress met Sept. 5, 1774. It had been recommended by Franklin the year before. In April, 1774, members of the Virginia House of Burgesses, after their formal dissolution by the Governor, had organized as a committee, and advised the committees of correspondence to confer as to the expediency of another Congress. Some of its delegates were elected by popular conventions; others by the popular houses of the legislatures; others by county committees; a few by immediate popular vote.[13] The instructions given to the delegates by their constituents were various. The delegates from New York and New Jersey were simply instructed "to represent" those colonies. The instructions of the others were in general confined to the adoption of such measures as might extricate the colonies from their present difficulties and obtain the repeal of the obnoxious acts of Parliament. The delegates of South Carolina were by their instructions expressly confined to agreeing to "legal measures."[14] This Con-

the resolution of Samuel Adams at a Boston town meeting, in November, 1772, for the appointment of such a town committee.

[13] "The delegates in the Congress of 1774 from New Hampshire were appointed by a Convention of Deputies chosen by the towns, and received their credentials from that convention. In Rhode Island they were appointed by the General Assembly and commissioned by the governor. In Connecticut they were appointed and instructed by the Committee of Correspondence for the Colony, acting under authority conferred by the House of Representatives. In New York the mode of appointment was various. In the City and County of New York the delegates were elected by popular vote taken in seven wards. The same persons were also appointed to act for the counties of West Chester, Albany and Duchess, by the respective committees of those counties; and another person was appointed in the same manner for the county of Suffolk. The New York delegates received no other instructions than those implied in the certificates, 'to attend the Congress and to represent' the county designated. In New Jersey the delegates were appointed by the committees of counties, and were simply instructed 'to represent' the colony. In Pennsylvania they were appointed and instructed by the House of Assembly. In the counties of New Castle, Kent, and Sussex-on-Delaware delegates were elected by a convention of the freemen assembled in pursuance of circular letters from the Speaker of the House of Assembly. In Maryland the appointment was by committees of the counties. In Virginia it was by a popular convention of the whole colony. In South Carolina it was by the House of Commons. Georgia was not represented in this Congress." In Massachusetts they were appointed by the House of Representatives. Curtis' Constitutional History of the United States, vol. i, p. 8, note 2.

[14] Journals, i, 2-9.

gress adopted a declaration of rights and the Non-importation Association, subscribed by each member on behalf of himself and the colony which he represented; and then dissolved, after recommending that another congress be called to meet at Philadelphia in the following year.[15] The second Continental Congress assembled at Philadelphia, May 10, 1775. The delegates were mostly chosen by popular conventions; but in some cases by the lower houses of the colonial legislatures, with subsequent ratifications by conventions.[16] Some credentials granted authority to consent and agree to all such measures as the Congress should deem necessary and effectual to obtain a redress of American grievances. Others were more moderate in their language. After their election the battle of Lexington was fought. Thereupon the Congress, with the consent of the people, assumed revolutionary powers, which were limited merely by their ability to carry them into effect. The first resolution of the first Continental Congress was: —

"That in determining questions in Congress, each colony or province shall have one vote; the Congress not being possessed of, or at present able to procure, proper materials for ascertaining the importance of each colony." [17]

The larger States were never able to procure an alteration of this rule.

The second Continental Congress organized an army; issued a continental currency; established a treasury department and post-office; raised a navy; licensed privateers; and in answer to applications from the people of four colonies,[18] advised them what forms of government to institute. They also gave recommendations to the people of the respective colonies as to the manner in which they should treat adherents to the King; and adopted the Declaration of Independence.[19]

[15] This has been considered the beginning of the Union. Hildreth's History of the United States, vol. i, p. 43; Lincoln's Inaugural. Both papers are reprinted in Preston's Documents, pp. 192-205.

[16] Curtis' Constitutional History of the United States, vol. i, p. 18.

[17] September 6, 1774. Journals, vol. i, p. 10. Towle's History and Analysis of the Constitution, 3d ed., p. 48.

[18] Massachusetts, New Hampshire, Virginia and South Carolina.

[19] See Penhallow v. Doane's Admrs. 3 Dallas, 54, 111. Money was raised by loans and the issue of the Continental currency.

The adoption of a formal instrument of union was delayed because of the refusal of some of the colonies to surrender their claims to the western territory. Finally that difficulty was surmounted. The Articles of Confederation, which were drawn by the Continental Congress, were ratified by Maryland, the last State necessary for their adoption, on March 1st, 1781.

In drafting these, the Committee unwisely rejected the suggestion of organizing an annual parliament of two houses;[20] and "misled partly by the rooted distrust for which the motive had ceased, and partly by erudition which studied Hellenic councils and leagues as well as later confederacies, took for its pattern the constitution of the United Provinces, with one house and no central power of final decision,"[21] as had been done in organizing the Continental Congress. No power was given to the Confederation to levy taxes, contributions being derived from requisitions upon the States, which could not be compelled to pay them; or to regulate commerce, interstate or international; or to create courts, except "for the trial of piracies and felonies committed on the high seas, and for deciding appeals in all cases of captures."[22] The most important powers could not be exercised without the assent of nine States. The articles could not be amended without the assent of all. During the war, the patriotism of the people, and the despotic powers granted to Washington as commander-in-chief, prevented these defects from causing the ruin of the country, although they greatly prolonged the struggle in which Great Britain would have been defeated earlier had adequate powers been vested in the United States. When peace was restored and provision was necessary to pay creditors at home and abroad, the Confederation became openly contemptible.

Coincident with the break-down of the Confederation, the several States had been organized under the advice of the Continental Congress, not in imitation of the federal body, but in governments similar to those which had prevailed in them while they were colonies, and analogous to that of Great Britain, with the legislatures generally divided into two houses, and the three

[20] This had been suggested by Joseph Hawley of Massachusetts in November, 1775. Bancroft's Formation of the Constitution, p. 11.

[21] Bancroft's Formation of the Constitution, p. 11.

[22] Articles of Confederation, IX.

departments, the executive, the legislative, and the judiciary, independent and co-ordinate.

The call of the Federal Convention was the result of a meeting of commissioners from Virginia and Maryland for the purpose of agreeing upon regulations for the navigation of Chesapeake Bay and the rivers Potomac and Pocomoke, who visited the house of Washington in March, 1785.[23]

§ 5. Preliminaries to the Federal Convention.

The formal initiative of the Federal Convention was the appointment of commissioners by Virginia and Maryland to draw a compact for the regulation of trade upon the Chesapeake Bay and the Potomac and Pocomoke rivers. These commissioners met at Alexandria in March, 1785, and in the same month visited Mt. Vernon, where they agreed, after consulting with Washington, to recommend a meeting of commissioners from all the States to make arrangements, with the consent of Congress, for the regulation of commerce. Virginia called such a conference, and five States were represented at Annapolis in September, 1786. New Jersey alone had authorized its delegates to consider "other important matters" besides commercial regulations, which might be necessary to the common interest and permanent harmony. A report was made, which seems to have been drawn by Hamilton.[1] In it the Commissioners submitted their opinion: —

"That the idea of extending the powers of their deputies to other objects than those of commerce, which has been adopted by the state of New Jersey, was an improvement on the original plan, and will deserve to be incorporated into that of a future convention. They are the more naturally led to this conclusion, as, in the course of their reflections on the subject, they have been induced to think that the power of regulating trade is of such comprehensive extent, and will enter so far into the general system of the federal government, that, to give it efficacy, and to obviate questions and doubts concerning its

[23] The original meeting was held at Alexandria, but the commissioners visited Mt. Vernon where the plan of the meeting of commissioners from all the States was suggested. Marshall's Life of Washington, vol. v, p. 90; Sparks, vol. i, p. 28; Washington's Writings, 1st ed., vol. ix, 509.

§ 5. [1] Curtis' Constitutional History of the United States, vol. i, p. 234.

precise nature and limits, may require a correspondent adjustment of other parts of the federal system. That there are important defects in the system of the federal government, is acknowledged by the acts of all those states which have concurred in the present meeting; that the defects, upon a closer examination, may be found greater and more numerous than even these acts imply, is at least so far probable, from the embarrassments which characterize the present state of our national affairs, foreign and domestic, as may reasonably be supposed to merit a deliberate and candid discussion, in some mode which will unite the sentiments and councils of all the states. In the choice of the mode, your commissioners are of opinion that a convention of deputies from the different states, for the special and sole purpose of entering into this investigation, and digesting a plan for supplying such defects as may be discovered to exist, will be entitled to a preference, from considerations which will occur without being particularized. Your commissioners decline an enumeration of those national circumstances on which their opinion respecting the propriety of a future convention, with more enlarged powers, is founded; as it would be a useless intrusion of facts and observations, most of which have been frequently the subject of public discussion, and none of which can have escaped the penetration of those to whom they would in this instance be addressed. They are, however, of a nature so serious, as, in the view of your commissioners, to render the situation of the United States delicate and critical, calling for the exertion of the united virtue and wisdom of all the members of the confederacy. Under this impression, your commissioners, with the most respectful deference, beg leave to suggest their unanimous conviction, that it may essentially tend to advance the interests of the Union, if the states, by whom they have been respectively delegated, would themselves concur, and use their endeavors to procure the concurrence of the other states, in the appointment of commissioners, to meet at Philadelphia on the second Monday in May next, to take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the constitution of the federal government adequate to the exigencies of the Union; and to report such an act for that purpose to the United States in Congress assembled, as, when agreed to by them, and afterwards confirmed by the legislatures of every state, will effectually provide for the same."[2]

February 21st, 1787, Congress adopted the following resolution:—

[2] Elliot's Debates, 2d ed., vol. i, pp. 117, 118.

"Whereas there is provision in the Articles of Confederation and Perpetual Union, for making alterations therein, by the assent of a Congress of the United States, and of the legislatures of the several states; and whereas experience hath evinced that there are defects in the present Confederation; as a means to remedy which, several of the states, and particularly the state of New York, by express instructions to their delegates in Congress, have suggested a convention for the purposes expressed in the following resolution; and such convention appearing to be the most probable mean of establishing in these states a firm national government,—*Resolved*, That, in the opinion of Congress, it is expedient that, on the second Monday in May next, a convention of delegates, who shall have been appointed by the several states, be held at Philadelphia, for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures such alterations and provisions therein as shall, when agreed to in Congress, and confirmed by the states, render the federal Constitution adequate to the exigencies of government and the preservation of the Union."[3]

It was not until the 25th of May, 1787, that a majority of States were represented at Philadelphia. The Federal Convention then organized and elected president George Washington. Rhode Island took no part in the proceedings; but delegates, appointed by the legislatures of the other twelve States, finally appeared. On September 17th the Constitution was completed[4] and was signed by less than three-fourths of the delegates who attended, many of these doubting its wisdom and fearing its failure, but accepting the scheme as the only chance of escape from anarchy and dissolution. The delegates with most influence in the Convention were James Madison of Virginia, the two Pinckneys of South Carolina, Rufus King of Massachusetts, Roger Sherman of Connecticut, James Wilson of Pennsylvania, and Gouverneur Morris of the last named State, to whose pen the style of the instrument owes its symmetry and clarity.[5] Hamilton and Franklin would have preferred different forms of government, the former

[3] Elliot's Debates, 2d ed., vol. i, p. 120.

[4] The plan of the present Constitution of the German Empire was dictated by Bismarck on the afternoon of Dec. 13th, 1871 (Von Sybel, Die Begründung des Deutschen Reichs, Band vi).

[5] "The instrument was written by the fingers which write this letter." (Morris to Pickering, December 22, 1814, Elliot's Debates, 2d ed., vol. v, p. 507.)

one more aristocratic, the latter more of a democracy; but Franklin rendered great service in promoting harmony in the convention, and Hamilton in securing the subsequent ratification.

Congress, eleven days after the close of the Convention, without any recommendation, transmitted the document to the State legislatures for submission to State conventions.[6] On June 21, 1788, it was ratified by the ninth State, New Hampshire, and was then binding upon all who had previously acceded; but it did not go into effect until the assemblage of the first Congress at Philadelphia on March 3, 1789.[7]

§ 6. Originality of the Work of the Federal Convention.

It was well said by Gladstone that "the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man." Sciolists and bookworms have sneered at the phrase as overlooking the indebtedness of the Federal Convention to the teachings of history. But the great statesman of our own time well appreciated the value and the character of the work of the statesmen of the eighteenth century. Their product was new, if anything can be new, unless we destroy the word and adopt the hyperbole of Solomon. The result was as much of an invention as were the first cotton-gin and telephone. Dominated though they were, like all men in every human action, by forces of which they were ignorant, they labored consciously. Avoiding dangers which history and experience had taught them to foresee, they deliberately selected the expedients which they found had proved effective to prevent them. They departed radically from the system of the Confederation. They did not follow blindly the constitution of a single State. They founded the first federal republic which could enact and enforce its laws directly upon its individual citizens. To crown all, they gave powers to courts never before given public recognition, which have been the preservation of the nation as well as of the form of government, and which will eventually be exercised by the tribunals of every civilized people.

They were men of few books, but they had read these well.

[6] Sept. 28, 1787, Journals XII, pp. 149–166; cited by Curtis, Constitutional History of the United States, vol. I, p. 630.

[7] Owings v. Speed, 5 Wheaton, 420.

The only theories of political economy with which their debates show familiarity[1] were a few exploded maxims of Hume,[2] quoted in the Convention, and perhaps a single reference to the classification of taxes made by the French physiocrats.[3]

Their study of ancient history seems to have gone little beyond the Lives of Plutarch and a few compilations made during the eighteenth century.[4] With modern English history most had

§ 6. [1] Adam Smith's great work on The Wealth of Nations was published in 1776; and an American edition in 1789, which speaks of the great demand for the book in the United States; but there is no reference to it in the reports of the debates, even in the discussion of taxes on exports. There is a tradition that Hamilton read and made a commentary on it in 1783. (See History of the Republic of the United States as traced in the Writings of Alexander Hamilton and his Contemporaries, vol. ii, p. 514.) Prof. W. G. Sumner, than whom no one seems better qualified to pass judgment on such a point, was satisfied from the internal evidence of Hamilton's writings, that he never read Adam Smith (Sumner's Life of Hamilton, pp. 108, 180). According to Sumner, Law and Hume are the only writers on political economy whom Hamilton quotes to any extent (Hamilton's Works, Lodge's ed., vol. i, pp. 70, 78, 256; vol. vii, pp. 86, 390; vol. vii, p. 245). Henry C. Adams, on the other hand, in his History of Taxation in the United States, p. 20, expresses the opinion that Hamilton's Report on Manufactures was inspired by Adam Smith. Prof. Ugo Rabbeno, in Protezionismo Americano, and E. G. Bourne, in Quarterly Journal of Economics, vol. viii, p. 328, have collected a series of parallel passages, which seem to prove that Hamilton consulted The Wealth of Nations when preparing this report.

[2] Hamilton, in the Convention, referred with approval to the fact "that one of the ablest politicians (Mr. Hume) had pronounced all that influence on the side of the crown which went under the name of *corruption*, an essential part of the weight which maintained the equilibrium of the Constitution." (Madison Papers, Elliot's Debates, 2d ed., vol. v, p. 229.) This was one of his favorite themes (See Jefferson's Ana, books 1 and 2, vol. ix, p. 96; Jefferson to William Short, Jan. 8, 1825, ibid., vol. vii, p. 389). He also quoted with approval the paradox that a national debt is a national blessing (Hamilton to Robert Morris, Hamilton's Works, 2d ed., vol. iv, p. 124).

[3] It seems that the term "direct taxes" in Article I, section 2, which was moved by Gouverneur Morris, was borrowed from the writings of the French physiocrats, Turgot, Quesnay, and Dupont de Nemours, with whom he and Franklin at least were familiar. See Franklin's Works, vol. viii, p. 245; Dunbar on The Direct Tax of 1861, 3 Quarterly Journal of Economics, p. 436; and the discussion of Direct Taxes, *infra*.

[4] "It is clear that Hamilton and Madison knew hardly anything more of Grecian history than what they had picked up from the observations of the Abbé Mably" (Freeman's History of Federal Government from the Foundation of the Achæan League to the Disruption of the United States, p. 319). Freeman refers to Mably's Observations sur l'Histoire de Grèce, which, as he shows, displays ignorance

such knowledge as is contained between the covers of Hume and Catharine Macaulay, together with the traditions of the conflict between the Crown and Parliament in the previous century, and a full acquaintance with contemporary events on the continent of Europe as well as Great Britain. A few had read with care the Parliamentary History, besides Locke and some writers on political science in the eighteenth century, and Wyse and Paine, if not Rousseau, had made all familiar with the theory of the social contract. But no references to these works are to be found in the reports of the debates, which abound in illustrations from colonial history. One only of them had any claim to the title of civilian, and his reading in that direction seems to have gone little beyond the works of Kames, although perhaps the most important phrase in the Constitution is said to have been taken by him from the civil law.[5]

The common law had been the subject of their deepest study,[6]

of the structure of that famous league. A number of the members of the Convention were graduates of American colleges; but at that time the curriculum of such a college went little beyond what is now required for admission to the freshman class. Two had studied in the Scotch universities, and one for a short time at Oxford; but the parades of classical learning in the debates show little knowledge which was not derived from Montesquieu. See Maine, Popular Government, p. 204.

[5] Judge Wilson, who is said to have suggested the words, "impair the obligation of contracts." Holmes' Argument in Sturges *v.* Crowninshield, 4 Wheaton, 122, 151.

[6] "In no country, perhaps, in the world, is the law so general a study. The profession itself is numerous and powerful, and in most provinces it takes the lead. The greater number of the deputies sent to the Congress were lawyers. But all who read, and most do read, endeavor to obtain some smattering in that science. I have been told by an eminent bookseller, that in no branch of his business, after tracts of popular devotion, were so many books as those on the law exported to the plantations. The colonists have now fallen into the way of printing them for their own use. I hear that they have sold nearly as many of Blackstone's Commentaries in America as in England. General Gage marks out this disposition very particularly in a letter now on your table. He states that all the people in his government are lawyers or smatterers in law — and that in Boston they have been enabled, by successful chicane, wholly to evade many parts of one of your capital constitutions."

"This study renders men acute, inquisitive, dexterous, prompt in attack, ready in defence, full of recourses. In other countries the people, more simple and of a less mercurial cast, judge of an ill principle in government only by an actual grievance; here they anticipate the evil, and judge of the pressure of the grievance by the badness of the principle. They augur misgovernment at a distance, and snuff the approach of

but even in that their books were few. According to John Adams, at the outbreak of the revolution there was but one copy of the State Trials and Selden's Tract of the Judicature of Parliament in the United States.[7]

With two great writers of their own time they were thoroughly familiar. The lectures of Sir William Blackstone were then recognized as an authority in America as well as England;[8] and the writings of Montesquieu were not only cited constantly with respect, but studied before the Convention as a preparation for its great work.[9]

From the former, they had learned those compacts between the Crown and Commons which had proved indispensable to British freedom. By the latter, they had been taught the causes of the decay of other nations; and especially the theory that each government which is permanent must be divided into three distinct and independent departments, the legislative, the judiciary and the executive.[10] The truth of this had been deeply impressed

tyranny in every tainted breeze." (Burke's Speech on Conciliation with America, March 22, 1775, Burke's Works, Am. ed., vol. ii, pp. 124, 125.)

[7] Those were in Boston. John Adams' Works, vol. x, pp. 238–239. In 1790 there was a copy of an English impeachment trial at Worcester, Massachusetts, but none in New Hampshire. For Jeremiah Smith was obliged to drive there from the latter State in order to find a form from which to draw the impeachment of Judge Woodbury Langdon. (Life of Jeremiah Smith, p. 38.) John Dickinson at least was well read in the Parliamentary History.

[8] According to Burke there were almost as many English copies of Blackstone sold in the United States as in England (*supra*, note 6). An American edition was published in Philadelphia in 1771. A copy bought by Roger Sherman in the same year is now in the library of the New York City Bar Association.

[9] The Spirit of the Laws was cited constantly in the debates at Philadelphia and the State Conventions, as well as in The Federalist. Washington, when preparing for the Convention, studied and copied with his own hand an abstract made for him by Madison. (Bancroft's Formation of the Constitution, p. 211.)

[10] "In every form of government (*πολιτεία*) there are three departments (*μόρια*), and in every form the wise law-giver must consider, what, in respect to each of these, is for its interest. If all is well with these, all must needs be well with it, and the differences between forms of government are differences in respect to these. Of these three, one is the part which deliberates (*τὸ βουλευόμενον*) about public affairs; the second is that which has to do with the offices. . .; and the third is the judicial part (*τὸ δικάζον*)." — Aristotle, Politics, book VI, c. xiv.

"Il y a dans chaque État trois sortes de pouvoirs: la puissance législative, la puissance exécutrice des

upon them by the imbecility of Congress under the Articles of Confederation.

They had been well disciplined by that severe school-mistress, experience. In the army, some had been tried by the weakness of the central power and the need of dancing attendance on local legislatures blinded to the common welfare by local interests and prejudices. As judges, others had observed the injustice and impairment of public credit from the obstructions cast by State legislatures in the way of foreign and domestic creditors. In

choses qui dépendent du droit des gens, et la puissance exécutrice de celles qui dépendent du droit civil.

"Par la première, le prince ou le magistrat fait des lois . . . et corrige ou abroge celles qui sont faites. Par la seconde, il fait la paix ou la guerre, envoie ou reçoit des ambassades, établie la sûreté, previent les invasions. Par la troisième, il punit les crimes, ou juge les différences des particuliers. On appellera cette dernière la puissance de juger, et l'autre simplement la puissance exécutrice de l'Etat. . .

"Lorsque dans la même personne ou dans le même corps de magistrature, la puissance législative est réunie à la puissance exécutrice, il n'y a point de liberté; parce qu'on peut craindre que le même monarque ou le même sénat ne fasse des lois tyranniques pour les exécuter tyranniquement.

"Il n'y a point encore de liberté si la puissance de juger n'est pas séparée de la puissance législative et de l'exécutrice. Si elle étoit jointe à la puissance législative, le pouvoir sur la vie et la liberté des citoyens seroit arbitraire: car le juge seroit législateur. Si elle étoit jointe à la puissance exécutrice, le juge pourroit avoir la force d'un oppresseur.

"Tout seroit perdu si le même homme, ou le même corps des principaux, ou des nobles, ou du peuple, exerçoient des trois pouvoirs: celui de faire des lois, celui d'exécuter les résolutions publiques, et celui de juger les crimes ou les différends des particuliers." — Montesquieu, L'Esprit des Lois, livre xi, ch. vi (1748).

"It may be confidently laid down, that neither the institution of a Supreme Court, nor the entire structure of the Constitution of the United States were the least likely to occur to anybody's mind before the publication of the 'Esprit des Lois.' We have already observed that the 'Federalist' regards the opinions of Montesquieu as of paramount authority, and no opinion had more weight with its writers than that which affirmed the essential separation of the Executive, Legislative, and Judicial powers. The distinction is so familiar to us, that we find it hard to believe that even the different nature of the Executive and Legislative powers was not recognized till the fourteenth century; it occurs in the Defensor Pacis of the great Ghibelline jurist, Marsilio da Padova (1327), with many other curious anticipations of modern political ideas, but it was not till the eighteenth that the 'Esprit des Lois' made the analysis of the various powers of the State part of the accepted political doctrine of the civilized world." — Maine, Popular Government, p. 218, cited from Thayer's Constitutional Cases, pp. 1, 2.

these legislatures again, many had seen the strength and weakness of their organization, and the necessity of some breakwaters against sudden floods of popular passion.

In Congress, they had felt the need of unity in the executive, and the powers of taxation and the regulation of commerce in the national legislature. Many had assisted in framing the constitutions of their respective States, and had tested the strength and weakness of the work they had thus accomplished. All these things were ever before them in their conclave. And if they builded better than they knew, they worked with intelligent foresight.

§ 7. Prototypes of the Federal Constitution.

The Constitution of the United States is not the first written constitution of a nation, although it is the first that has had a prolonged and successful duration. Articles of confederation in peace and war between different states were the natural outgrowth of treaties of alliance between small powers under constant dangers from an enemy too strong for any one of them alone. Such was the Achaian League, which lasted in Greece one hundred and thirty-four years, from the reign of Pyrrhus to the proconsulate of Mummius.[1] At the outbreak of the Revolution, such confederations dragged out an impotent existence in Switzerland and the Netherlands. From the latter form of league were copied many of the defects in the instrument which the Constitution displaced.[2] Such confederacies, however, were, with the exception of

§ 7. [1] See Freeman's History of Federal Goverment, *passim*, especially pp. 245, 704, for a history of the rise and fall and an account of the structure of the Achaian League.

[2] "In their first formative effort they missed the plain road of English and American experience. They had rightly been jealous of extending the supremacy of England, because it was a government outside of themselves; they now applied that jealousy to one another, forgetting that the general power would be in their own hands. Joseph Hawley of Massachusetts had, in November, 1775, advised annual parliaments of two houses; the committee for framing the confederation, misled partly by the noted distrust for which the motive had ceased and partly by erudition which studied Hellenic councils and leagues as well as later confederacies, took for its pattern the Constitution of the United Provinces, with one house and no central power of final decision. These evils were nearly fatal to the United Provinces themselves, although every one of them could be reached by a messenger within a day's journey; and here was a continent of States which could not be consulted

the Hanseatic League, which was maintained for commercial purposes, mainly if not solely for the purpose of defense, or in some cases of offensive war. None sought, except in so far as their mutual relations were concerned, to restrain the powers of the sovereigns of which they were composed. Still less was there any restraint upon the powers of the whole. The idea of a limitation upon the powers of a legislative body is of purely Anglo-Saxon origin. Limitations on the powers of the Kings of England were recognized by the common law and in certain cases were repeated and enlarged in the charters which they granted voluntarily or under compulsion. Charters were granted during the middle ages on the continent of Europe as well; and in England at least were enforced by the courts whenever sporadic attempts were made to overstep them. In England limitations of the prerogative were included in the coronation oath; and four kings lost their crown, and at least one his life, after proceedings judicial in their nature to punish its violation.[3] The King of Poland

without the loss of many months, and would ever tend to anarchy from the want of agreement in their separate deliberations."—Bancroft's Formation of the Constitution, pp. 10, 11.

[3] The articles voted by Parliament for the deposition of Edward II and Richard II, both of whom were afterwards killed in prison, found each guilty of the violation of his coronation oath (Howell's State Trials, vol. i, pp. 47, 147). The "Charge of High Treason and other High Crimes exhibited to the High Court of Justice by John Cook, Esq., Solicitor General, appointed by the said Court, for and in behalf of the people of England, against Charles Stuart King of England," upon which Charles I was found guilty and executed, charged him amongst other things with violating his coronation oath (Howell's State Trials, vol. iv, pp. 1070, 1119). The resolution of the Convention which declared the abdication of James II included in its recital of the grounds for declaring the throne vacant, that he "endeavored to subvert the constitution of this kingdom by breaking the original contract between king and people." (Macaulay's History of England, ch. x; Hallam's Constitutional History of England, ch. xiv.) Charles and James were also found guilty of violating "the fundamental laws" (ibid.). No previous writer, to the author's knowledge, has referred to the coronation oath as a stepping-stone to a written constitution.

The present coronation oath in England was thus established by the Act of 1 William and Mary, ch. vi:—

"The archbishop or bishop shall say, *Will you solemnly promise and swear to govern the people of this kingdom of England and the dominions thereto belonging, according to the statutes in parliament agreed on, and the laws and customs of the same?* The King and Queen shall say, *I solemnly promise so to do.* Archbishop or bishop: *Will you to your power cause*

upon his election swore obedience to the *pacta conventa* under the

law and justice in mercy to be executed in all your judgments? King and Queen: *I will.* Archbishop or bishop: *Will you to the extent of your power maintain the laws of God, the true profession of the gospel and the protestant reformed religion established by law? And will you procure unto the bishops and clergy of this realm, and to the churches committed to their charge, all such rights and privileges as by law do or shall appertain unto them, or any of them?* King and Queen: *All this I promise to do.* After this, the King and Queen laying his and her hand upon the holy gospels, shall say: King and Queen: *The things which I have here before promised, I will perform and keep, so help me God.* Then the King and Queen shall kiss the book."

At the same time the persons concerned must also make, subscribe and repeat the following declaration: —

"I A. B. do solemnly and sincerely in the presence of God profess, testify and declare, That I do believe that in the sacrament of the Lord's supper there is not any transubstantiation of the elements of bread and wine into the body and blood of Christ at or after the consecration thereof by any person whatsoever; (2) And that the invocation or adoration of the virgin Mary or any other saint, and the sacrifice of the mass, as they are now used in the church of Rome, are superstitious and idolatrous. (3) And I do solemnly in the presence of God profess, testify and declare, That I do make this declaration, and every part thereof, in the plain and ordinary sense of the words read unto me, as they are commonly understood by English protestants, without any evasion, equivocation or mental reservation whatsoever, and without any dispensation already granted me for this purpose by the pope, or any other authority or person whatsoever, or without any hope of any such dispensation from any person or authority whatsoever, or without thinking that I am or can be acquitted before God or man, or absolved of this declaration or any part thereof, although the pope, or any other person or persons, or power whatsoever, should dispense with or annul the same, or declare that it was null or void from the beginning." (12 and 13 Wm. III, ch. ii; 1 W. and M., Sess. II., ch. ii; 30 Car. II., ch. i.)*

The old form of the coronation oath taken by James I was as follows: —

"Juramentum, Regis Jacobi 1603. Archbishop: Sir, will you grant and keep and by your oath confirm to your people of England the laws and customs to them granted by the kings of England your lawful and religious predecessors; and namely the laws, customs and franchises granted to the clergy and to the people by the glorious king St. Edward, your predecessor, according and conformable to the laws of God and true profession of the gospel established in this kingdom and agreeing to the prerogatives of the kings thereof and to the ancient customs of this realm?

King. I grant and promise to keep them.

A. Will you keep peace and agreement entirely according to your power, both to God, the holy church, the clergy and the people?

K. I will keep it.

A. Will you to your power cause

* By 5 Anne, ch. 8, two clauses were added which promise that the King will inviolably maintain and preserve the settlement of the true Protestant religion with the government, worship, discipline, rights and privileges of the Church of Scotland as previously established; and the settlement of the Church of England and the doctrine, worship, discipline, and government thereof as by law established.

penalty of dethronement for their infringement.[4] In Scotland, during the wars with that Mary who will always be remembered as the Queen of Scots, theologians justified rebellion by assigning breaches of the promises thus made at the coronation, and to prove that the royal authority was not too lofty to be limited by contract, quoted from the texts in the Book of Books, where Jehovah repeatedly bound himself by a covenant with Israel.[5]

law, justice and discretion in mercy and truth to be executed in all your judgments?

K. I will.

A. Sir, will you grant to hold and keep the laws and rightful customs which the commonalty of your kingdom have,* and to defend and uphold them to the honour of God as much as in you lieth?

K. I grant and promise so to do.

Sequitur admonitio episcoporum, etc.

Our lord and king, we beseech you to grant and preserve unto us and every one of us and the churches committed to our charge all canonical privileges and due law and justice, and that you would protect and defend us as every good king in his kingdom ought to be a protector and defender of the bishops and churches under their government.

K. With a willing and devout heart I promise and grant that I will preserve and maintain to you and every of you and the churches committed to your charge all canonical privileges and due law and justice, and that I will be your protector and defender to my power by the assistance of God as every good king in his kingdom ought to protect and defend the bishops and churches under their government." (Prothero's Select Statutes and Documents, pp. 391, 392.) Anciently, at least, on the conclusion of the oath the archbishop turned to the crowd and asked four times, "Do you consent to have this man to be your king?"; a clear proof that the right to the crown originally depended on the choice of the people, which was used as an argument in favor of the execution of Charles and the dethronement of James. (Milton, Defence of the People of England, in Answer to Salmasius for the King, Milton's Works, Pickering's ed., vol. viii, p. 189, and *passim*. See also, Eikonoklastes, ibid., vol. iii, p. 382; Burnet's History of his Own Time, 2d ed., Book IV, vol. iii, p. 378.)

Charles I justified his refusal to sign the act abolishing bishops, and George III his refusal to agree to catholic emancipation, upon the ground that such assents would be violations of their respective coronation oaths. (See Eikon Basilike; Eikonoklastes, Milton's Works, Pickering's ed., vol. iii, p. 405; Defence of the People of England, in Answer to Salmasius, ibid., vol. viii, pp. 246, 247. (Campbell's Lives of the Chancellors, 1st ed., vol. iv, p. 101; vol. vii, p. 676.)

[4] See Adams, Defence of American Constitutions, 3d ed., vol. i, p. 79.

[5] The Rise of Modern Democracy in New England, by Charles Borgeaud of the University of Geneva, Switzerland, p. 78. This is a book of great value and originality.

* In some earlier oaths "*Quas vulgus elegerit*," which is translated by Milton, "that the common people, that is, the House of Commons, should choose." (Defence of the People of England in Answer to Salmasius for the King. Milton's Works, Pickering's ed., vol. viii, p. 245.

The power of the courts to enforce the limitations upon the prerogative of the crown was therefore a conception familiar to the minds of American lawyers long before the Revolution. The power of the courts to enforce limitations upon the power of a national legislature was not yet recognized. Blackstone had familiarized them with the doctrine of the omnipotence of Parliament. The maxim that it could do everything except make a man a woman, and a woman a man, was as trite a quotation then as now. Yet successive steps in human progress had not only shown the necessity but suggested the practicability of such a practice. Under the Tudors and Stuarts the doctrine of the divine right of kings was not only preached from the pulpits but argued at the bar. The crown lawyers contended that Parliament could not, even with the consent of the king, shear the crown of its essential prerogatives.[6] The king had no power to thus deprive his successors of their birthrights. He had not even the right to himself abandon a trust reposed in him by God. These claims of the prerogative of the crown were among the sources of the idea of a prerogative of the people.[7]

Although no court was so bold as to set aside an act of Parliament, we find a few judicial sayings that an act of Parliament against common right would be void;[8] and ecclesiastical courts where the supremacy of the pope was recognized had held statutes void which infringed the liberties of the church.[9] In the conflict

[6] This was expressly decided in Godden *v.* Hales, 2 Shower, 475; S. C. as Godwin *v.* Hales, Comberbach, p. 21; Howell's State Trials, vol. xi, p. 1166, where the arguments are set forth at length; 8 Bacon's Abridgement, pp. 70–79. But the decision, which sustained the power of the King to dispense with the penal statutes against Roman Catholics, was one of the causes of the Revolution of 1688. (Macaulay's History, ch. vi. See also Lord Bacon's Maxims, Reg. 19; Year Book, 2 Henry VII, p. 6.)

[7] See John Lilburne's tract, The People's Prerogative, A.D. 1647–8; cited by Borgeaud, The Rise of Modern Democracy in Old and New England, p. 89.

[8] Lord Coke, in Doctor Bonham's Case, 8 Rep. 118, and citations there set forth. Lord Holt, in Mayor and Commonalty of London *v.* Wood, 12 Modern Reports, 669, 687.

[9] In 1648 the Court of the Rota Romana refused to recognize a statute of the Republic of Genoa which forbade a Genoese subject from making an ecclesiastic his executor; "*tanquam contra libertatem ecclesiasticam est nullum ipso facto et jure ex defecto potestatis laicorum statutentium*" (Coxe, Judicial Power and Unconstitutional Legislation, pp. 123–128). The famous

with George III, the colonists turned the old weapons of royalty against its wishes. The government of the colonies had always been treated as a part of the crown's prerogative with which Parliament did not interfere, except in so far as the regulation of commerce was concerned. The colonial lawyers claimed that the Stamp Act was not binding, as an infringement of the prerogative; while they stirred up the people with the cry that taxation without representation was tyranny.[10]

The colonists were accustomed to having the statutes passed by their legislatures set aside as in conflict with a fundamental law. Their legislative powers were limited by their charters, which, like those of municipal or private corporations, permitted no legislation in conflict with the principles of the common law. Bills which they passed affecting private rights as well as the crown's prerogative were always subject to the disapproval of the Privy Council, which usually acted in accordance with opinions grounded upon legal precedents written by the law-officers of the crown.[11]

controversy between Henry II and Thomas à Becket arose from the refusal by the Archbishop to obey the Constitutions of Clarendon, which, amongst other things, took away benefit of the clergy in criminal cases, and which were solemnly annulled by him in his capacity as an ecclesiastical judge upon certain excommunications. After Becket's death, the King was unable to make peace with the Pope until he had renounced the obnoxious statutes (ibid., pp. 137–139).

[10] A large number of illustrations of those arguments, when first used against the validity of the writs of assistance to aid in the search for smuggled goods may be found in Mr. Justice Gray's notes to Quincy's Reports, *passim*. According to a letter of Chief Justice Hutchinson of Massachusetts, Feb. 26, 1766, "the chief justice of Rhode Island supposes no act of Parliament can controul a law of that colony" (ibid., p. 443). In the same year John Adams wrote to Cushing, his associate on the bench of Massachusetts: "You have my hearty concurrence in telling the jury the nullity of acts of Parliament" (ibid.). In 1675, Governor Leverett of Massachusetts claimed that the King and Parliament could enlarge, but could not restrict their charter rights (Brooks Adams, Emancipation of Massachusetts, p. 200, citing Randolph's Narrative, Hutch. Coll., Prince Soc. ed., vol. i, p. 243). In 1708 or 1709 Governor Cranston of Rhode Island formally superseded the execution of the act of Parliament, 6 Ann, ch. 30, affecting the currency (Chalmers, Introduction to the History of the Revolt in the American Colonies, Book VII, ch. i).

[11] A collection of these may be found in Chalmers' Opinions of Lawyers. In the celebrated case of Winthrop *v.* Lechmere, A.D. 1727 (Public Records of Connecticut, vol. vii, pp. 571–579); Thayer, Constitutional Cases, vol. i, pp. 34–39; Coxe, Judicial Power and

From the agreements of the English guilds were copied the agreements under which were formed the independent Congregational churches.[12] These again suggested the covenant made on the Mayflower when a deviation of the voyage brought the vessel toward a point without the boundaries covered by the Virginia charter and made a few restless spirits claim that each would have the right to be a law unto himself.[13] This was the first written constitution framed by and for themselves by the people of a community. Ten years later the Constitution of the colony of Connecticut was adopted by the inhabitants of the three towns of Windsor, Hartford and Wethersfield in eleven orders.[14]

Unconstitutional Legislation, Appendix, pp. 370–382), the Privy Council held a colonial statute of Connecticut "null and void, being contrary to the laws of England in regard it makes lands of inheritance distributable as personal estates, and is not warranted by the charter of that colony." The Privy Council afterwards reversed this decision in Clark v. Tousey (Brooks Adams, Emancipation of Massachusetts, p. 301).

[12] Borgeaud's Rise of Modern Democracy in Old and New England, pp. 137, 138.

[13] THE MAYFLOWER COMPACT. — "In the name of God, Amen; We, whose names are underwritten, the loyall subjects of our dread soveraigne King James, by the grace of God, of Great Britaine, France, and Ireland King, defender, of the faith, etc., haveing undertaken, for the glorie of God, and advancemente of the Christian faith and honor of our king and countrie, a voyage to plant the first colonie in the Northerne parts of Virginia, doe, by these presents, solemnly and mutually, in the presence of God, and one of another, covenant and combine ourselves together into a civill body politick, for our better ordering and preservation and furtherance of the ends aforesaid; and, by vertue heareof, to enacte, constitute, and frame, such just and equall laws, ordenances, acts, constitutions and offices, from time to time, as shall be thought most meete and convenient for the generall good of the Colonie. Unto which we promise all due submission and obedience. In witnes whereof we have hereunder subscribed our names, at Cap Codd, the 11th. of November, in the year of the raigne of our sovereigne lord, King James, of England, France, and Ireland the eighteenth, and of Scotland the fifty-fourth, Anno Domini, 1620." Preston's Documents Illustrative of American History, pp. 30, 31. A similar agreement was made by settlers of Rhode Island about 1637. (Arnold, History of Rhode Island, vol. i, pp. 103, 108.) An agreement in imitation of the Mayflower Contract, executed by the early settlers of Ohio, in 1802 is described in The Green Bag, vol. vii, p. 112. Much invaluable learning on the constitutional and institutional history of the different States may be found in the histories of the different State courts published in that periodical.

[14] January 14, 1638. The preamble is: —

"Forasmuch as it hath pleased the

The genius of John Lilburne took these proceedings for examples when, in 1648, to free England from the oppression of the Long Parliament he helped frame, and persuaded the army to support the Agreement of the People.

The first scheme of a written constitution for a nation was the work of an English clothier and soap-boiler. The same man was the first who argued successfully in a court of justice, that a statute passed by a supreme legislature was void, because inconsistent with the fundamental laws.[15] It is strange that the name of

Allmighty God by the wise disposition of his diuyne pruidence so to Order and dispose of things that we the Inhabitants and Residents of Windsor, Harteford and Wethersfield are now cohabiting and dwelling in and vppon the River of Conectecotte and the lands thereunto adioyneing; And well knowing when a people are gathered togather the word of God requires that to mayntayne the peace and union of such a people there should be an orderly and decent Gouerment established according to God, to order and dispose of the affayres of the people at all seasons as occation shall require; doe therefore assotiate and conioyne our selues to be as one Publike state or Comonwealth; and doe, for our selues and our successors and such as shall be adioyned to us att any tyme hereafter, enter into Combination and Confederation togather, to mayntayne and presearue the liberty and purity of the gospell of our Lord Jesus wch we now prfesse, as also the disciplyne of the Churches, wch according to the truth of the said gospell is now practised amongst vs; As also in or Ciuell Affaires to be guided and gouerned according to such Lawes, Rules, Orders and decrees as shall be made, ordered & decreed, as followeth:"—

Of this, Judge Simeon E. Baldwin says in his essay on the Three Constitutions of Connecticut, Papers of New Haven Colony Historical Society, vol. v, p. 180:

"Historians concede that the first written constitution of representative government, ordained by men, was agreed on by the inhabitants of the three towns of Windsor, Hartford and Wethersfield, 250 years ago. There had been before, agreements for the future organization of a body politic, like that signed on board of the Mayflower, in Plymouth Bay; there had been constitutional forms in the old world, rising gradually and successively into life; there had been speculative plans for Utopian republics, framed by philosophers; but never had a company of men deliberately met to frame a social compact, constituting a new and independent commonwealth, with definite officers, executive and legislative, and prescribed rules and modes of government, until the first planters of Connecticut came together for their great work on January 14th, 1638-9."

Howell's State Trials, vol. v, pp. 443-444. See *infra*, Appendix, p. 59.

[15] The claim that there were certain "fundamental laws" of England, which had peculiar sanctity and could not be abrogated was constantly set up during the conflict with Charles I, as well as during the Commonwealth. The first article of Strafford's impeachment charged "That he the said Thomas Earl of

Lilburne is not placed by that of Hampden in the pages

Strafford hath traitorously endeavoured to subvert the fundamental laws and government of the realms of England and Ireland, and instead thereof to introduce an arbitrary and tyrannical government against law; which he hath declared by traitorous words, councils, and actions; and by giving his majesty advice, by force of arms to compel his loyal subjects to submit thereto." (Howell's State Trials, vol. iii, p. 1185.) Similar language was used in the recitals of his bill of attainder. (Ibid., p. 1518.) In the debate on the bill, the poet Waller asked what were the fundamental laws. He was silenced by the reply of Sergeant Maynard, that, if he did not know that, he had no business to sit in the House. Gardiner's Fall of the Monarchy of Charles I, vol. ii, p. 140, citing D'Ewes's Diary, Harl. MSS.

Lilburne continually claimed the protection of the "fundamental laws" against the arbitrary acts of the Rump Parliament. (See appendix to this chapter, *infra*, p. 54.) After its dissolution and the establishment of the Instrument of Government, Cromwell said: "In every Government there must be somewhat Fundamental, somewhat like a Magna Charta, which should be standing, be unalterable." .. "That Parliaments should not make themselves perpetual is a Fundamental. Of what assurance is a Law to prevent so great an evil, if it lie in the same Legislature to *unlaw* it again? Is such a law likely to be lasting? It will be a rope of sand; it will give no security; for the same men may unbuild what they have built." (Carlyle, Letters and Speeches of Oliver Cromwell, Part VIII, Speech III (12 Sept., 1654). Carlyle's Works, vol. xvii, p. 70.) In 1656 Sir Henry Vane, who had returned from Massachusetts with his mind soaked with "the New England idea," wrote a letter to Cromwell on The Healing Question. He declared that during the three years of the Protectorate there has been "great silence in heaven, as if God were pleased to stand still and be a looker-on to see what his people would make of it in England. And as God hath had the silent part, so man, and that good men, too, have had the active and busy part, and have, like themselves, made a great sound and noise, like the shout of a king in a mighty host." He said the time had come for a new arrangement, and recommended that "a restraint be laid upon the supreme power before it be erected in the form of a fundamental constitution." He considers how this "fundamental constitution" shall be established:

"The most natural way for which would seem to be by a general council or convention of faithful, honest, and discerning men, chosen for that purpose by the free consent of the whole body, by order from the present ruling power, considered as general of the army. Which convention is not properly to exercise the legislative power, but only to debate freely and agree upon the particulars that, by way of fundamental constitutions, shall be laid and inviolably observed, as the conditions upon which the whole body so represented doth consent to cast itself into a civil and politic incorporation. Which conditions so agreed will be without danger of being broken or departed from, considering of what it is they are conditions, and the nature of the convention wherein they are made, which is of the people represented in their highest state of sovereignty, as they have the sword in their hands unsubjected unto the

honoring the pioneers of the paths toward constitutional liberty.[16]

Although Cromwell broke his pledge to support the Agreement of the People, four years later, on the dissolution of the Barebones Parliament, he set in force the Instrument of Government, the first written constitution of a nation which was established.[17] This failed, however, from its want of popular origin. The first Parliament chosen under it refused to acknowledge its superiority. Cromwell feared to submit the dispute to the courts, and ordered a dissolution. The representatives yielded, although claiming that he had transgressed the Instrument.[18] The second Parliament modified the scheme with his consent, and within four years from its promulgation all pretence of obedience to the Instrument was abandoned.[19]

At the outbreak of the Revolution the colonists governed themselves through provincial governments, the executives of which

rules of civil government, but what themselves, orderly assembled for that purpose, do think fit to make. And the sword upon these conditions subjecting itself to the supreme judicature thus to be set up, how suddenly might harmony, righteousness, love, peace, and safety unto the whole body follow hereupon, as the happy fruit of such a settlement, if the Lord have any delight to be amongst us!"

[16] The first, if not the only, writer who shows any adequate appreciation of the services of Lilburne is Professor Charles Borgeaud of the University of Geneva, Switzerland, in The Rise of Modern Democracy in Old and New England. Even he does not mention Lilburne's second trial, which contains the first successful argument against the validity of a statute ever made in a court of justice. The writer of this work has added a sketch of Lilburne's life in an appendix to this chapter, *infra*, p. 46.

[17] It is reprinted in Gardiner's Constitutional Documents of the Puritan Revolution, p. 314. This was "voted by a council of officers, December 16, 1653. It is said by Hume to have been drawn by Lambert in four days (Hume's History of England, ch. lxi). Like the agreements of the people it provided for the periodical election of parliaments and set limits to the legislative authority in favor of Protestant religious liberty and for the security of the public debt. It did not, however, like the former, guarantee personal liberty.

[18] Gardiner's Documents of the Puritan Revolution, pp. lx–lxiii. By the Instrument of Government (xxii, ibid., p. 320), parliaments could not be "adjourned, prorogued, or dissolved without their own consent during the first three months of their sitting." Cromwell construed this as meaning lunar months of twenty-eight days, which was the mode of computing the pay of the army and navy; and dissolved the parliament before the end of three calendar months (Hume, History of England, ch. lxi).

[19] Gardiner's Documents, pp. lxiii–lxiv.

were known as committees of safety, a name borrowed from the junto of officers who ruled England after the dissolution of the Rump Parliament.[20] Even before the Declaration of Independence, the Continental Congress recommended the colonies, in response to the request of some of them, "to call a full and free representation of the people, to establish such a form of government as in their judgment will best promote the happiness of the people and most effectually secure good order in the province during the continuance of the present dispute between Great Britain and the colonies."[21]

The first State constitutions were naturally formed in imitation of the frames of government which had been created by and under their charters. Two of the colonies, Connecticut and Rhode Island, continued to use their charters without any change of name, — Rhode Island till 1842, Connecticut till 1818. The powers of the executive, legislative and judiciary were still kept distinct. The office and name of governor — except in Pennsylvania and New Hampshire, where the chief executive was called a president, — were retained with a provision for his election by the people or the legislature and with a deprivation of those powers which had been most obnoxious in colonial times. The previous existence of a council and assembly made the step to a creation of two legislative houses natural. The council was usually changed into a senate;[22] and the lower house retained its old name and functions. Two States, however, Pennsylvania and Georgia, besides Vermont, which was not yet recognized, had but a single house. But Pennsylvania had an anomalous and unsatisfactory check on its lower house by a body of censors; executive councils were retained for a while in Pennsylvania, Vermont, Georgia, and Virginia; and Massachusetts has kept till the present day a governor's council as a check on the powers of the executive, besides the senate as a check upon the house of representatives.

[20] This English committee is described in Hume's History of England, ch. lxii. The same name was adopted during the French Revolution.

[21] This was the recommendation to New Hampshire, South Carolina and Virginia in 1775. Journals I, 231, 235, 279.

[22] In Maryland, Massachusetts, New Hampshire, New York, North Carolina, South Carolina, and Virginia, the upper house was called "The Senate," in Delaware, "The Council," in New Jersey, "The Legislative Council."

The courts were usually continued with their old powers under names from which all reference to the king was excluded; but they had extended their jurisdictions to an extent previously unknown. They had claimed [23] and in at least two cases [24] had exercised the power to refuse to enforce an act of a State legislature as unconstitutional.[25]

§ 8. Models of the Federal Constitution.

The Federal Convention was composed of men who had been accustomed to rule and legislate in the camp and the senate. They had learned by experience the impossibility of foreseeing the results of untried forms of government, founded on *a priori* reasoning. They had suffered, not only from the arbitrary power of the crown and Parliament, but also from the imbecility of Congress. They had realized, too, the evils resulting from hasty action by State legislatures unrestricted from making breaches of the public faith and setting aside private contracts. They had acquired by tradition, as well as from the study of "The Spirit of the Laws," that respect for the British Constitution with which Montesquieu had inspired Europe. The superiority of the State constitutions which bore to that a resemblance, over the Articles of Confederation, was of easy recognition. As soon as

[23] Commonwealth *v.* Caton, 4 Call. (Va.) 5, A.D. 1782; Symsbury Case, Kirby (Conn.), 444, 447, A. D. 1785. See the argument of George Mason in Robin *v.* Hardaway, Jefferson's Reports (Va.) 114, 118, 123, A. D. 1772.

[24] Trevett *v.* Weeden, Rhode Island, A. D. 1786; Chandler's Criminal Trials, vol. ii, p. 69; Thayer's Constitutional Cases, vol. i, 73; Holmes *v.* Walton, New Jersey, 1780, cited in State *v.* Parkhurst, 4 Halstead (N. J.), 444; Am. Hist. Assoc. Papers, vol. ii. 45. In Rutgers *v.* Waddington, Thayer's Constitutional Cases, vol. i, p. 63, an act of the New York legislature was held void by the Mayor's Court of New York, August 27, 1784, because in violation of the treaty of peace. Reference is made to a Massachusetts case in the letter by J. B. Cutting to Thomas Jefferson, of July 11, 1788, printed in Bancroft's Constitution, vol. ii, pp. 472, 473. The North Carolina case, Bayard *v.* Singleton, 1 Martin (N.C.) 42, was decided in November, 1787, after the adjournment of the Federal Convention.

[25] This subject will be discussed at length in the subsequent chapters on the Judicial Power. It is treated in The Relation of the Judiciary to the Constitution, by Wm. M. Meigs, American Law Review, March, 1885; Judicial Power and Unconstitutional Legislation, by Brinton Coxe, *passim;* and Thayer's Constitutional Cases, vol. i, pp. 48–94; and Mr. Justice Gray's notes to Quincy's Reports.

it was determined that the new government should be national in form, they turned for instruction to the description of the Constitution of Great Britain by Sir William Blackstone.[1]

From his account of the powers of the crown they drew those of the executive, — not from the powers actually exercised by George III, when the weakness of his two predecessors had brought the veto power into disuse and laid the foundations of that system of cabinet Government which has since restricted the crown to a mere ceremony;[2] but from those which the king still preserved in theory and which were actually exercised within a century by William of Orange.

Some, of whom Hamilton was one,[3] were so disgusted by the

§ 8. [1] Hamilton had the indiscretion to admit this at the time: "I deny the similarity betwixt the present constitution and that of the United Netherlands." "In my most humble opinion, it has a much greater affinity with the government which, in all human probability, will remain when the history of the Seven Provinces shall be forgotten." (Letters of Caesar, by Alexander Hamilton, in The Daily Advertiser, Oct. 1, 1787; Ford's Essays on the Constitution, p. 287.)

[2] James Iredell, afterwards a justice of the Supreme Court, seems to have had some appreciation of the functions of the British cabinet. See his Answers to Mr. Mason's Objections to the New Constitution, Ford's Pamphlets on the Constitution, p. 348.

[3] Hamilton made no secret of this in private conversation. See the letter of Gouverneur Morris to Ogden, of Dec. 28, 1804: "Our poor friend Hamilton bestrode his hobby to the great annoyance of his friends, and not without injury to himself. More a theoretic than a practical man, he was not sufficiently convinced that a system may be good in itself and bad in relation to particular circumstances. He well knew that his favorite form was inadmissible unless as the result of civil war; and I suspect that his belief in that which he called an approaching crisis arose from a conviction that the kind of government most suitable, in his opinion, to this extensive country, could be established in no other way."

"General Hamilton hated republican goverment because he confounded it with democratical government, and he detested the latter because he believed it must end in despotism and be in the meantime destructive to public morality." See *supra*, § 2, note 13.

This testimony by his friend is unimpeachable and is corroborated by Jefferson in his Ana (Jefferson's Works, 1st ed., vol. ix, p. 99), where he reports Hamilton as saying to him, Aug. 13, 1791: —

"I own it is my own opinion, though I do not publish it from Dan to Beersheba, that the present government is not that which will answer the ends of society, by giving stability and protection to its rights, and that it will probably be found expedient to go into the British form."

Hamilton himself said, in a pamphlet in defence of the Constitution: —

"If truth, then, is permitted to

license of the times that they would have established a monarchy if they had had the power. Had Washington been a father, he would have had more difficulty in resisting the temptation to assume the crown which was once at least within his grasp. A few men outside of the Convention, who doubted the wisdom of popular government, advocated the sapient scheme of swearing allegiance to that son of George III, then Bishop of Osnaburg,[4] who afterwards, when Duke of York and Commander-in-Chief, scandalized even those who thought the corruption of the British government its strength, by allowing his mistress to sell the commissions which he signed.[5]

Rumors that the Convention was about to recommend some such folly became so loud that a few of its members felt obliged to answer them. "Though we cannot affirmatively tell you what we are doing, we can negatively tell you what we are not doing — we never once thought of a king."[6]

The powers of the upper house of the national legislature were assimilated to those of the House of Lords. Like that it had jurisdiction over the trial of impeachments and could not originate money bills. The House of Representatives was intended as an imitation of the House of Commons. But, though the main lines of the new instrument were copied from a form that had been

speak, the mass of the people of America (any more than the mass of other countries) cannot judge with any degree of precision concerning the fitness of this new Constitution to the peculiar situation of America; they have, however, done correctly in delegating the power of framing a government to those every way worthy and well qualified." (Letters of Caesar, by Alexander Hamilton, The Daily Advertiser, Oct. 17, 1787; Ford's Essays on the Constitution, p. 289.) Under the influence of Madison and Jay, he used more tact when he wrote the immortal numbers of The Federalist.

[4] Curtis, in his Constitutional History, vol. i, p. 624, note, quotes a curious letter from Colonel Humphreys to Hamilton, written from New Haven, Conn., Sept. 16, 1787, which says: "It seems, by a conversation I have had here, that the ultimate practicability of introducing the Bishop of Osnaburg is not a novel idea among those who were formerly termed Loyalists. Ever since the peace it has been occasionally talked of and wished for. Yesterday, where I dined, half in jest, half in earnest, he was given as the first toast." See other quotations by Curtis to the same effect.

[5] See A Report of the Evidence and Proceedings upon the Charges preferred against the Duke of York, Albion Press Edition, 1809.

[6] Pennsylvania Journal, Aug. 27, 1787, quoted by Curtis, Constitutional History, vol. i, p. 626.

stamped with the approval of time as well as of philosophers, the imitation was not servile. They knew by experience as well as history the mischief in the colonies and the mother country that had been caused by the lack of sufficient checks upon the powers of Parliament as well as the prerogative. They not only adopted the main checks which were a part of the British Constitution, but they took others which had been incorporated in the new State constitutions as well as some invented by themselves. The first Constitution of Massachusetts has a closer resemblance than any other to that of the United States.[7]

§ 9. Compromises of the Constitution.

Compromises are the foundation of the Federal Constitution. The members of the Convention were too experienced in public life to sacrifice the public welfare for a syllogism. They cared nothing for a name when the thing wished could be gained in substance under another term. They were too wise to reject a part when they could not obtain the whole. Their sagacity was excelled only by their patriotism. Provisions which to the

[7] This, which with some amendments is still in force, was the most carefully constructed State Constitution then in existence. The rejection by the town meetings of the proposed Constitution of 1778, drafted by the State legislature or General Court, because, amongst other things, it did not provide sufficiently for a separation of the three departments, had caused a thorough consideration of the whole subject by the people of the State before the meeting of the Constitutional Convention in 1779, which was chosen for that sole purpose. From this seem to have been taken the clauses in the Federal Constitution concerning the veto power; impeachments; habeas corpus; and the tenure of office of judges. In that also, the upper house of the Legislature was called the Senate and had the power to amend but not to originate money bills; and the lower was the House of Representatives. The same name with different powers over money bills and the power to try impeachments was given to the upper houses in six other States. *Supra*, § 7, note 22. The name House of Representatives was also then applied to the lower house in the State Constitutions of New Hampshire, South Carolina, Pennsylvania and Vermont. The Journal of the Convention which framed the Constitution of 1780, was published by the order of the State Legislature in 1832. A pamphlet containing a report of the reasons for the rejection of the Constitution of 1778 by a convention of delegates of the towns of Lynn, Salem, Danvers, Wenham, Manchester, Gloucester, Ipswich, Newburyport, Salisbury, Boxford, Methuen and Topsfield, held by adjournment, Ipswich, April 29, 1778, was published by John Michael, at Newburyport, in 1778.

majority seemed beneficial were rejected because it was thought that their express inclusion might endanger the ratification of the plan, while they could under the general language be subsequently established by Congress.[1]

After the struggle between those who wished a new national constitution and those who were willing only to accept an amendment of the Articles of Confederation had ended in the defeat of the latter, the word "national" was stricken from the paper. Provided that the form was national, they were satisfied that it might be termed federal, even though that name was susceptible of two inconsistent interpretations.[2] The names of President and Congress were continued, because used under the Confederation, although the House of Representatives, at least, had no resemblance to a congress of ambassadors, and the new executive did not preside. These, however, were in the nature of concessions to popular prejudices, made voluntarily. Between the members of the Convention were constant differences which more than once threatened a disruption, and were only harmonized by reluctant compromise. The larger States were resolved to cancel the injustice of the Confederation, which placed each of them upon an equal footing with Connecticut and Rhode Island. Some of their delegates wished to insist upon this at the opening of the Convention,

§ 9. [1] Hamilton's Opinion on the Bank (Hamilton's Works, 1st ed., vol. i, p. 127; Story on the Constitution, § 1268). When the grant of an express power to incorporate a bank was proposed, Gouverneur Morris opposed it, observing that it was extremely doubtful whether the Constitution they were framing could ever be passed at all by the people of America; that to give it its best chance, however, they should "make it as palatable as possible, and put nothing into it not very essential, which might raise up enemies" (Jefferson's Ana, Works, 1st ed., vol. ix, p. 191). So Gouverneur Morris opposed the inclusion of an express grant of power to establish a university, saying: "It is not necessary. The exclusive power at the seat of government will reach the object" (Madison Papers, Elliot's Debates, 2d ed., vol. v, p. 544). His own proposition of the creation of six cabinet offices was not adopted, undoubtedly for the same reason (ibid., p. 446). Morris admitted in his letter to Pickering, Dec. 22, 1814, that when he drafted the article on the judicial power, "conflicting opinions had been maintained with so much professional astuteness, that it became necessary to select phrases which, expressing my own notions, would not shame others, nor shock their self love; and to the best of my recollection, this was the only part which passed without cavil" (ibid., vol. i, p. 507).

[2] See the discussion of the meaning of the term quoted, *infra*, § 17.

and to demand that votes in that body should be counted in accordance with the number of constituents represented.[3] Only the moderation of Virginia prevented such a course, which would have broken up the proceedings at the start. The smallest States were equally determined to make no sacrifice of their present rights, and pointed to the oppressions of Athens and Sparta upon their weaker confederates as a warning against the danger of an hegemony. The settlement of this question by the adoption of the suggestion of Roger Sherman not only saved the Union, but established the only upper chamber in the world which at the end of the nineteenth century enjoys either power or respect.

The difference between the occupations and domestic institutions of the North and South presented the same questions which divided the Union after it was formed, and they nearly prevented at the first that consolidation which seventy years later they almost tore apart. Commerce and shipping were the industries for which the climate and harbors of New England had fitted its inhabitants. For these objects its delegates demanded that a majority in Congress should have the power to pass a navigation law and negotiate commercial treaties. Satisfied and enriched by agriculture, the planters of the South were willing to have their rice, indigo and tobacco shipped on foreign as well as domestic bottoms. They feared, however, lest the general government might discriminate against them by a tax upon their exports. Those of the interior had good cause for fear lest a majority might through a short-sighted policy barter to Spain the right of

[3] "Previous to the arrival of a majority of the states, the rule by which they ought to vote in the Convention had been made a subject of conversation among the members present. It was passed by Gouverneur Morris, and favored by Robert Morris and others from Pennsylvania, that the large states should unite in firmly refusing to the small states an equal vote, as unreasonable, and as enabling the small states to negative every good system of government, which must, in the nature of things, be founded on a violation of that equality. The members from Virginia, conceiving that such an attempt might beget fatal altercations between the large and small States, and that it would be easier to prevail on the latter, in the course of the deliberations, to give up their equality for the sake of an effective government, than, on taking the field of discussion, to disarm themselves of the right, and thereby throw themselves on the mercy of the larger states, discountenanced and stifled the project." Madison Papers, Elliot's Debates, 2d ed., vol. v, p. 125.

free navigation of the Mississippi in return for commercial privileges in that country and its colonies.[4] They were unwilling to give up the right of importing slaves from Africa; and wished when slaves escaped to have them returned by the Northern States. Representation by population, they insisted, should be proportioned to slave population as well as free, if for no other reason, to prevent the destruction of slavery by a capitation tax. The conscientious scruples of the descendants of the Puritans of the North made their delegates refuse to recognize any right of property by man in man. This matter, too, was adjusted by the adoption of the rule, that representatives and direct taxation should both be proportioned to the number of free inhabitants plus three-fifths of the rest, and that a capitation should be considered a direct tax.[5] The taxation of exports by the States severally or united was forbidden absolutely. The power to regulate commerce was vested in a majority of Congress, but it was provided that treaties could not be negotiated without the consent of two-thirds of the States present in the Senate. The slave-trade was preserved for a period of twenty years;[6] and fugitive slaves, like fugitives from justice, were to be returned by the free States to their masters. The conscience of the North was salved by the omission of the name of slave from the Constitution. "Circumlocutions," said John Quincy Adams, "were the fig-leaves under which these parts of our body politic are decently concealed."[7]

[4] Jay, who had been sent to Spain to negotiate a treaty, had requested Congress for permission to concede to Spain the exclusive right to navigate the Mississippi for a limited period of time. Congress by a vote of seven to five had authorized him so to do, and he had negotiated a treaty for that purpose, which had not been ratified. Washington also was in favor of this course, in return for favorable commercial advantages. See Curtis' Constitutional History, vol. i. pp. 210–214, citing Washington's Writings, 1st ed., vol. ix, pp. 172, 173, 180, 205, 206, 261. Secret Journals, vol. iv, pp. 50, 54, 109, 110, 111.

[5] Constitution, Article I, §§ 2 and 9, *infra*.

[6] Till 1808, Constitution, Article I, § 9.

[7] Argument in the Amistad Case, p. 39.

§ 10. Result of the Federal Convention.

As the result of their labors they established a federal republic with a presidential form of government. They created a strong and stable nation with local self-government secured to the different States, who were restrained from creating domestic discord by unjust discrimination in favor of their own citizens. The instrument that they framed has withstood the shock of the invasion of a foreign army, which captured and burned the capital, and of a civil war which divided the whole country for five years into two hostile camps, and left the conquered section so disordered that for ten years more its local governments were upheld by the national sword. During all this time private property has remained secure, and civil liberty undisturbed except for a brief interval amidst the embers of rebellion.[1] Despite the strain caused by the immigration of a vast foreign population of servile races, debased by generations of tyranny, by custom as well as inheritance unfitted to exercise the rights of citizenship, the sovereignty of the people has remained undiscredited and unimpaired, as a beacon light for the friends of popular government throughout the world. In the struggle between the supporters of civilization against the hordes of barbarians within their ranks, which is now in progress throughout Europe as well as America, property has more safety here than in any other country. The spectacle of a people submitting public controversies to the same mode of settlement as private law-suits and acquiescing in the decisions, has set an example which foreign nations are about to imitate, not only in internal discords, but in those which are international.

The invention of representative government in England removed the obstacle which had made it impossible in Greece and Italy to combine freedom with an extension of territory. But democratic government could not be accompanied by stability of public credit and security of private property until the United States first established a written constitution guarded from infringement by the courts.

[1] *Infra*, § 38.

APPENDIX TO CHAPTER I.

JOHN LILBURNE AND THE AGREEMENT OF THE PEOPLE.

More than a passing word is due to freeborn John Lilburne, of whom Hume, a sympathizer with neither his religion nor his politics, said that he was "the most turbulent, but the most upright and courageous of human kind;"[1] and who by his experiments, as well as his teachings, did more than any other to found that present system of public law which gives the courts power to disregard an act of the legislature as unconstitutional. He was born about 1618, the son of Richard Lilburne, a gentleman of Thickley-Punchardon in the County of Durham.[2] His name appears in the pamphlets written by himself both as Lilburn and Lilburne, the later publications having the final *e*. He had little early education; admitting that he never acquired the knowledge of any tongue but his own, except the mastery of ordinary Latin law-terms;[3] but he acquired by study during his imprisonments a wide knowledge of English history and a good smattering of law. When about fourteen years of age he was apprenticed to a cloth-dealer[4] in London, where he probably acquired those Puritan doctrines to which he adhered through life. Thence he went to Holland for a short time and engaged in trade there as a factor.[5] On his return in 1639, when about twenty years old, he was arrested and brought before the Star Chamber on the false charge of importing factious and scandalous books, amongst others Bastwick's "Answer to certain Objections," "Litany for the especiall Use of our English Prelates," and "The Vanity and Impiety of the old Litany." Lilburne refused to pay the fees for entering his appearance before the Star Chamber, and to answer the charges under oath, amongst other grounds because the requirement was a violation of the Petition of Right. For this he was sentenced to a fine of five hundred

[1] Hume's History of England, ch. lx.
[2] Howell's State Trials, vol. iii, p. 1320; vol. iv, p. 1291; vol. v, p. 416.
[3] Ibid., vol. iv, pp. 1282, 1283, 1297.
[4] Ibid., vol. iii, p. 1317.
[5] Ibid.

pounds, to exposure in the pillory, to be whipped from the Fleet to the pillory, and then to imprisonment till he should furnish sureties for his good behavior.[6]

He withstood his punishment bravely, receiving between the Fleet and the pillory at Westminster more than two hundred stripes from a whip with a threefold knotted cord; while he repeated texts and prophesied to the people. On his arrival he was offered relief from the pillory if he would confess his fault, which he refused. When in the pillory, stooping with his neck in the yoke and his bare head exposed to the sun, he held forth to the crowd, denying the charges against him, justifying himself for his refusal to take the illegal oath, denouncing the bishops, and exhorting his hearers to be faithful, valiant soldiers in Christ's army. In the midst of his discourse he threw amongst the mob three of the books which were the subject of his accusation. His mouth was at last stopped by a gag; but when it was removed, as he took his head out of the pillory, he cried: "I am more of a conqueror through him that hath loved me. *Vivat rex;*" and on his return to prison published an account of his sufferings, with a copy of his speech signed in his blood.[7] The Star Chamber thereupon voted that all persons sentenced to be whipped should be searched and their hands bound before their punishment, and

"That the said John Lilburn should be laid alone, with irons on his hands and legs, in the Wards of the Fleet, where the basest and meanest sort of prisoners are used to be put; and that the Warden of the Fleet take especial care to hinder the resort of any persons whatsoever unto him. And particularly, that he be not supplied with money from any friend, and that he take special notice of all letters, writings, and books brought unto him, and seize and deliver the same unto their lordships; and take notice from time to time, who they are that resort unto the said prison to visit the said Lilburn, or to speak with him, and inform the Board thereof."[8]

He lay thus in prison for nearly three years, kept in fetters till his life was endangered by illness, nearly starved till his friends provided him with food through stratagem, having it passed to him by his fellow prisoners through holes in the wall or floor of his cell; and at times so brutally treated by his gaolers that he lost the use of two fingers for life.[9] In 1640, at the opening of the Long Parliament, he petitioned for his liberty, and was the first prisoner released by them.[10]

[6] Howell's State Trials, vol. iii, pp. 1315–1327.

[7] Ibid., vol. iii, pp. 1328–1345.

[8] Ibid., vol. iii, p. 1341.

[9] Ibid., vol. iii, pp. 1345, 1346, 1351.

[10] Ibid., vol. iii, p. 1342.

Lilburne took an active part in arousing the people to aid the Parliament against the King, and May 4, 1641, Charles honored him by his arraignment for high treason, before the House of Lords, for resisting soldiers in a riot.[11] The same day, the House of Commons, on the report of a Committee which had investigated the subject, resolved, "That the sentence of the Star Chamber against John Lilburne is illegal, and against the liberty of the subject; and also bloody, cruel, wicked, barbarous and tyrannical"; that reparation ought to be given to him; and that his case, with those of Prynne, Bastwick, and others, should be transmitted to the Lords.[12] Charles soon had to pay attention to matters more nearly touching himself than the prosecution of Lilburne, who was imprisoned for some time, either on this charge or for some other offense against the Lords; and, on his discharge, sued the lieutenant of the Tower for four thousand pounds as damages for false imprisonment.[13] He then enlisted in the parliamentary army, where he became a lieutenant-colonel;[14] was captured by the King's forces; and arraigned at Oxford for treason. He was allowed a trial by jury; but before the appointed day, Parliament, at his wife's instance, passed a law for reprisals upon royalist or malignant prisoners, which stopped the proceedings.[15] He escaped by bribing his guard, and returned to the army, meanwhile continuing his occupation as a pamphleteer. His speeches and writings were so full of propositions concerning the rights of freeborn Englishmen, that he obtained the nickname of Freeborn John, and gained great popularity among the soldiers and the people.[16] He grounded his arguments upon four authorities in the order given: Holy Scripture, sound reason, Magna Charta, and the other fundamentals, the laws of the land and historical precedents; thus relegating the law to a subordinate jurisdiction.[17] He was at first on close terms with Cromwell, whom he aided by his attacks on Parliament.[18] It was not unnatural that he should have come into conflict with his military superiors. He was threatened with hanging, by the Earl of Manchester, for insubordination through excess of zeal at the capture of Tickell Castle, and was obliged to quit the army because of his refusal to sign the Solemn League and Covenant.[19] Meanwhile he petitioned Parliament for

[11] Howell's State Trials, vol. iii, p. 1342.

[12] Ibid.

[13] Ibid., vol. iv, p. 1385.

[14] Ibid., vol. iii, p. 1344.

[15] Ibid., vol. iii, p. 1344; vol. iv, pp. 1272, 1304.

[16] Borgeaud, The Rise of Modern Democracy in Old and New England, p. 48.

[17] Ibid., p. 49.

[18] See Clarendon's History of The Rebellion, quoted in Howell's State Trials, vol. iv, p. 1419.

[19] Borgeaud, Rise of Modern Democracy in Old and New England, p. 48.

reparation for his imprisonment by the Star Chamber.[20] The Lords passed an ordinance giving him two thousand pounds, to be collected out of the estates of two members of the Star Chamber and the deputy warden of the Fleet.[21] Meanwhile he was imprisoned by a snap vote of the House of Commons, obtained, in the absence of his own friends, by Manchester and Bastwick, with whom he had now quarreled in a tract against him and his clerical associates.[22] While in Newgate, Lilburne wrote several pamphlets, in which he maintained the sovereignty of the people over the House of Commons. "Now, for any man to imagine that the shadow or representative is more worthy than the substance, or that the House of Commons is more valuable and considerable than the Body for whom they serve, is all one as if they should affirme that an Agent or Ambassador from a Prince hath the same or more authority than the Prince himselfe."[23]

He was the principal author of the Agreement of the People, the first written Constitution with limits to the power of a national legislature ever proposed in any country. It was submitted by the agents of five regiments of horse to the Commons in 1647, with the general approval of the army. This provided for the dissolution of the Long Parliament in the following year, a new apportionment of members, and biennial elections. The legislative power was granted and limited as follows: —

"That the power of this, and all future Representatives of this Nation, is inferior only to theirs who chuse them, and doth extend, without the consent or concurrence of any other person or persons, to the enacting, altering, and repealing of Lawes; to the erecting and abolishing of Offices and Courts; to the appointing, removing, and calling to account Magistrates, and Officers of all degrees; to the making War and Peace, to the treating with forraigne States: And generally, to whatsoever is not

[20] His petitions are printed in Howell's State Trials, vol. iii, pp. 1343-1346.

[21] Ibid., vol. iii, p. 1359.

[22] England's Miserie and Remedie, pp. 1–4 (British Museum, E, 302), quoted by Borgeaud, pp. 49, 50.

[23] England's Miserie and Remedie, 1645, pp. 1–4 (British Museum, E, 302), quoted by Borgeaud, pp. 49, 50. See also A Remonstrance of Many Thousands Citizens and other Free-born People of England to their owne House of Commons, occasioned through the Illegall and Barbarous Imprisonment of that famous and Worthy Sufferer for his Countries Freedome Lieutenant Col. John Lilburne, — Wherein their just Demands in behalfe of themselves and the whole Kingdome concerning their Publick Safety, Peace, and Freedome is expressed; calling those their Commissioners in Parliament to an Account, to how they (since the beginning of their Session to this present) have discharged their Duties to the Universality of the People, their Sovereign *Lord*, from whom their Power and Strength is derived, and by whom (*ad bene placitum*) it is continued." British Museum, 1104, a 7, cited by Borgeaud, p. 51.

expressly, or implyedly reserved by the represented themselves. Which are as followeth,

"1. That matters of Religion, and the wayes of God's worship, are not at all intrusted by us to any humane power, because therein wee cannot remit or exceed a tittle of what our Consciences dictate to be the mind of God, without wilfull sinne: neverthelesse the publike way of instructing the Nation (so it be not compulsive) is referred to their discretion.

"2. That the matter of impressing and constraining any of us to serve in the warres, is against our freedome; and therefore we do not allow it in our Representatives; the rather, because money (the sinews of war) being alwayes at their disposall, they can never want numbers of men, apt enough to engage in any just cause.

"3. That after the dissolution of this present Parliament, no person be at any time questioned for anything said or done, in reference to the late publike differences, otherwise than in execution of the Judgments of the present Representatives or House of Commons.

"4. That in all Laws made, or to be made, every person may be bound alike, and that no Tenure, Estate, Charter, Degree, Birth or place do confer any exemption from the ordinary Course of Legall proceedings, whereunto others are subjected.

"5. That as the Laws ought to be equall, so they must be good, and not evidently destructive to the safety and well-being of the people.

"These things we declare to be our native Rights, and therefore are agreed and resolved to maintain them with our utmost possibilities, against all opposition whatsoever, being compelled thereunto, not only by the examples of our Ancestors, whose blood was often spent in vain for the recovery of their Freedomes, suffering themselves, through fraudulent accommodations, to be still deluded of the fruit of their Victories, but also by our own wofull experience, who having long expected, and dearly earned the establishment of these certain rules of Government are yet made to depend for the settlement of our Peace and Freedome, upon him that intended our bondage, and brought a cruell Warre upon us."[24]

After the success of the army in their conflict with Parliament, he was released from prison in 1647 or 1648, on the presentment of a petition signed by over seven thousand of his friends, who also prayed that the ordinance for his indemnity be passed.[25] The establishment of a precedent in relieving him from the estates of those who had sentenced him was opposed by the Speaker and others as likely to react subsequently upon themselves.[26] While the ordinance lay on the table,

[24] The document is set forth at length by Borgeaud, pp. 67-73. The first draft was prepared at a conference between representatives of the Levellers, of whom Lilburne was one, the officers, the Independents, and the Parliament. (The Legal Fundamental Liberties of England, by Lilburne, reprinted in the Clarke Papers, vol. ii, p. 257.)

[25] Howell's State Trials, vol. iii, p. 1359.

[26] Ibid., p. 1360.

Parliament had disposed of the estates of two of the delinquents whom it named.[27] Finally an ordinance passed the first reading which gave him three thousand pounds out of the estate of the Lord Keeper, who took part in his sentence.[28] This was opposed by tactics not unknown to legislatures of the present day. The ordinance was stolen before its second reading. During Lilburne's absence in search of a copy, after his friends had left the house, his enemies procured its rejection; and the passage of orders giving him three hundred pounds in cash and three thousand pounds more to be settled out of the estates of new delinquents in the insurrections, not yet sequestered.[29] Finally he procured the passage of an ordinance allowing him the same sum out of the specified sequestered estates, but hampered with such conditions that he obtained little money from them.[30]

Meanwhile, he took part as agent for the rank and file in the conferences with the General Council of officers concerning the Agreement of the People, where he distinguished himself for the bitterness of his language, and challenged some of the officers to a duel.[31] The conference failed, and the troops mutinied. Although the first mutiny was suppressed, and one of the ringleaders shot, Cromwell was forced to yield, and a new Agreement of the People, first drafted by Lilburne, was presented to Parliament, January 20, 1648–1649, in the name of the army, by the General-in-Chief and his council of officers.[32] This provided concerning the legislative power: —

"Eighthly: That the Representatives have, and shall be understood to have, the supreme trust in order to the preservation and government of the whole; and that their power extend, without the consent or concurrence of any other person or persons, to the erecting and abolishing of Courts of Justice and public offices, and to the enacting, altering, repealing and declaring of laws, and the highest and final judgment, concerning all natural or civil things, but not concerning things spiritual or evangelical. Provided that, even in things natural and civil, these six particulars next following are, and shall be, understood to be excepted and reserved from our Representatives, viz. 1. We do not empower them to impress or constrain any person to serve in foreign war, either by sea or land, nor for any military service within the kingdom; save that they may take order for the forming, training, and exercising of the people in a military way, to be in readiness for resisting of foreign invasions, suppressing of sudden

[27] Howell's State Trials, vol. iii, p. 1359.

[28] Ibid., pp. 1364–1366.

[29] Ibid., pp. 1365–1367.

[30] Ibid., pp. 1367–1368.

[31] Ibid., vol. iv, p. 1368.

[32] Borgeaud, pp. 74–76. For the debates concerning this, in which Lilburne took part, see the Clarke Papers.

insurrections, or for assisting in execution of the laws; and may take order for the employing and conducting of them for those ends; provided, that, even in such cases, none be compellable to go out of the county he lives in, if he procure another to serve in his room.

"2. That, after the time herein limited for the commencement of the first Representative, none of the people may be at any time questioned for anything said or done in relation to the late wars or public differences, otherwise than in execution or pursuance of the determinations of the present House of Commons, against such as have adhered to the King, or his interest, against the people; and saving that accomptants for public moneys received, shall remain accountable for the same. 3. That no securities given, or to be given, by the public faith of the nation, nor any engagements of the public faith for satisfaction of debts and damages, shall be made void or invalid by the next or any future Representatives; except to such creditors as have, or shall have, justly forfeited the same: and saving, that the next Representative may confirm or make null, in part or in whole, all gifts of lands, moneys, offices, or otherwise, made by the present Parliament to any member or attendant of either House. 4. That, in any laws hereafter to be made, no person, by virtue of any tenure, grant, charter, patent, degree or birth, shall be privileged from subjection thereto, or from being bound thereby, as well as others. 5. That the Representative may not give judgment upon any man's person or estate, where no law hath before provided; save only in calling to account and punishing public officers for abusing or failing in their trust. 6. That no Representative may in anywise render up, or give, or take away, any of the foundations of common right, liberty, and safety contained in this Agreement, nor level men's estates, destroy property, or make all things common; and that, in all matters of such fundamental concernment, there shall be a liberty to particular members of the said Representatives to enter their dissents from the major vote.

"Ninthly. Concerning religion, we agree as followeth: — 1. It is intended that the Christian Religion be held forth and recommended as the public profession in this nation, which we desire may, by the grace of God, be reformed to the greatest purity in doctrine, worship and discipline, according to the Word of God; the instructing the people thereunto in a public way, so it be not compulsive; as also the maintaining of able teachers for that end, and for the confutation or discovering of heresy, error, and whatsoever is contrary to sound doctrine, is allowed to be provided for by our Representatives; the maintenance of which teachers may be out of a public treasury, and, we desire, not by tithes: provided, that Popery or Prelacy be not held forth as the public way or profession in this nation. 2. That, to the public profession so held forth, none be compelled by penalties or otherwise; but only may be endeavoured to be won by sound doctrine, and the example of a good conversation. 3. That such as profess faith in God by Jesus Christ, however differing in judgment

from the doctrine, worship or discipline publicly held forth, as aforesaid, shall not be restrained from, but shall be protected in, the profession of their faith and exercise of religion, according to their consciences, in any place except such as shall be set apart for the public worship; where we provide not for them, unless they have leave, so as they abuse not this liberty to the civil injury of others, or to actual disturbance of the public peace on their parts. Nevertheless, it is not intended to be hereby provided, that this liberty shall necessarily extend to Popery or Prelacy. 4. That all laws, ordinances, statutes, and clauses in any law, statute, or ordinance to the contrary of the liberty herein provided for, in the two particulars next preceding concerning religion, be, and are hereby, repealed and made void.

"Tenthly. It is agreed, that whosoever shall, by force of arms, resist the orders of the next or any future Representative (except in case where such Representative shall evidently render up, or give, or take away the foundations of common right, liberty, and safety, contained in this Agreement), he shall forthwith, after his or their such resistance, lose the benefit and protection of the laws, and shall be punishable with death, as an enemy and traitor to the nation."[33]

The trial of the King, which began the day when the Agreement was presented, afforded an excuse for the postponement of the consideration of the latter which was never resumed.[34] Cromwell soon acquired sufficient strength to abandon it. And Lilburne with some of his fellow agitators was, on March 28th, 1649, again imprisoned in the Tower, whence he sent forth a hurricane of pamphlets attacking the arbitrary proceedings of the Rump Parliament.[35] A third Agreement of the People sent by him to the soldiers contained the following article which was subsequently included in the charges of treason made against him: —

"And all laws made, or that shall be made, contrary to any part of this Agreement are hereby made null and void."[36]

Another mutiny arose, but was promptly quelled, and discipline in the army finally restored. To silence Lilburne and the rest a new law of treason was enacted by the Rump Parliament: —

"That if any person shall maliciously or advisedly publish, by writing, printing or openly declaring that the said government is tyrannical, usurped, or unlawful; or that the Commons in Parliament assembled are not the supreme authority of this nation, or shall plot, contrive or en-

[33] Gardiner's Documents of the Puritan Revolution, pp. 279-281.

[34] Borgeaud, pp. 91, 92.

[35] The names of a number of them are given by Borgeaud.

[36] An Agreement of the Free People of England, tendered as a Peace offering to the distressed Nation. London, May 1, 1649. (British Museum, 552 [23].) Howell's State Trials, vol. iv, p. 1363.

deavour to stir up or raise force against the present government, or for the perversion or alteration of the same, and shall declare the same by any open deed; that then every such offence shall be taken, deemed, and adjudged by the authority of the present Parliament to be High Treason."[37]

The act also made it treason for a civilian to try to stir up a mutiny in the army. Nothing daunted, Lilburne, while in the Tower proceeded to break the law by a number of publications. He was indicted for high treason under the statute on account of his publication of "A Salva Libertate"; "An Impeachment of High Treason against Oliver Cromwell and his son-in-law John Ireton Esqrs., late members of the late forcibly dissolved House of Commons, presented to public view by lieut. colonel John Lilburne, close prisoner in the Tower of London, for his real, true, and zealous affection to the Liberties of this nation"; "An Outcry of the Young-men and Apprentices of London, or an Inquisition after the lost fundamental laws and liberties of England, directed Aug. 29, 1649, in an Epistle to the private Soldiers of the Army, especially all those that signed the solemn Engagement at Newmarket Heath the 5th of June, 1647, but more especially the private Soldiers of the General's regiment of horse, that helped to plunder and destroy the honest and true-hearted Englishmen, traitorously defeated at Burford, the 15th of May, 1649"; "A Preparative to an Hue and Cry after Sir Arthur Haslerig"; and "The legal and fundamental Liberties of the People of England, revived, asserted and vindicated." The first of these books he had given to the lieutenant of the Tower as a protest against a warrant to bring him before the Attorney-General. "The Outcry of the Apprentices" he had given to some soldiers. In these books he had deliberately violated the statute by speaking of "the present tyrannical and arbitrary, new erected, robbing government";[38] saying on the first page of one: —

"I have fully, both by law and reason, undeniably and unanswerably proved that the present Juncto sitting at Westminster are no Parliament at all in any sense, either upon the principles of law or reason, but are a company of usurping tyrants and destroyers of your laws, liberties, freedoms and proprieties, sitting by virtue of the power and conquest of the sword."[39]

He had also said: —

"Granting that the Parliament hath power to erect a court of justice to administer the law, provided that the judges consist of persons that are

[37] Acts of May 14, 1649, and July 7, 1649; Howell's State Trials, vol. iv, pp. 1347–1351.

[38] Impeachment of High Treason against Oliver Cromwell.

[39] Ibid., p. 1.

not members of Parliament, and provided the power they give them be universal, that is to say, to administer the law to all the people of England indefinitely, who are all equally born free alike, and not to two or three particular persons solely ; the last of which for them to do is unjust, and altogether out of their power." [40]

Lilburne's wife and family petitioned for a suspension of the proceedings, that they might have time to persuade him to make submission. He would, however, make no propositions, except first to submit the case to twelve judges, one to be selected by himself, the rest by his adversaries; then that he be released under a promise to emigrate to the West Indies within six months, —

" Provided, that all those that are free and willing to go along with me of what quality soever, may have free liberty at their pleasure to go, and provided, seeing many of those I know willing to undertake the journey, are made very poor by reason of their sufferings in the present distractions, may have all such monies justly paid unto them, as is owing them, either upon arrears, for faithful service already done, or for monies lent to the public, that so they may be the better enabled for their journey, they engaged thereupon to go ; and provided, that other that are willing to go, and are so very poor, that they cannot transplant themselves, may have from the public some reasonable allowance for that end, this being the land of their nativity, where by the law of nature, they may challenge a subsistence ; and therefore it is but just, seeing their company and principles are a burthen and trouble to the men in present power, that they should make their willingness (for peace-sake), able to transport themselves into a desart, where, with industry, and the blessing of God thereupon, they may expect a livelihood, and this, with the engagement of the present power, for a peaceable protection while we stay here in England, and for their assistance for a reasonable convoy in some part of our journey, I will engage in security, I will not act against their power, during my stay in England, directly or indirectly ; but for me to engage singly to go alone, seeing I know no plantation already planted ; but I would sooner chuse, to be cut in pieces in England, than engage to go to it : therefore particularly I shall not engage, without terms above said, come life, come death, to which I shall stand." [41]

Finally, moved by the tears and importunities of his wife, he petitioned : —

" That my Trial, (so suddenly intended) may for some reasonable time be suspended, that so I may have time to hear and consider what many of

[40] Lilburne, The legal and fundamental Liberties of the People of England revived, asserted and vindicated. See also his Picture of the Council of State.

[41] Howell's State Trials, vol. iv, p. 1426.

them say they have to offer by way of reason and argument, to persuade me to what at present my conscience is not convinced of. And I should likewise be desirous, if your house should judge convenient, that some competent number of gentlemen of your house might be permitted to debate with me those particulars, wherein I have appeared most to differ with other men's judgments: whereby possibly rational arguments may be so strongly urged, as peradventure may give such satisfaction as may tend to the reconciling many differences and distractions; upon the knowledge of the acceptance of which, during all that time of suspension of trial, I do hereby faithfully promise not in the least to disturb those that shall grant me this favour, being not so apt to make disturbance as is conceived." [42]

At his trial, in October, 1649, though barely thirty years of age and without legal training, he conducted his defense single-handed against bench and bar in a most masterly manner. The court-room was packed with his friends, who influenced the jury by expressions of their sympathy, so loud that several companies of soldiers were brought to the neighborhood to keep order. He so continually complained of the unfairness of the prosecution, that he put both the prosecutors and the judges, throughout the case, upon the defensive. His arguments in favor of his demand that counsel should be allowed him in the defense of a criminal prosecution, as they would have been in a civil action, were a just arraignment of the barbarous system of criminal jurisprudence that then prevailed. He refused to admit the publication of the books, although frequently asked about the facts, justifying himself against the criticisms of his prosecutors for this action by the example of Christ before Pilate. His concluding argument consisted of technical objections to the proof of his publication of the books, combined with complaints about the injustice of his treatment, and reference to his services in the cause of religious freedom. The peroration was as follows: —

"I have almost done, Sir; only once again I claim that as my right which you have promised. That I should have counsel to matter of law; and if you give me but your own promise, which is my undoubted right by your own law, I fear not for my life; But if you again shall deny both these legal privileges, I shall desire my jury to take notice, that I aver you rob me of the benefit of the law, and go about to murder me, without and against law: and therefore, as a free-born Englishman, and as a true Christian that now stands in the sight and presence of God, with an upright heart and conscience, and with a chearful countenance, cast my life, and the lives of all the honest freemen of England, into the hands of God, and

[42] Howell's State Trials, vol. iv, pp. 1432, 1433.

his gracious protection, and into the care and conscience of my honest jury and fellow-citizens; who I again declare by the law of England, are the conservators and sole judges of my life, having inherent in them alone the judicial power of the law, as well as fact: you judges that sit there being no more, if they please, but cyphers to pronounce the sentence, or their clerks to say Amen to them: being at the best in your original, but the Norman Conqueror's intruders. And therefore, you gentlemen of the Jury are my sole Judges, the keepers of my life, at whose hands the Lord will require my blood, in case you leave any part of my Indictment to the cruel and bloody men. And therefore I desire you to know your power, and consider your duty both to God, to me, to your own selves, and to your country: And the gracious assisting Spirit and Presence of the Lord God Omnipotent, the Governor of heaven and earth, and all things therein contained, go along with you, give counsel and direct you, to do that which is just, and for his glory."

"The people with a loud voice cried, Amen, Amen, and gave an extraordinary great hum; which made the Judges look something untowardly about them, and caused major-general Skippon to send for three more fresh companies of foot-soldiers." [43]

The jury brought in a verdict of not guilty, which was greeted with popular applause and bonfires in the streets. Notwithstanding this, he was returned to the Tower and kept there imprisoned ten days longer, till he was released upon the warrant of Bradshaw.[44]

Shortly afterwards Lilburne was elected to the London Common Council, but his election was set aside, upon which he said; "I have been judged by man, but God will judge between Cromwell and me;" [45] then for a while dropped politics and set up as a soap-boiler.[46]

For two years Lilburne continued this trade, which he combined with that of a promoter of private claims before Parliament. He then excited the hostility of Parliament by his conduct in the prosecution of a claim for his uncle George Lilburne and Josiah Primate against Sir Arthur Haslerig, about a colliery in the County of Durham, which they claimed Haslerig had taken from them by force. The Committee reported in favor of Haslerig; whereupon the House voted acquitting Haslerig, determining the petition to be false, malicious and scandalous, directing it to be burnt by the common hangman, fining Primate and Col. Lilburne seven thousand pounds each, part of

[43] Howell's State Trials, vol. iv, p. 1395.

[44] Ibid., p. 1406.

[45] Gardiner's Puritan Commonwealth and Protectorate, vol. i, p. 198.

[46] "The project of the wild levelling representative is at an end since John Lilburne turned off the trade of state-mending to take up that of soap-boiling." Merc. Politicus, June 12, 1650, quoted in Gardiner's Commonwealth and Protectorate, vol. i, p. 199, note 1.

which was to be paid to Haslerig, and providing that Lilburne should be banished, and depart the kingdom within thirty days, and that in case of his return, he should be proceeded against as a felon, and suffer the pains of death accordingly. When summoned to the bar of the House to receive his sentence he refused to kneel and was accordingly ordered to withdraw. The House on January 30th, 1651, passed an act to carry out its judgment, which, after allowing Lilburne twenty days to leave the country, provided that in case after the expiration of that time he should be found there, "the said John Lilburne shall be, and is hereby adjudged a felon, and shall be executed as a felon without benefit of clergy."[47] He accordingly went to Holland, but two years later returned to England to contest the validity of the law, when he was committed to Newgate and brought to trial. He filed several exceptions to the indictment upon the grounds that the description of the Parliament in the indictment was informal, that the act did not conform to the judgment upon him, and that the indictment did not set forth with sufficient specification that he was the John Lilburne described in the act. The most interesting exception was, however, that the act was void as contrary to the fundamental principles of law. This was as follows: —

"Exception 2. The said Indictment is grounded upon the fore-recited act, intitled, 'An Act for the Execution of a Judgment given in Parliament against Lieut. col. John Lilburne'; and so relates only to some judgment supposed to be given in parliament against the said lt. col. John Lilburne; and if no such judgment were given, the act were void, and the judgment also. Now it doth not appear that any judgment, for any crime whatsoever, was given in parliament against the said Lieut. col. John Lilburne.

"1. Before any judgment can be given in law against any Englishman, for any crime, there must be either an Indictment, presentment, or some information or accusation, against him, to that court that judgeth him, for some crime supposed to be committed by him. 2. The party accused must either appear before that court, or be out-lawed for not appearing. 3. If the party appears, he must either confess the crimes or misdemeanors whereof he is accused, or else plead to the indictment, presentment, or information, or accusation against him, and come to trial thereupon. And as some of these ought in law to precede a judgment against any Englishman, so also some of these afore-mentioned proceedings, in order to a lawful judgment, ought to be entered upon such record, wherein any such judgment is entered; and unless it doth appear upon the record, wherein any judgment is entered against any Englishman for any crime, that some

[47] Howell's State Trials, vol. v, pp. 407–409.

such proceeding as abovesaid, hath been made before the judgment passed against him, the judgment is to be holden for erroneous and void, and ought so to be reputed. Now it doth not appear either by the said pretended act, as it is recited in the indictment, nor by any record of the supposed judgment produced, nor any otherwise, that there was any indictment, presentment, or information to the parliament of the Commonwealth of England against the said Lieut. col. John Lilburne ; or even if there were, it doth not appear, that he ever appeared to the same, nor that he was ever outlawed for not appearing ; neither doth any pleading by the said lieut. col. John Lilburne to any such indictment or information appear, nor any trial of him for the same. And therefore if any such pretended judgment be entered, as the said supposed act, and the Indictment of John Lilburne, prisoner at the bar, thereupon, doth relate unto, the same is erroneous and void in law; and by consequence the said indictment is void." [48]

In his closing speech to the jury, he took the position that the act was void because unconstitutional ; and upon that ground he was acquitted, as appears from the subsequent examination of the jurors before the Council of State, where several substantially admitted this, by saying that they voted for acquittal because they were judges of the law as well as the facts, although two or three claimed that their verdict was on the ground of insufficient proof that he was the Lilburne described in the statute.[49]

"Concerning the act whereupon he was indicted, this he said: It was a lye and a falsehood: an act that hath no reason in it, no law for it ; it was done as Pharoah did; Resolved upon the question, that all the male children should be murdered. That if he died upon this Act, he died upon the same score that Abel did, being murdered by Cain. That the act was a void act, a printed thing, there being no one punctilio or clause in it, grounded on the law of England, and that it was an unjust, unrighteous, and treacherous act, and that he doubted not to shatter that act in pieces." [50]

"As for all parliaments in general, he said parliaments were a delegated power, and ought to give a reason of all they do; and that it was not in their power (as he had proved in his plea at large, before the Lord Chief Justice Rolls and Mr. Justice Bacon, May 18, 1647;) nor had they the least jurisdiction, to sentence him, or any of the least free-born Englishman; unless it be their own members. That all crimes whatever were to be heard, determined, and judged at the Common-law, and no where else. Acts of Attainder were not lawful."

"For the Jury, he called them his honourable Jury, and said they were

[48] Howell's State Trials, vol. v, pp. 438–439.

[49] Ibid., pp. 446-450.

[50] Ibid., p. 443.

the Keepers of the Liberties of England; and will make it appear that the Jury are the Judges of the Law, as well as of the Fact.

"Moreover he charged them to consider, Whether if I die on the Monday, the parliament on Tuesday may not pass such a sentence against every one of you twelve; and upon your wives and children, and all your relations; and then upon the rest of the city, and then upon the whole county of Middlesex, and then upon Hertfordshire, and so by degrees there be no people to inhabit England, but themselves?"[51]

This is the first case in the history of jurisprudence, where an act of a national legislature was disregarded as unconstitutional.

A large gathering of people was present at the trial resolved to rescue him by force if he were convicted. He seems to have been troubled no further, and it is said that Oliver Cromwell, who, though publicly his enemy, had reasons for not pushing him too far, subsequently paid him privately a pension equivalent to the pay of a lieutenant-colonel.[52] He died in 1657, less than forty years of age, but so long as civil liberty is preserved the name of John Lilburne should not be forgotten.

[51] Howell's State Trials, vol. v, pp. 443-444.

[52] Oldmixon vol. ii, p. 419.

CHAPTER II.

NATURE OF THE CONSTITUTION AND THE PREAMBLE. NULLIFICATION, SECESSION AND RECONSTRUCTION.

§ 11. Nature of the Constitution of the United States.

THE UNITED STATES are a nation. The Union is not a league, and cannot be dissolved except by a revolution. These are principles which have been established by the adjudications of the courts, the action of Congress and the executive, the acquiescence of the States, and the arbitrament of war. The question lies at the foundation of the government, and on it the people of the country were for three-quarters of a century divided. Now that a generation is in power which accepts the decision, whether sound or erroneous, as final, the arguments on either side deserve a dispassionate consideration.

Those in favor of the legal right of secession are as follows: It is an axiom of political science that no law can bind a sovereign; for a sovereign is above all law. The Articles of Confederation were a league between sovereign States. Those sovereign States formed the Constitution. It was drafted by their delegates and ratified by them separately. The right to withdraw from the Union, it has been claimed, was reserved by New York and Virginia in their ratifications. It was called by its makers and statesmen, contemporary with its adoption, as well as since, a compact, a confederacy, and a federal government. The United States have the same name that was applied to them under the Articles of Confederation. There is nothing in the Constitution to show that it is a different bond. No clause of that instrument gives power to coerce a State. Such power was suggested in the Federal Convention, but rejected by a large majority. The States are expressly recognized in that instrument. Should they refuse to act, for example, by failing to elect Senators, the Union would cease to exist. It must then, it is contended, be a league or com-

pact, and nothing more. Now a compact, even between individuals, ceases to be binding on the breach of one of its conditions. International law justifies the dissolution of a league for a similar reason. In the case of individuals the courts will determine whether on one side a breach has been made which relieves the other from the stipulations upon its part. There is no court with power to adjudicate between the claims of nations. Each independent State must be its own judge in such a case; and when one determines that there is cause sufficient to itself for the dissolution of a league or treaty of alliance, the league is thereby dissolved, in view of international law as well as in fact, and the aggrieved party has no remedy but war. If the Constitution is a league, it is no longer binding upon any one of the States which has determined to withdraw from it. The citizens of that State must, it is said, obey the will of the State in that respect, and in waging war under the State banner against the United States, they are not guilty of treason.

The advocates of the prevailing view have denied that the States were sovereign before the adoption of the Constitution. They have denied that the States formed the Constitution, insisting that its preamble shows that it was adopted, not by the States, but by the people of the country at large, whose votes were taken in the States of their respective residence for convenience, without any legal signification. Even if the Constitution was formed by some of the States, they had the power to so merge themselves together in one nation as to make subsequent separation illegal. The proceedings of the Federal Convention, it is claimed, show that it was the intention of its members to establish a national form of government, and not a league. The fact that the document which they constructed terms itself a constitution and not a league, its provisions in other respects and the form of government which it creates operating directly upon the people, and not upon the States, with direct and popular representation in the lower house of Congress, and with a court having jurisdiction over States to act as a common umpire, all support the construction that it was its intention to establish an indissoluble union of indestructible States. The subsequent decisions of the Supreme Court of the United States, the action of the other departments

of the government, the acquiescence of the States, and the result of the Civil War, have so firmly established this position, that its discussion now is less practical than academic. These contentions, however, will be considered separately.

§ 12. Sovereignty of the States before the Federal Constitution.

Before the adoption of the Constitution, the several States who were parties to the Confederation were independent and sovereign. This theory, although disputed by high authority, seems to be established. Prior to the outbreak of the Revolution, the colonies were separate, connected with each other only through their common dependence upon Great Britain, differing in the race of their inhabitants, the character of their occupations, and the nature of their religion. When the difficulties arose with Great Britain, at the outbreak of the Revolutionary War, they sent delegates to the Continental Congress, which superintended the conduct of the war, and which passed and promulgated the Declaration of Independence. The extent of the powers of the Continental Congress, which were neither limited nor authorized by any charter, written law, or constitution, depended upon the necessity of the respective cases which arose; and it was in fact a provisional government.[1] Had it continued thus until the adoption of the Federal Constitution, it might well have been claimed that the sovereignty was in its constituents at large, and that the several States were never sovereign or independent.[2] Still, there, the members voted by States, and not as individuals, and were subject to be recalled by their constituencies at any time; and the interference with local affairs was made usually in the form of recommendations rather than orders.[3] When, however, the Articles

§ 12. [1] See Penhallow *v.* Doane's Administrators, 3 Dallas, 54, 81, 91, 93, 94, 111.

[2] At the opening of the Continental Congress in 1774, Patrick Henry said that the colonial governments were at an end, America was thrown into one mass and in a state of nature, and that consequently the people ought to be considered as entitled to representation in accordance with their numbers. His motion, however, failed. (John Adams, Works, vol. ii, pp. 366–377; Curtis' Constitutional History, vol. i, pp. 9, 10.) *Supra*, § 4.

[3] The Continental Congress "*directed* New York to arm and train her militia." Dane's Abridgement, vol. ix, Appendix, p. 39.

of Confederation were ratified, the sovereignty of the several States was distinctly recognized. They provide expressly that

"Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right which is not by this Confederation expressly delegated to the United States in Congress assembled." [4]

Thus we find in the first formal instrument which bound the States together, an express recognition of their sovereignty and independence.

So, the bill of rights in the first Constitution of Massachusetts: —

"The people of this Commonwealth have the sole and exclusive right of governing themselves as a free, sovereign and independent State, and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right which is not, or may not hereafter be, by them expressly delegated to the United States of America in Congress assembled." [5]

The treaties made by the United States with other nations, prior to the adoption of the Federal Constitution, also recognize either expressly or by implication, the independence and sovereignty of the several States. The Treaty of Amity and Commerce with France in 1778, recites in its preamble that it was made between —

[4] Articles of Confederation, II. "The word *sovereign*, as applied to a State, was first adopted in the Confederation, in the 2d article, and discontinued with it, except in New Hampshire. The Constitution of New Hampshire, adopted February, 1792, is the same as the said 1st article, 4th section, of the Massachusetts Bill of Rights." (Dane's Abridgement, vol. ix, Appendix, p. 29.)

[5] Massachusetts Constitution of 1780, Part I. Article iv. The delegates to the State conventions of ratification received commissions or credentials from their respective governors; which, in the case of Georgia, contained the recital, "The State of Georgia by the grace of God, free, sovereign, and independent," and concluded, "In the year of our Lord 1777, and of our sovereignty and independence the eleventh." In New Jersey, "In the year of our Lord 1786, and of our sovereignty and independence the eleventh." In New York, "In the eleventh year of the independence of the said State." In North Carolina, "In the eleventh year of our independence, A.D. 1787." In Massachusetts, "In the eleventh year of the independence of the United States of America." In South Carolina, "In the year of our Lord 1787, and of the sovereignty and independence of the United States of America the eleventh." (Stephens, Constitutional View of the War between the States, vol. i, pp. 96–115.)

"The Most Christian King and the thirteen United States of North America, to wit, New Hampshire, Massachusetts Bay, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia." [6]

It speaks synonymously of "The United States of America," and of "the said States;" [7] and of "the thirteen United States." [8] It refers to the ports, havens, roads, countries, islands, cities, towns, subjects, people and inhabitants; and the benefit, conveniency and safety "of the said United States and each of them," and "of the said United States or any of them." [9] The plenipotentiaries on the part of the United States who signed the same are set forth in the preamble as:

"The United States, on their part, having fully impowered Benjamin Franklin, Deputy from the State of Pennsylvania to the General Congress, and President of the Convention of said State, Silas Deane, late Deputy from the State of Connecticut, to the said Congress, and Arthur Lee, Councellor at Law." [10]

The Treaty of Alliance with France, signed and ratified on the same date, similarly names the separate States as parties to the same: —

"The Most Christian King and the United States of North America, to wit: New Hampshire, Massachusetts Bay, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia;" [11]

and the plenipotentiaries are similarly described.[12] Similar language is found in the contract between the United States and the King of France in 1782, in regard to the payment of the French

[6] U. S. R. S. relating to District of Columbia and Post Roads, and Public Treaties, p. 203.

[7] Ibid., Article I, p. 204.

[8] Ibid., Article XXX, p. 212.

[9] Ibid., Article III, IV, VI, VIII, XI, pp. 204, 205, 206, 207. In two articles, however, are references to the United States as an entity. Article XX, "For the better promoting of commerce on both sides, it is agreed that if a war shall break out between the said two nations," etc. Article XXII: "It shall not be lawful for any foreign privateers, not belonging to subjects of the Most Christian King nor citizens of the said United States, who have commissions from any other Prince or State in enmity with either nation, to fit their ships in the ports of either the one or the other of the aforesaid parties," etc. Ibid. p. 209.

[10] Ibid., Preamble, p. 204.

[11] Ibid., p. 201.

[12] Ibid., p. 203.

loan.[13] The contract between the King and the United States, upon the same subject, in 1783, recognizes the independence of the thirteen United States of North America, and refers throughout to those thirteen States.[14]

[13] U. S. R. S. relating to District of Columbia and Post Roads, and Public Treaties, pp. 214–217.

[14] "A contract between His Most Christian Majesty and the thirteen United States of North America, entered into at Versailles, on the 25th of February, 1783.

"The re-established peace between the belligerent Powers, the advantages of a free commerce to all parts of the globe, and the independence of the thirteen United States of North America, acknowledged and founded on a solid and honorable basis, rendered it probable that the said States would be in a condition to provide hereafter for their necessities by means of the resources within themselves without being compelled to implore the continuation of the succours which the King has so liberally granted during the war; but the Minister Plenipotentiary of the said United States to His Majesty, having represented to him the exhausted state to which they had been reduced by a long and disastrous war, His Majesty has condescended to take into consideration the request made by the aforesaid Minister, in the name of the Congress of the said States, for a new advance of money to answer numerous purposes of urgent and indispensable expenses in the course of the present year; His Majesty has in consequence determined, notwithstanding the no less pressing necessities of his own service, to grant to Congress a new pecuniary assistance, which he has fixed at the sum of six millions livres tournois, under the title of loan, and under the guaranty of the whole thirteen United States, which the Minister of Congress has declared his acceptance of, with the liveliest acknowledgments, in the name of the said States." (Ibid., p. 217.)

In Article II: "His Majesty here confirms, in case of need, the gratuitous gift to the Congress of the said thirteen United States." (Ibid., p. 218.)

Similar language is used in Article IV, (Ibid., p. 219): "and it is signed by the Ministers Plenipotentiaries of his Majesty and the Congress of the thirteen United States of North America." (Ibid., p. 319.)

In the first Article of the Treaty of France, in 1782, with Great Britain, "His Britannic Majesty acknowledges the said United States, viz., New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, to be free, sovereign and independent States; that he treats with them as such, and for himself, his heirs and successors, relinquishes all claim to the Gouvernment, propriety and territorial rights of the same, and every part thereof; and that all disputes which might arise in future on the subject of the boundaries of the said United States may be prevented, it is hereby agreed and declared that the following are and shall be their boundaries, viz.:" (Ibid., p. 261.)

In the first article of the Treaty of France in 1783 with Great Britain, "His Britannic Majesty acknowledges the said United States, viz., New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey,

In the provisions concerning the restitution of confiscated property, it is merely agreed that Congress shall recommend this to the Legislatures of the respective States, without any definite promise on the part of the United States, that the several States shall carry out said recommendations, as in fact many of them failed to do.[15] Similar language may be found in the provisional articles for this Treaty signed in 1782.[16]

The independence and sovereignty of the separate States was occasionally disputed even at that time. Thus, in the debates of the Federal Convention, Rufus King

"wished, as everything depended on this proposition, that no objection might be improperly indulged against the phraseology of it. He conceived that the import of the term 'states,' 'sovereignty,' '*national*,' 'federal,' had been often used and applied in the discussions inaccurately and delusively. The States were not 'sovereigns' in the sense contended for by some. They did not possess the peculiar features of sovereignty — they could not make war, nor peace, nor alliances, nor treaties. Considering them as political beings, they were dumb, for they could not speak to any foreign sovereign whatever. They were deaf, for they could not hear any proposition from such sovereign. They had not even the organs or faculties of defence or offence, for they could not of themselves raise troops, or equip vessels, for war. On the other side, if the union of the States comprises the idea of a confederation, it comprises that also of consolidation. A union of the States is a union of the men composing them, from whence a *national* character results to the whole. Congress can act alone without the States, they can act (and their acts will be binding) against the instructions of the States. If they declare war, war is *de jure* declared; captures made in pursuance of it are lawful; no acts of the States can vary the situation, or prevent the judicial consequences. If the States, therefore, retained some portion of their sovereignty, they had certainly divested themselves of essential portions of it. If they formed a confederacy in some respects, they formed a nation in others. The Convention could clearly deliberate on and propose any alterations that

Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, to be free, sovereign and independent States; that he treats with them as such, and for himself, his heirs and successors, relinquishes all claims to the Government, propriety and territorial rights of the same, and every part thereof." (Ibid., p. 266.)

[15] Ibid., p. 268.

[16] Ibid., pp. 261–264.

Congress could have done under the Federal Articles. And could not Congress propose, by virtue of the last article, a change in any article whatever, — and as well that relating to the equality of suffrage as any other? He made these remarks to obviate some scruples which had been expressed. He doubted much the practicability of annihilating the States; but thought that much of their power ought to be taken from them." [17]

Mr. Madison said:

"Some gentlemen are afraid that the plan is not sufficiently national, while others apprehend that it is too much so. If this point of representation was once well fixed, we should come nearer to one another in sentiment. The necessity would then be discovered of circumscribing more effectually the State governments, and enlarging more effectually the bounds of the general government. *Some contend that the States are sovereign, when in fact they are only political societies.* The States never possessed the essential rights of sovereignty. *They were always vested in Congress.* Their voting as States in Congress is no evidence of their sovereignty. The State of Maryland voted by counties. Did this make the counties sovereign? The States, at present, are only great *corporations*, having the power of making by-laws, and these are effectual only if they are not contradictory to the general confederation." [18]

In the legislature of South Carolina, which recommended the State Convention of ratification, General Charles Cotesworth Pinckney, after quoting the Declaration of Independence, used these prophetic words:—

"The separate independence and individual sovereignty of the several States were never thought of by the enlightened band of patriots

[17] Madison Papers, Elliot's Debates, 2d ed., vol. v, pp. 212, 213.

[18] Yates's Notes of Secret Debates, Elliot's Debates, 2d ed., vol i, p. 461. Madison's own report of this speech, which was published after his subsequent report on the Virginia Resolutions, omits most of this language. (Madison Papers, ibid., vol. v, p. 256.) Rufus King thus reports the speech:—

"We are vague in our language. We speak of the sovereignty of the States. The States are not sovereign in the full extent of the term. There is a gradation from a simple corporation for limited and specified objects, such as an incorporation of a number of mechanics, up to a full sovereignty as preserved by independent nations whose powers are not limited. The last only are truly sovereign." (Rufus King's Report of Debates in Federal Convention, June 29, 1787; Life and Correspondence, vol. i, p. 610. See also Dr. Benjamin Rush, in his Address to the People of the United States, American Museum, January, 1787.

who framed this Declaration; the several States are not even mentioned by name in any part of it, as if it was intended to impress this maxim on America, that our freedom and independence arose from our Union, and that without it we could be neither free nor independent. Let us, then, consider all attempts to weaken this Union, by maintaining that each State is separately and individually independent, as a species of political heresy, which can never benefit us, but may bring on us the most serious distress."[19]

About the prior sovereignty of three at least of the United States, there can be no question. The States of North Carolina and Rhode Island at first refused to ratify the Federal Constitution. The new government was organized by eleven States on March 4, 1789. North Carolina did not ratify the Constitution until November 21 of the same year, and Rhode Island not till May 29, 1790. In the meantime, these States were considered by themselves, as well as by the eleven United States, and were in fact, independent and foreign States.[20] Texas declared her independence in 1835 and maintained it until 1845, when she was incorporated into the Union by an Act of Congress. Upon the other hand, it is hard to see how the new States, carved out of the national territory which was acquired by conquest, treaty, or cession from the other States, were ever sovereign or independent.[21]

[19] Elliot's Debates, 2d ed., vol. iv, pp. 301, 302. See also Wilson's remarks on the nature of the Confederation. Considerations on the Bank of North America, Wilson's Works, vol. iii, pp. 406, 407.

[20] The Massachusetts Magazine for March, 1789, says, in its summary of American News and Politics:

"RHODE ISLAND. This foreign State has again refused to accede to a union with her late sisters. Anxious of enjoying the protection of the Union, the inhabitants of Newport, Providence and other places are determined to sue for its protection and to be annexed to Massachusetts or Connecticut, thereby to evince to their present legislature, that unless they take measures for a speedy adoption of the Constitution, their boasted sovereignty as an independent State will ere long be at an end."

"NORTH CAROLINA. This other foreign State has lately evinced a disposition to become a member of the United States." The revenue laws put them upon the same footing as foreign States, and there was no provision for them in the first Judiciary Act. 1 Story's Laws of the U. S., pp. 30, 50, 53; Baldwin's Views, p. 96.

[21] In his valedictory to the Senate, Judah P. Benjamin, of Louisiana, argued ingeniously that the United States held the sovereignty of this territory in trust until the admission of each new State. (Blaine's Twenty

It seems clear, however, that Marshall was right when he said:—

"As preliminary to the very able discussions of the Constitution which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these States anterior to its formation. It has been said that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But when these allied sovereigns converted their league into a government, when they converted their congress of ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature empowered to enact laws on the most interesting subjects, the whole character in which the States appear underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected." [22]

§ 13. The Constitution was formed by the Thirteen States.

It must also be conceded that the Constitution was formed by the thirteen States and not by the people of the United States at large. The delegates were in some cases elected by the people of the different States, and in others appointed by their respective legislatures. They voted in the Convention by States and not as individuals. The object of the ratification by the people of the several States was because it was deemed that the legislatures had no power under their respective constitutions to delegate or grant away any power vested in them by the ratification of the Constitution.[1] These facts are plain to every student of the history of the appointment of the delegates to the Federal Convention, the proceedings of that Convention, and the ratifica- of the Constitution by the thirteen States.

§ 14. Form of Ratifications of the Constitution.

The Constitution was ratified by the people of the thirteen States acting through conventions elected for that purpose. There is nothing in the form of the ratifications which supports

Years in Congress, vol. 1, pp. 249–251.) Senator Yulee, of Florida, made a similar claim. (Ibid.)

[22] Chief Justice Marshall in Gibbons v. Ogden, 9 Wheaton 1, 187.

§ 13. [1] See the Speech of Madison, quoted *infra*, § 19. For the credentials of the delegates to the State Convention, see *supra*, § 12, note 5.

the position that the Constitution was a league, or an amendment of the Articles of Confederation, or that the right to withdraw from it was reserved. Seven of them ran in the name of "We, the delegates of the people of the State."[1] That of Delaware was in the name of "We, the deputies of the people of the State of Delaware." That of New Jersey, "We, the delegates of the State of New Jersey." The ratifications of Massachusetts, South Carolina, New Hampshire, and North Carolina were in the third person, and in the name of "the Convention," or "this Convention." All of them used the phrase "ratify." Eight of them, the phrase, "assent to and ratify."[2] That of Delaware stated that its deputies did "freely and entirely approve of, assent to, ratify and confirm the said Constitution." That of New Jersey, that they did "agree to ratify and confirm the same and every part thereof." That of Connecticut, "assent to, ratify, and adopt the Constitution." The same form was used by Georgia. The Convention of North Carolina resolved that it did "adopt and ratify the said Constitution and form of government." Each of them acted in the name and on behalf of the people of their respective State, and no others. The preamble of the ratification of Massachusetts, however, recited that the Convention acknowledged, "with grateful hearts, the goodness of the Supreme Ruler of the universe, in affording the people of the United States, in the course of His Providence, an opportunity, deliberately and peaceably, without force or surprise, of entering into an explicit and solemn compact with each other, by assenting to and ratifying a new Constitution, in order to form a more perfect union," with a recital of the other clauses set forth in the preamble to the Federal Constitution. The use of the word "compact" here, if of any legal effect, can only strengthen the position of those who claim that the Constitution was a mere social compact between the whole people of the United States at large, and not a compact in the nature of a treaty between the people of the several States.

§ 14. [1] The States of Pennsylvania, Connecticut, Georgia, Maryland, Virginia, New York and Rhode Island. The forms of the credentials of the delegates are quoted *supra*, § 12, note 5.

[2] Pennsylvania, Massachusetts, Maryland, South Carolina, New Hampshire, Virginia, New York and Rhode Island.

The words "with each other" would have been replaced by some phrase, such as "between the people of each State," had that been the intent.

Much stress is laid, by the advocates of secession, upon the declarations in the ratifications of Virginia and New York. The ratification of New York is preceded by a declaration of twenty-four articles concerning political rights and the construction of the Constitution. These are followed by the declaration, —

"Under these impressions, and declaring that the rights aforesaid cannot be abridged or violated, and that the explanations aforesaid are consistent with the said Constitution, and in confidence that the amendments which shall have been proposed to the said Constitution will receive an early and mature consideration, we, the said delegates, in the name and on behalf of the people of the State of New York, do by these presents assent to and ratify the said Constitution."

Manifestly, this declaration of the understanding in New York, to which the other States did not accede, could have no binding effect upon the construction of the instrument. It was not intended to be either a reservation or a condition.

But there is nothing in those declarations which tends to support the right of secession. The only one upon which stress is laid is the third, which states —

"That the powers of the government may be reassumed by the people, whensoever it shall become necessary to their happiness."

This merely refers to the right of revolution which is recognized in the Declaration of Independence, and does not claim to be a reservation of any legal right of receding from the instrument thus ratified. Similar observations apply to the ratification of Virginia, which is preceded by the declaration —

"That the powers granted under the Constitution, being derived from the people of the United States, may be resumed by them whensoever the same shall be perverted to their injury or oppression, and that every power not granted thereby remains with them, and at their will;"

and concludes: —

"With these impressions, with a solemn appeal to the Searcher of all 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 a delay with a hope of obtaining amendments previous to the ratifications, we, the said delegates, in the name and in behalf 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."

In the New York Convention, Lansing moved a resolution which reserved the right to withdraw from the Union. Hamilton wrote for advice to Madison, who was in Congress at New York. The answer of Madison was read to the Convention by Hamilton as follows: —

"My opinion is, that a reservation of a right to withdraw, if amendments be not decided on under the form of the Constitution within a certain time, is a conditional ratification; that it does not make New York a member of the new Union, and, consequently, that she could not be received on that plan. The Constitution requires an adoption *in toto* and *forever*. It has been so adopted by the other States. An adoption for a limited time would be as defective as an adoption of some of the articles only. In short, any condition whatever must vitiate the ratification. The idea of reserving a right to withdraw was started at Richmond, and considered as a conditional ratification, which was itself abandoned as worse than a rejection."[8]

§ 15. Legality of an Indissoluble Union between Sovereign States.

The concessions, that the separate States prior to the Constitution were sovereign and independent, and that the Federal Constitution was formed and ratified by them in their independent sovereign capacities, by no means compel the conclusion that they had no power to merge their several sovereignties into one. Metaphysicians have claimed that a sovereignty cannot thus commit suicide,[1] but the arguments are merely a play upon words, and

[8] Hamilton's Works, vol. ii, pp. 467–471; quoted in Bancroft's History, ed. of 1886, vol. vi, p. 459.

§ 15. [1] See the Republic of Republics, by Bernard J. Sage, under the pseudonym of P. C. Centz, Barrister, 4th ed., Part I, ch. vii, p. 48; Part II, ch. xiii, p. 142; ch. xiv, p. 147,

the facts conclusively dispose of them. The sovereignty of a State, like that of a monarch, can be lost by abdication as well as by conquest. Without discussing the merger of the United States and Provinces of the Netherlands into the Kingdom of Holland, and the different sovereignties of the Italian peninsula into the Kingdom of Italy, we have a case known to the makers of the Federal Constitution, with comments on it by a writer whom they and their contemporaries recognized as an authority.[2] After the union of the crowns of Scotland and England by the succession of James VI of Scotland to the English throne in 1603, the countries remained separate kingdoms for more than a century. Under Queen Anne, in 1707, the two parliaments agreed to adopt twenty-five articles of union between the nations. The acts of ratification recite the acts of the Scotch Parliament, which established the church of Scotland and the four Scotch universities, and provide for a clause in the coronation oath promising the inviolable maintenance of the former, together with the English acts of uniformity, and all other acts then in force for the preservation of the church of England.[3] The treaty covenanted and it was enacted that these acts "shall forever be observed as fundamental and essential conditions of the union." Blackstone said: —

"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 infringement of those points which, when they were separate and independent nations, it was mutually stipulated should be 'fundamental and essential conditions of the union.'" "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

ch. xiv, p. 155. Part III, ch. vi, p. 193. Part IV, ch. v, p. 307. This is by far the ablest argument in support of the legal right of secession.

[2] The union between England and Scotland was cited as an analogy by Roger Sherman in the Letters of a Countryman, New Haven Gazette, Nov. 14, 1787; Ford's Essays on the Constitution, pp. 216, 217; and by Governor Randolph in the Virginia Convention. Elliot's Debates, 2d ed., vol. iii, p. 196. See *supra*, § 4, note 4.

[3] See English Act, 5 Ann., c. 8, 1706; *supra*, § 7, note 3. The Scotch Act was a year later.

part of its 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 fœderate 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." [4]

These authorities would seem to be conclusive. And this position was conceded by Jefferson Davis, who said: —

"No doubt the States — the people of the States — if they had been so disposed, might have merged themselves into one great consolidated State, retaining their geographical boundaries merely as matters of convenience." [5]

§ 16. The Constitution is not a Legal Compact.

The Constitution is in no legal sense a compact between the States. That it is, has been the contention of the advocates of nullification and secession.[1] They base their position on the fact that it has been called a compact by statesmen at the time of its

[4] Blackstone's Commentaries, vol. i, p. 97, note citing Warburton's Alliance, 195.

Blackstone continues in the same note: "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.

"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 honorably 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 above mentioned (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." Ibid., p. 96.

[5] Davis, Rise and Fall of the Confederate Government, vol. i, p. 155.

§ 16. [1] See Calhoun's speech in the Senate, Feb. 26, 1833, in reply to Webster's attack on his resolutions in regard to the Force Bill. Niles' Register, vol. xliii, Sup. p. 259; Sage's The Republic of Republics, *passim*.

adoption[2] and since, even by some such as Webster,[3] who denied the corollary that a breach by some of the parties legally absolved from obedience the rest.

The difficulty here lies in the fact that the term is used by nearly all whom they quote in a colloquial and not a legal sense. Most laws as well as constitutions are the result of compromises of which men speak as compacts. At the birth of the Constitution, more than now, this term was common, since there were then more disciples of the theory that all law was based on the social contract.[4] A gross breach of such a compromise, whether contained in a statute or a constitution, would, it was conceded, release the injured party from all further obligations. But the latter's action, although justified morally, was none the less illegal, and, where a people was a party, could only be accomplished by a revolution. When James II was deposed, it was resolved by the two Houses of Parliament that —

"King James the Second, having endeavored to subvert the Constitution of the kingdom by breaking the original contract between the King and the people, and having, by the advice of Jesuits and other wicked persons, violated the fundamental law, and withdrawn himself out of the kingdom, hath abdicated the government, and that the throne is thereby become vacant."

Yet the proceeding is not justified as legal, but is always described as "the glorious revolution of 1688."

An able work by an advocate of the South, just before the Civil War, argues that —

"The Constitution is indeed a compact between States, but it is also a compact between slaveholding and non-slaveholding sections; and these sections are susceptible of obligations and injuries."[5]

[2] See Gouverneur Morris, quoted in his Life, vol. iii, p. 193; Hamilton in the Federalist, No. 85; Washington to David Stuart, Oct. 17, 1787; and other quotations in Sage's The Republic of Republics, 4th ed., pp. 202–207.

[3] See the Memorial to Congress on the Subject of Restraining the Increase of Slavery in New States to be admitted into the Union, prepared by a committee appointed at a Public Meeting in Boston, Dec. 3, 1819, consisting of Daniel Webster, Josiah Quincy, and others. Boston, Samuel Phelps, Printer, 1819; Sage's Republic of Republics, Appendix F.

[4] "In some sense even government itself is a contract." Brown *v.* Bank, 8 Mass., 448.

[5] The Lost Principle, by Barbarossa, Richmond, 1860.

And his arguments in support of the latter are as cogent as those advanced on behalf of the former theory. Yet no lawyer would seriously argue to a court that either of these sections can be a person which can bind and unbind itself any more than it could sue or be sued.

Others, as Hayne, speak of the new government created by the Constitution as a party to the compact: —

"Here, then, is a case of a compact between sovereigns; and the question arises, what is the remedy for a clear violation of its express terms by one of the parties." . . . "The creating power is three-fourths of the States. By their decision the parties to the compact have agreed to be bound, even to the extent of changing the entire form of the government itself; and it follows of necessity, that, in case of a deliberate and settled difference of opinion between the parties to the compact, as to the extent of the powers of either, resort must be had to their common superior (that power which may give any character to the Constitution they may think proper), viz., three-fourths of the States." [6]

The exposure of this fallacy by Webster needs no words of comment: —

"His argument consists of two propositions, and an inference. His propositions are —

"1. That the Constitution is a compact between the states.

"2. That a compact between two, with authority reserved to one to interpret its terms, would be a surrender to that one, of all power whatever.

"3. Therefore (such is his inference) the general government does not possess the authority to construe its own powers.

"Now, sir, who does not see, without the aid of exposition or detection, the utter confusion of ideas involved in this so elaborate and systematic argument?

"The Constitution, it is said, is a compact between States: the States, then, and the States only, are parties to the compact. How comes the general government itself a party? Upon the honorable gentleman's hypothesis, the general government is the result of the

[6] Mr. Hayne's Reply to Mr. Webster, abridged by himself, delivered in the Senate, January 27, 1830. Elliot's Debates, 2d ed., vol. iv, pp. 509–513. So Judge J. S. Black in his argument in Milligan's case said: "That was the compact made with the general government at the time it was created."

compact, the creature of the compact, not one of the parties to it. Yet the argument, as the gentleman has now stated it, makes the government itself one of its own creators. It makes it a party to that compact to which it owes its own existence.

"For the purpose of erecting the Constitution on the basis of a compact, the gentleman considers the States as parties to that compact; but as soon as his compact is made, then he chooses to consider the general government, which is the offspring of that compact, not its offspring, but one of its parties; and so, being a party, has not the power of judging on the terms of compact.

"If the whole of the gentlemen's main proposition were conceded to him — that is to say, if I admit, for the sake of the argument, that the Constitution is a compact between States — the inferences which he draws from that proposition are warranted by no just reason; because, if the Constitution be a compact between States, still that Constitution, or that compact, has established a government with certain powers; and whether it be one of those powers, that it shall construe and interpret for itself the terms of the compact, in doubtful cases, can only be decided by looking to the compact, and inquiring what provisions it contains on this point. Without any inconsistency with natural reason, the government, even thus created, might be trusted with this power of construction. The extent of its powers, therefore, must still be sought for in the instrument itself." [7]

The whole phraseology of the Constitution is in conflict with the one theory as much as with the other. In contradistinction with the preceding instrument of union, it does not call itself a

[7] Webster's Reply to Hayne, Elliot's Debates 2d ed., vol. iv, pp. 516-517. This point is yielded by the acute and learned author of The Republic of Republics, 4th ed., pp. 259-260: "The Fourteenth Party to the Compact was, according to Robert Y. Hayne and Judge J. S. Black, the government, which could not have had any existence till long after the eleven states had ratified, established, and finished said compact." After quoting them: —

"Other eminent men make the same mistake, so that the confusion of ideas on this subject is general. It is only necessary to say that the compact existed and was complete, through those ratifications, declared in itself to be sufficient for the establishment of it, many months before the general government existed. After the collective States, in the Congress of themselves, had recognized the finished compact, and advised the States to act under it, by electing their subjects as its functionaries; after the several States had elected their quotas, according to the express terms; and after these electees had convened and organized under the said pact; then and not till then did or could the general government exist. It is then absurd to call the government a party."

league,[8] nor a compact, nor articles of confederation;[9] but a Constitution,[10] which is ordained and established,[11] which vests powers in a government;[12] and which shall be the supreme law of the land, by which the judges in every State shall be bound, anything in the Constitution or laws of any State to the contrary notwithstanding.[13] The Constitution is founded upon compact, but is not itself a compact.[14]

[8] Articles of Confederation, III.

[9] Preamble and concluding clause of Articles of Confederation.

[10] See Webster's Speech in the Senate, Feb. 16, 1833, against Calhoun's Resolutions; Niles's Register, xliii, Appendix, p. 170.

[11] Preamble.

[12] Article I, § 8, concluding clause.

[13] Ibid., Article VI.

[14] "Whether the Constitution be a compact between States in their sovereign capacities, is a question which must be mainly argued from what is contained in the instrument itself. We all agree that it is an instrument which has in some way been clothed with power. We all admit that it speaks with authority. The first question then is, what does it say of itself? What does it purport to be? Does it style itself a League, Confederacy, or Compact between sovereign States? It is to be remembered, sir, that the Constitution began to speak only after its adoption. Until it was ratified by nine States, it was but a proposal, the mere draught of an instrument. It was like a deed drawn, but not executed. The Convention had framed it; sent it to Congress, then sitting under the Confederation; Congress had transmitted it to the State legislatures; and by these last it was laid before conventions of the people in the several States. All this while it was inoperative paper. It had received no stamp of authority, no sanction; it spoke no language. But when ratified by the people in their respective conventions, then it had a voice, and spoke authentically. Every word in it had then received the sanction of the popular will, and was to be received as the expression of that will. What the Constitution says of itself, therefore, is as conclusive as what it says on any other point. Does it call itself a 'Compact'? Certainly not. It used the word *compact* but once, and that is when it declares that the States shall enter into no compact. Does it call itself a 'League', a 'Confederacy', a 'subsisting Treaty between the States'? Certainly not. There is not a particle of such language in all its pages. But it declares itself a *Constitution*. What is a *Constitution*? Certainly not a league, compact, or confederacy, but a *fundamental law*. That fundamental regulation which determines the manner in which the public authority is to be executed, is what forms the *constitution* of a State. Those primary rules which concern the body itself, and the very being of the political society, the form of government, and the manner in which power is to be exercised,—all, in a word, which form together the *constitution of a State*, these are the fundamental laws. This, sir, is the language of the public writers. But do we need to be informed, in this country, what a *constitution* is? Is it not an idea perfectly familiar, definite, and well settled? We are at no loss to understand what is meant by the Constitution of one of the States; and the Constitution of the United States

§ 17. Proceedings in Federal Convention as to the Determination of the Form of the New Government.

The proceedings in the Federal Convention show that it was intended to create a national government. The resolution of

speaks of itself as being an instrument of the same nature. It says, this *Constitution* shall be the law of the land, any thing in any State *Constitution*, to the contrary, notwithstanding. And it speaks of itself, too, in plain contradistinction from a confederation; for it says that all debts contracted, and all engagements entered into, by the United States, shall be as valid under this *Constitution* as under the *Confederation*. It does not say, as valid under this *Compact*, or this League, or this Confederation, as under the former Confederation, but as valid under this *Constitution*.

"This, then, sir, is declared to be a *Constitution*. A Constitution is the fundamental law of the State; and this is expressly declared to be the supreme law. It is as if the people had said, 'We prescribe this fundamental law', or 'the supreme law,' for they do say that they establish this Constitution, and that it shall be the supreme law. They say that they *ordain* and *establish* it. Now, sir, what is the common application of these words? We do not speak of ordaining leagues and compacts. If this was intended to be a compact or league, and the States to be parties to it, why was it not so said? Why is there found no one expression, in the whole instrument, indicating such intent? The old Confederation was expressly called a league; and into this league it was declared that the States, as States, severally entered. Why was not similar language used in the Constitution, if a similar intention had existed? Why was it not said, 'the States enter into this new league,' 'the States form this new confederation,' or 'the States agree to this new compact'? Or why was it not said, in the language of the gentleman's resolution, that the people of the several States acceded to this compact in their sovereign capacities? What reason is there for supposing that the framers of the Constitution rejected expressions appropriate to their own meaning, and adopted others wholly at war with that meaning?

"Again, sir, the Constitution speaks of that political system which is established as 'the Government of the United States'. Is it not doing a strange violence to language to call a league or a compact between sovereign powers a *government*? The government of a State is that organization in which the political power resides. It is the political being created by the Constitution or fundamental law. The broad and clear difference between a government and a league or compact is, that a government is a body politic; it has a will of its own; and it possesses powers and faculties to execute its own purposes. Every compact looks to some power to enforce its stipulations. Even in a compact between sovereign communities, there always exists this ultimate reference to a power to insure its execution; although, in such case, this power is but the force of one party against the force of another; that is to say, the power of war. But a *government* executes its decisions by its own supreme authority. Its use of force in compelling obedience to its

Congress which recommended the Convention recited as the reason for the same: —

"Such Convention appearing to be the most suitable means of establishing in these States a firm national government."[1]

own enactments is not war. It contemplates no opposing party having a right of resistance. It rests on its power to enforce its own will; and when it ceases to possess this power, it is no longer a government." Daniel Webster's Speech of Feb. 16, 1833, in the Senate, in opposition to Calhoun's Resolutions of Jan. 22, 1833. Niles's Register, vol. xliii, Appendix, p. 170; Webster's Speeches, 8th ed., vol. ii, pp. 174–176.

See Calhoun's Reply of Feb. 26, 1833, Niles's Register, vol. xliii, p. 259; Calhoun's Speeches pp. 98–122, quoted in Stephens' Constitutional View of the Late War between the States, vol. i, pp. 343–387.

"I do not agree that the Constitution is a compact between States in their sovereign capacities. I do not agree that, in strictness of language, it is a compact at all. But I do agree that it is founded on consent or agreement, or on compact, if the gentleman prefers that word, and means no more by it than voluntary consent or agreement. The Constitution, sir, is not a contract, but the result of a contract; meaning by contract no more than assent. Founded on consent, it is a government proper. Adopted by the agreement of the people of the United States, when adopted, it has become a Constitution. The people have agreed to make a Constitution; but, when made, that Constitution becomes what its name imports. It is no longer a mere agreement. Our laws, sir, have their foundation in the agreement or consent of the two houses of Congress. We say, habitually, that one house proposes a bill, and the other agrees to it; but the result of this agreement is not a compact, but a law. The law, the statute, is not the agreement, but something created by the agreement; and something which, when created, has a new character, and acts by its own authority. So the Constitution of the United States, founded in or on the consent of the people, may be said to rest on compact or consent; but it is not itself the compact, but its result. When the people agree to erect a government, and actually erect it, the thing is done, and the agreement is at an end. The compact is executed, and the end designated by it attained. Henceforth, the fruit of the agreement exists, but the agreement itself is merged on its own accomplishment, since there can be no longer a subsisting agreement or compact to form a constitution or government, after that constitution or government has been actually formed and established." Daniel Webster's Speech of Feb. 16, 1833, in the Senate, in opposition to Calhoun's Resolutions of Jan. 22, 1833. Niles's Register, vol. xliii, Appendix, p. 170; Webster's Speeches, 8th ed., vol. ii, pp. 176–177.

See Calhoun's Reply of Feb. 26, 1833, Niles's Register, vol. xliii, 259; Calhoun's Speeches, pp. 98–122, quoted in Stephens' Constitutional View of the Late War between the States, vol. i, pp. 343–387. So, marriage is founded upon contract, but when solemnized is a *status*, which is something more than a contract.

§ 17. [1] Elliot's Debates, 2d ed., vol. i, p. 120.

At the opening of the Federal Convention, Governor Randolph, on behalf of the delegates from Virginia, presented a series of resolutions as the foundation of their proceedings. The first was: —

"*Resolved*, that the Articles of Confederation ought to be so corrected and enlarged as to accomplish the objects proposed by their institution; namely, 'common defence, security of liberty, and general welfare.'"[2]

The resolutions throughout referred to a "national legislature," "a national executive," and "a national judiciary."[3] Charles Pinckney, of Virginia, also laid before the House "the draft of a Federal Government, which he had prepared, to be agreed upon between the free and independent States of America." It was entitled: "Plan of a Federal Constitution." The copy of this latter document, which is now preserved, presents a singular likeness to the Constitution as finally adopted. It is believed, however, to be a corrected copy, which contains many alterations from the original, consisting of propositions which were subsequently adopted by the Convention.[4]

[2] Madison Papers, Elliot's Debates, 2d ed., vol. v, p. 127; ibid., p. 129.

[3] Ibid., pp. 127–128.

[4] "Note of Mr. Madison to the Plan of Charles Pinckney, May 29, 1787: —

"'The length of the document laid before the Convention, and other circumstances, having prevented the taking of a copy at the time, that which is inserted in the debates was taken from the paper furnished to the secretary of State, and contained in the Journal of the Convention, published in 1819; which, it being taken for granted that it was a true copy, was not then examined. The coincidence in several instances between that and the Constitution, as adopted, having attracted the notice of others, was at length suggested to mine. On comparing the paper with the Constitution in its final form, or in some of its stages, and with the propositions and speeches of Mr. Pinckney in the Convention, it was apparent that considerable error had crept into the paper, occasioned possibly by the loss of the document laid before the Convention (neither that nor the resolution offered by Mr. Patterson being among the preserved papers), and by a consequent resort for a copy to the rough draught, in which erasures and interlineations following what passed in the Convention, might be confounded, in part at least, with the original text, and, after a lapse of more than thirty years, confounded also in the memory of the author. There is in the paper a similarity in some cases, and an identity in others, with details, expressions, and definitions, the results of critical discussions and modification in the Convention, that could not have been anticipated. Examples may be noticed in Article VIII of the paper; which is remarkable also for the circumstance, that, whilst it

On the following day, in imitation of the practice of the Confederation: —

"The house went into Committee of the Whole on the state of the Union. Mr. Gorham was elected to the chair by ballot. The proposi-

specifies the functions of the President, no provision is contained in the paper for the election of such an officer, nor indeed for the appointment of any executive magistracy, notwithstanding the evident purpose of the author to provide an *entire* plan of a federal government. Again, in several instances where the paper corresponds with the Constitution, it is at variance with the ideas of Mr. Pinckney, as decidedly expressed in his propositions, and in his arguments, the former in the Journal of the Convention, the latter in the report of its debates. Thus, in Article VIII of the paper, provision is made for removing the President by impeachment, when it appears that, in the Convention, on the 20th of July, he was opposed to any impeachability of the executive magistrate. In Article III it is required that all money bills shall originate in the first branch of the legislature; which he strenuously opposed on the 8th of August, and again on the 11th of August. In Article V, members of each House are made ineligible to, as well as incapable of holding, any office under the Union, etc., as was the case at one stage of the Constitution, — a disqualification highly disapproved and opposed by him on the 14th of August. A still more conclusive evidence of error in the paper is seen in Article III, which provides, as the Constitution does, that the first branch of the legislature shall be chosen by the people of the several States; whilst it appears that on the 6th of June, according to previous notice, too, a few days only after the draught was laid before the Convention, its author opposed that mode of choice, urging and proposing, in place of it, an election by the legislatures of the several States."

"The remarks here made, though not material in themselves, were due to the authenticity and accuracy aimed at in this record of the proceedings of a public body so much an object, sometimes, of curious research, as at all times of profound interest."

"Striking discrepancies will be found on a comparison of his plan as furnished to Mr. Adams, and the view given of that which was laid before the Convention, in a pamphlet published by Francis Childs at New York, shortly after the close of the Convention. The title of the pamphlet is 'Observations on the plan of government, submitted to the Federal Convention on the twenty-eight of May, 1789, by Charles Pinckney,' etc. A copy is preserved among the 'Select Tracts,' in the library of the Historical Society of New York. But what conclusively proves that the choice of the House of Representatives by the people could not have been the choice in the lost paper, is a letter from Mr. Pinckney to James Madison, of the 28th of March, 1789, now on his files, in which he emphatically adheres to a choice by the State legislatures. The following is an extract: 'Are you not, to use a full expression, abundantly convinced that the theoretical nonsense of an election of the members of Congress by the people, in the first instance, is clearly and practically wrong — that it will in the end be the means of bringing our councils into

tions of Mr. Randolph, which had been referred to the committee, being taken up, he moved, on the suggestion of Mr. G. Morris, that the first of his propositions, — to wit: '*Resolved, that the Articles of Confederation ought to be so corrected and enlarged, as to accomplish the objects proposed by their institution; namely, common defense, security of liberty, and general welfare,*' — should mutually be postponed, in order to consider the three following: —

"'1. That a union of the States merely federal will not accomplish the objects proposed by the Articles of Confederation, namely, common defense, security of liberty, and general welfare.

"'2. That no treaty or treaties among the whole or part of the States, as individual sovereignties, would be sufficient.

"'That a *national* government ought to be established, consisting of a *supreme* legislative, executive, and judiciary.'

"The motion for postponing was seconded by Mr. G. Morris, and unanimously agreed to.

"Some verbal criticisms were raised against the first proposition, and it was agreed, on motion of Mr. Butler, seconded by Mr. Randolph, to pass on to the third, which underwent a discussion, less, however, on its general merits than on the force and extent of the particular terms *national* and *supreme*.

"Mr. Charles Pinckney wished to know of Mr. Randolph, whether he meant to abolish the State governments altogether. Mr. Randolph replied, that he meant by these general propositions merely to introduce the particular ones which explained the outlines of the system he had in view.

"Mr. Butler said, he had not made up his mind on the subject, and was open to the light which discussion might throw on it. After some general observations, he concluded with saying, that he had opposed the grant of powers to Congress, heretofore, because the whole power was vested in one body. The proposed distribution of the powers with different bodies changed the case, and would induce him to go great lengths.

"Gen. Pinckney expressed a doubt whether the act of Congress recommending the Convention, or the commissions of the deputies to it, would authorize a discussion of a system founded on different principles from the Federal Constitution.

"Mr. Gerry seemed to entertain the same doubt.

contempt — and that the legislatures (of the States) are the only proper judges of who ought to be elected?'" Note by Madison. Madison Papers, Elliot's Debates, 2d ed., vol. v, pp. 570–579.

"Mr. Gouverneur Morris explained the distinction between a *federal* and a *national supreme* government; the former being a mere compact resting on the good faith of the parties, the latter having a complete and *compulsive* operation. He contended that in all communities there must be one supreme power, and one only.

"Mr. Mason observed, not only that the present Confederation was deficient in not providing for coercion and punishment against delinquent states, but argued very cogently, that punishment could not, in the nature of things, be executed on the States collectively, and therefore that such a government was necessary as could directly operate on individuals, and would punish those only whose guilt required it.

"Mr. Sherman admitted that the Confederation had not given sufficient power to Congress, and that additional powers were necessary; particularly that of raising money, which, he said, would involve many other powers. He admitted, also, that the general and particular jurisdictions ought in no case to be concurrent. He seemed, however, not to be disposed to make too great inroads on the existing system; intimating, as one reason, that it would be wrong to lose every amendment by inserting such as would not be agreed to by the States.

"It was moved by Mr. Reed, and seconded by Mr. Charles Cotesworth Pinckney, to postpone the third proposition last offered by Mr. Randolph, viz., 'that a national government ought to be established, consisting of a supreme legislative, executive, and judiciary,' in order to take up the following, viz.: '*Resolved*, That, in order to carry into execution the design of the states in forming this Convention, and to accomplish the objects proposed by the Confederation, a more effective government, consisting of a legislative, executive, and judiciary, ought to be established.' The motion to postpone for this purpose was lost.

"Massachusetts, Connecticut, Delaware, South Carolina, ay, 4; New York, Pennsylvania, Virginia, North Carolina, no, 4.

"On the question, as moved by Mr. Butler, on the third proposition, it was resolved, in committee of the whole, 'that a national government ought to be established, consisting of a supreme legislative, executive, and judiciary.'

"Massachusetts, Pennsylvania, Delaware, Virginia, North Carolina, South Carolina, ay, 6; Connecticut, no, 1; New York, divided (Col. Hamilton, ay, Mr. Yates, no.)"[5] New Jersey and the other States were not represented.[6]

[5] Madison Papers. Elliot's Debates, 2d ed., vol. v, pp. 132–134.

[6] Yates' Minutes, ibid., vol. i, p. 392.

The Committee of the Whole, after a subsequent discussion in which there was a sharp conflict between the larger and smaller States, reported to the Convention, "that a national government ought to be established, consisting of a supreme legislative, executive, and judiciary";[7] and that the national legislature ought to consist of two branches, the members of the first branch to be elected by the people of the several States, and those of the second branch to be chosen by the individual legislatures.[8]

"That the national legislature ought to be empowered to enjoy the legislative rights vested in Congress by the Confederation; and moreover, to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation; to negative all laws passed by the several States contravening, in the opinion of the national legislature, the Articles of Union or any treaties subsisting under the authority of the Union."[9]

"That the rights of suffrage in the first branch of the national legislature ought not to be according to the rules established in the Articles of Confederation, but according to some equitable ratio of representation; namely, in proportion to the whole number of white and other free citizens and inhabitants, of every age, sex, and condition, including those bound to servitude for a term of years, and three-fifths of all other persons, not comprehended in the foregoing description, except Indians not paying taxes in each State."[10]

"That the right of suffrage in the second branch of the national legislature ought to be according to the rule established for the first."

"*Resolved*, That a national executive be instituted, to consist of a single person; to be chosen by the national legislature, for the term of seven years; with power to carry into execution the national laws, to appoint to offices in cases not otherwise provided for, to be ineligible a second time, and to be removable on impeachment and conviction of malpractices or neglect of duty; to receive a fixed stipend by which he may be compensated for the devotion of his time to the public service, to be paid out of the national treasury."[11]

On the following day,—

"Mr. Patterson observed to the Convention, that it was the wish

[7] Madison Papers. Elliot's Debates, 2d ed., vol. v, p. 189.
[8] Ibid., p. 189.
[9] Ibid., p. 190.
[10] Ibid., p. 190.
[11] Ibid., p. 190.

of several deputations, particularly that of New Jersey, that further time might be allowed them to contemplate the plan reported from the Committee of the Whole, and to digest one purely federal, and contra-distinguished from the reported plan. He said, they hoped to have such a one ready by to-morrow to be laid before the Convention: and the Convention adjourned, that the leisure might be given for the purpose." [12]

This plan was prepared by the deputations from Connecticut, New York, New Jersey and Delaware, with the aid of Luther Martin of Maryland. The motive which inspired the smaller States was the fear that their interests would be injured by the loss of their equal right of suffrage. Dickinson of New Jersey said to Madison: —

"You see the consequences of pushing things too far. Some of the members from the small States wish for two branches in the general legislature, and are friends to a good national government; but we would sooner submit to foreign power than submit to be deprived, in both branches of the legislature, of an equality of suffrage, and thereby be thrown under the domination of the larger States." [13]

This plan, which is known as "The Propositions from New Jersey," contains, as its first resolution, —

"That the Articles of Confederation ought to be so revised, corrected, and enlarged, as to render the Federal Constitution adequate to the exigencies of government, and the preservation of the Union."

It gave Congress the power to raise revenues by a tariff on imports and postage, "and to pass acts for the regulation of trade and commerce, as well with foreign nations as with each other." It provided, for the collection of other revenues by the requisition among the States, —

"That, if such requisition be not complied with in the time specified therein, to direct the collection thereof in the non-complying States, and for that purpose to devise and pass acts directing and authorizing the same."

Neither of these powers was to be exercised without the consent of more States than a majority. A debate then ensued upon

[12] Madison Papers. Elliot's Debates, vol. v, p. 191.

[13] Ibid., p. 191.

the advantages of the different systems, in which that recommended by the Committee of the Whole was called "national," and the propositions of New Jersey, "federal." The distinction between a federal and national government, which most of the members of the Convention seemed to entertain, was thus stated by Governor Randolph: —

"The true question is, whether we shall adhere to the federal plan or introduce the national plan. The insufficiency of the former has been fully displayed by the trial already made. There are but two modes by which the end of a general government can be attained: the first, by coercion, as proposed by Mr. Patterson's plan; the second, by real legislation, as proposed by the other plan. Coercion he pronounced to be *impracticable*, *expensive*, *cruel to individuals*. It tended, also, to habituate the instruments of it to shed the blood, and riot in the spoils of their fellow-citizens, and consequently train them up for the service of ambition. We must resort, therefore, to a *national legislation over individuals;* for which Congress are unfit. To vest such power in them would be blending the legislative with the executive, contrary to the received maxim on this subject. If the union of these powers, heretofore, in Congress has been safe, it has been owing to the general impotency of that body. Congress are, moreover, not elected by the people, but by the legislatures, who retain even a power of recall. They have, therefore, no will of their own; they are a mere diplomatic body, and are always obsequious to the views of the States, who are always encroaching on the authority of the United States. A provision for harmony among the States, as in trade, naturalization, etc.; for crushing rebellion, whenever it may rear its crest; and for certain other general benefits, must be made."

"The powers for these purposes can never be given to a body inadequate as Congress are in point of representation, elected in the mode in which they are, and possessing no more confidence than they do: for, notwithstanding what has been said to the contrary, his own experience satisfied him that a rooted distrust of Congress pretty generally prevailed. A national government alone, properly constituted, will answer the purpose; and he begged it to be considered that the present is the last moment for establishing one. After this select experiment, the people will yield to despair." [14]

Madison said, however: —

"Much stress has been laid by some gentlemen on the want of

[14] Madison Papers. Elliot's Debates, 2d ed., vol. v, p. 198.

power in the Convention to propose any other than a *federal* plan. To what had been answered by others, he would only add, that neither of the characteristics attached to a *federal* plan would support this objection. One characteristic was, that, in a *federal* government, the power was exercised not on the people *individually*, but on the people *collectively*, on the *states*. Yet in some instances, as in piracies, captures, etc., the existing Confederacy and in many instances the amendments to it proposed by Mr. Patterson, must operate immediately on individuals. The other characteristic was, that a *federal* government derived its appointments not immediately from the people, but from the States which they respectively composed. Here, too, were facts on the other side. In two of the states, Connecticut and Rhode Island, the delegates to Congress were chosen, not by the legislatures, but by the people at large; and the plan of Mr. Patterson intended no change in this particular." [15]

Dickinson from New Jersey moved to postpone the first resolution of Mr. Patterson's plan in order to take up the following: —

"That the Articles of Confederation ought to be revised and amended, so as to render the government of the United States adequate to the exigencies, the preservation, and the prosperity of the Union." [16]

The postponement was agreed to by ten States, Pennsylvania being divided; but the resolution after debate was defeated by six States to four. Connecticut, New York, New Jersey, Delaware, ay, 4; Massachusetts, Pennsylvania, Virginia, North Carolina, South Carolina, Georgia, no, 6; Maryland, divided.[17] The Committee of the Whole at which the question had been discussed, finally agreed to rise and report the propositions as previously adopted without alteration. Massachusetts, Connecticut, Pennsylvania, Virginia, North Carolina, South Carolina, Georgia, ay, 7; New York, New Jersey, Delaware, no, 3; Maryland divided.[18]

The first resolution "that a national government ought to be established, consisting of a supreme legislative, executive and judiciary," was then taken up in the Convention.

"Mr. Ellsworth, seconded by Mr. Gorham, moves to alter it, so as to run 'that the government of the United States ought to consist of a supreme legislative, executive and judiciary.' This alteration, he said,

[15] Madison Papers, Elliot's Debates, 2d ed., vol. v, p. 206.
[16] Ibid., p. 198.
[17] Ibid., p. 206.
[18] Ibid., pp. 211, 212.

would drop the word *national*, and retain the proper title 'the United States.' He could not admit the doctrine that a breach of any of the Federal Articles could dissolve the whole. It would be highly dangerous not to consider the Confederation as still subsisting. He wished, also, the plan of the Convention to go forth as an amendment of the Articles of the Confederation, since, under this idea, the authority of the legislatures could ratify it. If they are unwilling, the people will be so too. If the plan goes forth to the people for ratification, several succeeding conventions within the States would be unavoidable. He did not like these conventions. They were better fitted to pull down than to build up constitutions.

"Mr. Randolph did not object to the change of expression, but apprised the gentleman who wished for it, that he did not admit it for the reasons assigned; particularly that of getting rid of a reference to the people for ratification.

"The motion of Mr. Ellsworth was acquiesced in, *nem. con.*"[19]

Subsequently, when the clause defining treason was considered, Luther Martin moved an amendment.

"Provided, that no act or acts done by one or more of the States against the United States, or by any citizen of any one of the United States, under the authority of one or more of the said States, shall be deemed treason, or punished as such; but in case of war being levied by one or more of the States against the United States, the conduct of each party towards the other, and their adherents respectively, shall be regulated by the laws of war and of nations."

The proposition seems to have had no other supporter.[20]

The fact that in the Federal and State conventions speakers repudiated the idea of the application of coercion against the States does not support the view that the Federal Government cannot suppress a rebellion supported by the officers and people of a State.

It appears from these debates as well as elsewhere in these proceedings, that, forewarned by the experience of the Confederation, when States refused obedience to the laws of Congress, and suggestions were made of their coercion by armed force, the

[19] Madison Papers, Elliot's Debates, 2d ed., vol. v, p. 214.

[20] It is only mentioned in Martin's Letter to the Maryland Legislature. Elliot's Debates, 2d ed., vol. i, p. 383. No reference to it is to be found in either the Journal or any of the reports. It probably was not even seconded.

delegates intended to frame a new form of government which would enforce the Federal laws by treating the attempted hostile State legislation as a nullity and applying force, not to the State government, but to the individual citizens of the State who resisted, even though they might be State officials.

It was said by Ellsworth, in the Connecticut Convention: —

"We see how necessary for the Union is a coercive principle. No man pretends the contrary; we all see and feel this necessity. The only question is, Shall it be a coercion of law, or a coercion of arms? There is no other possible alternative. Where will those who oppose coercion of law come out? Where will they end? A necessary consequence of their principles is a war of the States, one against the other. I am for coercion by law — that coercion which acts only upon delinquent individuals. This Constitution does not attempt to coerce sovereign bodies, States, in their political capacity."[21]

So Madison said in the Virginia Convention, when defending the clause which gives to Congress power concurrent with the States to call forth the militia to suppress insurrections and repel invasions: —[22]

"A concurrence in the former case is necessary, because a whole State may be in insurrection against the Union."[23]

Luther Martin wrote to the Maryland Convention: —

"The time may come when it shall be the duty of a State, in order to preserve itself from the oppression of the general government, to have recourse to the sword; in which case, the proposed form of government declares that the State, and every one of its citizens who acts under its authority are guilty of a direct act of treason."[24]

It seems plain, therefore, that the Convention determined, after full discussion, to adopt a plan national in form; but, to conciliate prejudice, avoided the use of the name. Since then until late years, writers judicial, political, and academical have usually eschewed the word, national, and substituted for it "federal." Although since the Civil War the term, National Government, has come into common use, we still ordinarily speak of Federal

[21] Elliot's Debates, 2d ed., vol. ii, p. 197. See the remarks of Roger Sherman in the Federal Convention. Ibid., vol. v, p. 450.

[22] Constitution, Article I, Section 8.

[23] Elliot's Debates, 2d ed., vol. iii, p. 424.

[24] Ibid., vol. i, p. 382.

practice in the Federal courts. But as appears by the Congressional resolution quoted at the beginning of this section, as well as in the debates in the Convention, the phrase, federal, is not inconsistent with, national.

§ 18. History of the Preamble.

The change in the nature of the government of the United States from the league embraced in the Articles of Confederation to a Constitution indissoluble by law appears not only in the manner in which the Constitution operates, but also in its preamble.

"We the People of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

The preamble to the instrument which the Constitution abrogated is as follows: —

"Articles of Confederation and Perpetual Union between the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia.

The third of the Articles of Confederation is: —

"The said States hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever."

The second Article of the New England Confederation of 1643 provided that: —

"The said United Colonies, for themselves and their posterities, do joyntly and severally, hereby enter into a firme and perpetuall league of friendship and amytie, for offence and defence, mutuall advise and succour, upon all just occations both for preserveing and propagateing the truth and liberties of the Gospel, and for their owne mutuall safety and wellfare." [1]

§ 18. [1] Preston's Documents Illustrative of American History, p. 88.

The first appearance of the preamble in the reports of the Convention is in Charles Pinckney's plan as now preserved, where it is in the same form as in the draft of the Committee of Detail.[2] His plan was referred to that Committee together with the resolutions specifically adopted, of which the first was :—

"*Resolved*, that the government of the United States ought to consist of a supreme legislative, judiciary and executive."[3]

In the report of the Committee of Detail, the preamble appeared : —

"We, the people of the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, do ordain, declare, and establish, the following Constitution for the government of ourselves and our posterity : —

"Article I. The style of the government shall be, 'The United States of America.'"[4]

At that time it had not been determined to ignore that part of the Articles of Confederation which required unanimous consent to any amendment of the same.[5] After the Convention had decided that a ratification by nine States should be sufficient to establish the Constitution between themselves, the Committee of Style, without any apparent discussion of the subject in the Convention, changed the preamble to its present form. The substitution of the phrase, "people of the United States," for "the people of the States of New Hampshire" and the other twelve States, had evidently no signification except to make it clear that the United States might consist of a less number than the original thirteen.

[2] Madison Papers, Elliot's Debates, 2d ed., vol. v, p. 129. In the opinion of Mr. Madison, this copy contains many alterations made by the other in the original paper during the progress of the Convention. (Appendix, No. 2, to Madison Papers, Elliot's Debates, 2d ed., vol. v, p. 578, quoted before, § 17, note 4.) The preamble seems more likely to be correct than any other part of the paper.

[3] Ibid., p. 375.

[4] Ibid., pp. 376, 377.

[5] Articles of Confederation, XIII.

§ 19. Significance of the Phrase, "We the People of the United States."

From the use of the phrase, "We the people of the United States," some writers of respectable authority have argued that the Constitution was adopted by the people of the United States at large, and not by the people of the different States which ratified the Constitution.

The best statement of this view is that of Webster: —

"It," the Constitution, "declares that it is ordained and established by the People of the United States. So far from saying that it is established by the governments of the several States, it does not even say that it is established by the people of the several States. But it pronounces that it is established by the people of the United States in the aggregate. Doubtless the people of the several States taken collectively constitute the people of the United States, but it is in this their collective capacity, it is as all the people of the United States that they establish the Constitution."[1]

The history of the formation and ratification of the Constitution contradicts these statements. As originally drawn the preamble ran, "We the people of" the thirteen States, each of which was specifically named. It was then intended not to violate the Articles of Confederation, but to require unanimous consent to the change. When, at a later session, the Convention ventured to require the assent of but nine States to put the new government in force, the language was altered so that it might serve in such a case; and no other intent was suggested or contemplated. The States did accede to the Federal Constitution. Each State

§ 19. [1] Webster's Reply to Hayne.

It is thus put by the historian Motley: "The Constitution was not drawn up by the States, it was not promulgated in the name of the States, it was not ratified by the States. The States never acceded to it, and possess no power to secede from it. It was 'ordained and established' over the States by a power superior to the States — by the people of the whole land in their aggregate capacity, acting through conventions of delegates expressly chosen for the purpose within each State, independently of the State governments, after the project had been framed." (John Lothrop Motley's letter to the London Times. Rebellion Record, vol. i, p. 210.) The most elaborate argument in its support is in the Appendix to volume ix of Dane's Abridgment, which was published immediately after the debate between Hayne and Webster on Foote's Resolutions. See also Story on the Constitution, §§415–418, 463.

Convention acted and claimed to act only in the name of the people of its own State.[2]

The reasons for requiring a ratification by the people of each State instead of the State legislatures were principally the grave doubts as to the power of the State legislatures to delegate to Congress part of the legislative powers vested in them by their respective peoples; but also the intention to deprive those legislatures of all claim to the right of secession, and to give to the Constitution the sanction of a fundamental law ordained by all the people upon whom it operated.

These views were thus expressed by Madison: —

"Mr. Madison thought it clear that the legislatures were incompetent to the proposed changes. These changes would make essential inroads on the State Constitutions; and it would be a novel and dangerous doctrine, that a legislature could change the Constitution under which it held its existence. There might indeed be some Constitutions within the Union, which had given a power to the legislature to concur in alterations of the federal compact. But there were certainly some which had not; and, in the case of these, a ratification must of necessity be obtained from the people. He considered the difference between a system founded on the legislatures only, and one founded on the people, to be the true difference between a *league* or *treaty*, and a *constitution*. The former, in point of moral *obligation*, might be as inviolable as the latter. In point of *political operation*, there were two important distinctions in favor of the latter. First, a law violating a treaty ratified by a pre-existing law might be respected by the judges as a law, though an unwise or perfidious one. A law violating a constitution established by the people themselves would be considered by the judges as null and void. Secondly, the doctrine laid down by the law of nations in the case of treaties is, that a breach of any one article by any of the parties frees the other parties from their engagements. In the case of a union of people under one constitution, the nature of the fact has always been understood to exclude such an interpretation. Comparing the two modes, in point of expediency, he thought all the considerations which recommended this Convention, in preference to Congress, for proposing the reform, were in favor of State Conventions, in preference to the legislatures, for examining and adopting it." [3]

[2] *Supra*, § 13. See the Federalist, No. xxxix, quoted *infra*, § 28.

[3] Madison Papers, Elliot's Debates, 2d ed., vol. v, pp. 355, 356.

§ 20. Significance of the Phrase "to form a more perfect Union."

The concluding Article of Confederation provided that "the Union shall be perpetual." Patterson claimed in the Federal Convention, that no State could lawfully withdraw from it without the consent of the rest: —

"The Confederation is in the nature of a compact; and can any State, unless by the consent of the whole, either in politics or law, withdraw their powers? Let it be said by Pennsylvania and the other large States that they for the sake of peace consented to the Confederation; can she now resume her original right without the consent of the others?" [1]

In a letter to Congress by Washington, written by the unanimous order of the Convention: —

"In all our deliberations on this subject we kept constantly in our view that which appears to us the greatest interest of every true American, the consolidation of our Union — in which is involved our prosperity, felicity, safety, perhaps our national existence." [2]

It is clear that it was the intention of the Constitution that the former union should continue more perfect, more consolidated, and be perpetual.[3]

"The Union of the States never was a purely artificial arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Articles of Confederation. By these the Union was solemnly declared to 'be perpetual.' And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained 'to form a more perfect Union.' It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not? But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom, and independence, and every

§ 20, [1] Yates' Minutes, Elliot's Debates, 2d ed., vol. iv, p. 413.

[2] Madison Papers, Elliot's Debates, 2d ed., vol. v, pp. 535, 536.

[3] See Texas v. White, 7 Wall. 700.

power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. And we have already had occasion to remark at this term, that 'the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'without the States in union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." [4]

Every clause in the Constitution in which it differed from the Articles of Confederation was designed to make the Union "more perfect."

§ 21. Significance of the Phrase, "to Establish Justice."

The phrase "to establish justice" is not found in the Articles of confederation. One of the chief evils which called the Federal Convention together was the

"necessity of providing more effectually for the security of private rights, and the steady dispensation of justice. Interferences with these were evils which had, more perhaps than anything else, produced this Convention. Was it to be supposed that republican liberty could long exist under the abuses of it practiced in some of the States?" [1]

There was no Federal court to enforce rights of property secured by treaties and to hold invalid acts of State legislatures in contravention of treaty rights or for the prevention of the collection of debts due domestic as well as foreign creditors. For this reason, in order to establish justice, there was inserted in the Constitution an article,[2] providing for courts of the United

[4] Chief Justice Chase in Texas v. White, 7 Wall. 700, 724–725.

§ 21. [1] Madison in the Federal Convention. Madison Papers, Elliot's Debates, vol., v, p. 162.

[2] Article III, *infra*.

States; the direction that "this Constitution, and the Laws of the United States, which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding;"[3] and the inhibitions against the enactment by the States of tender laws, bills of attainder, and laws impairing the obligations of contracts.[4] The prohibitions to the United States, as well as the States, of the enactment of bills of attainder and ex post facto laws,[5] and the recognition of debts contracted by the United States before the adoption of the Constitution, were also designed for this end. The beneficial effects of these prohibitions cannot be overestimated.[6]

§ 22. Significance of the Phrase "to Insure domestic Tranquillity."

The Articles of Confederation provided no means for the insurance of domestic tranquillity. Congress could not, without the consent of the States, raise the money to arm and to pay an army with which to protect itself from domestic insult. It was at one time driven from the seat of government by a mutiny of

[3] Article VI, *infra*.

[4] Article I, § 10, *infra*.

[5] Article I, §§ 9 and 10, *infra*.

[6] "The founders of our democratic, or rather republican institutions were neither visionaries nor socialists. It is among the eternal lessons of history, which they well knew, that the masses of the people were subject to the influence of supposed temporary interests, and of 'violent and casual forces' which might be in conflict with their own vital and permanent welfare. Realizing this truth, and the necessity of safe-guarding these vital and permanent interests, the founders of our political and legal institutions devised — and the device has been supposed to be the crowning proof of their wisdom — the American polity of constitutional restraints upon all the departments of the governments which the people established. All the original States undertook to secure the inviolability of private property. This they did, either by extracting and adopting, in terms, the famous thirty-ninth article of Magna Charta, securing the people from arbitrary imprisonment and arbitrary spoliation, or by claiming for themselves, compendiously, all of the liberties and rights set forth in the Great Charter." Argument of Hon. John F. Dillon, in Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 379. "These have been, indeed, the great triumphs of our popular system of government, for these were supposed to be its vulnerable spots. Disbelievers in republican institutions had predicted early shipwreck on these rocks, and when it came not they simply postponed the period of fulfilment." Ibid., p. 381.

eighty soldiers.[1] The power of taxation which is granted in the Constitution was designed for that as well as other ends. Congress under the Confederation was similarly unable to assist in suppressing rebellions within the individual States. Even its right to do so, did it have the means, rested on a forced construction.[2] For this reason, there was inserted the express provision that

"The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence."[3]

§ 23. Significance of the Phrase, "to provide for the common Defense."

Provision for the "common defense" was one of the express objects of the Confederation of the United States,[1] and was more efficiently secured by the Constitution.

The New England Confederation was formed "for offence and defence, mutuall advise and succour."[2] The Constitution furnishes new means for that purpose in its provisions for raising armies[3] and taxation.[4]

§ 24. Significance of the Phrase, "to promote the general Welfare."

The United Colonies of New England confederated, amongst other things, "for their own mutuall safety and welfare."[1] The Articles of Confederation of the United States expressed the object of the league as for "their mutual and general welfare."[2] The word "general welfare" was used in the Constitution as broader than and inclusive of the word "mutual." The clause granting Congress the power of taxation limits its exercise "to pay the debts and provide for the common defense and general welfare of the

§ 22. [1] *Supra*, § 3, note 12.
[2] *Supra*, § 3.
[3] Article IV, § 4; *infra*.

§ 23. [1] Articles of Confederation, III.
[2] *Supra*, § 4.
[3] *Infra*.
[4] *Infra*.

§ 24. [1] Preston's Documents Illustrative of American History, p. 88, quoted *supra*, § 4, note 1.
[2] Articles of Confederation, III.

United States."[3] The phrase in the latter clause has been the excuse for the exercise of all doubtful powers by Congress, and will be considered more appropriately in connection with the power of taxation.[4] Neither this nor any other part of the preamble is a grant of power.[5]

§ 25. Significance of the Phrase, "to secure the Blessings of Liberty."

The New England Confederation of 1643 assigned as an object of the league, "for preserveing and propagateing the truth and liberties of the Gospel."[1] The experience of a century had taught the people that political liberty was more in danger, if not of more importance; and the Articles of Confederation of the United States included in the enumeration of their objects, "the security of their liberties."[2] It required almost another hundred years for them to learn to extend the blessings of liberty to the people of every race within their borders.

§ 26. Significance of the Phrase, "Ordain and Establish."

The words "ordain and establish" are inconsistent with the theory that the new government was a league or treaty. They are words usually applied to legislation, especially legislation of an extraordinary character. Ordinances by the common law were originally regulations made by the King without the consent of Parliament. In 1641, when the Commons were discussing the manner in which Parliament could legislate without the consent of Charles, the antiquary D'Ewes, referring to an ancient precedent which did not support his position, boldly asserted they had the right to pass laws in the form of ordinances without the consent of the Crown.[1] The suggestion was applauded, and almost

[3] Constitution, Article I, § 8.

[4] *Infra.*

[5] Story on the Constitution, § 462. See *infra.*

§ 25. [1] Quoted *supra*, § 4, note 1.

[2] Articles of Confederation, III.

§ 26. [1] The first ordinance which passed the Commons, was in 1641, authorizing commissioners to proceed to Edinburgh to treat with the Scottish Parliament. It did not take effect till it passed the Lords. The name and form were suggested by the antiquarian D'Ewes, who cited a precedent of 1373 under Edward III, which did not apply, since that, like all other previous ordinances, was made by the King without the consent of Parliament. Gardiner's Fall of the Monarchy of Charles I, vol. i, p. 238.

invariably during the Great Rebellion until the abolition of the office of King, Parliament legislated by ordinance. The Continental Congress and Congress under the Confederation usually proceeded by ordinances or resolutions. The first Constitutions of Pennsylvania, Vermont and Massachusetts contain the phrase "ordain and establish." Those of New York and Georgia, "ordain and declare." [2]

[2] The Constitution of Pennsylvania, framed by a popular convention which sat from July 15th to September 28th, 1776, recites in its preamble: —

"We, the representatives of the freemen of Pennsylvania, in general convention met, for the express purpose of framing such a government, confessing the goodness of the Great Governor of the universe (who alone knows to what degree of earthly happiness mankind may attain, by perfecting the arts of government) in permitting the people of this State, by common consent, and without violence, deliberately to form for themselves such just rules as they shall think best, for governing their future society; and being fully convinced that it is our indispensable duty to establish such original principles of government as will best promote the general happiness of the people of this State, and their posterity, and provide for future improvements, without partiality for, or prejudice against any particular class, sect, or denomination of men whatever, do, by virtue of the authority vested in us by our constituents, *ordain, declare, and establish*, the following *Declaration of Rights* and *Frame of Government*, to be the CONSTITUTION of this commonwealth, and to remain in force therein forever, unaltered, except in such articles as shall hereafter on experience be found to require improvement, and which shall by the same authority of the people, fairly delegated as this frame of government directs, be amended or improved for the more effectual obtaining and securing the great end, and design of all government, hereinbefore mentioned." Poore's Charters and Constitutions, Part II, pp. 1540, 1541.

The Constitution of Vermont, adopted by a popular convention which sat between July 2d and July 8th, 1777, and subsequently affirmed and declared to be a part of the laws of the State, by the legislature in 1779 and 1782, states in its preamble: —

"We the representatives of the Freemen of Vermont, in general convention met, for the express purpose of forming such a government, — confessing the goodness of the Great Governor of the universe, (who alone knows to what degree of earthly happiness, mankind may attain, by perfecting the arts of government), in permitting the people of this State, by common consent, and without violence, deliberately to form for themselves, such just rules as they shall think best for governing their future society; and being fully convinced that it is our indispensable duty, to establish such original principles of government, as will best promote the general happiness of the people of this State, and their posterity, and provide for future improvements, without partiality for, or prejudice against any particular class, sect or denomination of men, whatever, — do, by virtue of authority vested in us, by our constituents, *ordain, declare and establish*, the fol-

The plan of Pinckney, as now preserved, contains the same preamble as the report of the Committee of Detail: —

"We, the people of the States of New Hampshire, Massachusetts, Rhode Island, Providence Plantations, Connecticut, New York, New

lowing declaration of rights, and frame of government to be the CONSTITUTION of this COMMONWEALTH, and to remain in force therein, forever, unaltered, except in such articles, as shall, hereafter, on experience, be found to require improvement, and which shall, by the same authority of the people, fairly delegated as this frame of government directs, be amended or improved, for the more effectual obtaining and securing the great end and design of all government, hereinbefore mentioned." Poore's Charters and Constitutions, Part II, pp. 1858, 1859.

The Constitution of Massachusetts, framed by a popular convention which sat from September 1st, 1779, to March 2d, 1780, and adopted by a vote of more than two-thirds of the people, has the following preamble: —

"The end of the institution, maintenance, and administration of government is to secure the existence of the body-politic, to protect it, and to furnish the individuals who compose it with the power of enjoying, in safety and tranquillity, their natural rights and the blessings of life; and whenever these great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity, and happiness.

"The body-politic is formed by a voluntary association of individuals; it is a social compact by which the whole people covenants with each citizen and each citizen with the whole people that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of making laws, as well as for an impartial interpretation and a faithful execution of them; that every man may, at all times, find his security in them.

"We, therefore, the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the great Legislator of the universe, in affording us, in the course of His providence, an opportunity, deliberately and peaceably, without fraud, violence, or surprise, of entering into an original, explicit, and solemn compact with each other, and of forming a new constitution of civil government for ourselves and posterity; and devoutly imploring His direction in so interesting a design, *do agree upon, ordain, and establish* the following declaration of rights and frame of government as the constitution of the commonwealth of Massachusetts." Poore's Charters and Constitutions, Part I, pp. 956, 957.

The Constitution of Georgia, framed and unanimously agreed to by a popular convention, February 5th, 1777, concludes its preamble: —

"We, therefore, the representatives of the people, from whom all power originates, and for whose benefit all government is intended, by virtue of the power delegated to us, *do ordain and declare, and it is hereby ordained and declared*, that the following rules and regulations be adopted for the future government of this State." Poore's Charters and Constitutions, Part I, p. 378.

The Constitution of New York, framed by a popular convention which

Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, do ordain, declare and establish the following Constitution for the government of ourselves and our posterity."[3]

In Hamilton's plan, which he furnished to Madison at about the close of the Federal Convention, the preamble reads —

"The people of the United States of America, do ordain and establish this Constitution for the government of themselves and their posterity."[4]

The form was manifestly adopted for the purpose of reaffirming the statement that the Constitution was a law rather than a treaty. It was suggested by the form used in previous State Constitutions, and shows an intention to place the Federal Constitution upon the same footing.

§ 27. Significance of the Word "Constitution."

But above all the preamble concludes with the words, "this Constitution of the United States of America." In the Articles of Confederation, that instrument was styled "a firm league of friendship."[1] If no change had been designed, the word "league" would have been repeated. The word Constitution had a well-known meaning at the time, having been used in the Constitutions of the different States which were not still governed under their colonial charters. It signified a fundamental law,[2] unchangeable and indissoluble except in the manner therein indicated, or by a revolution. This fact, coupled with the subsequent declaration that the Constitution of the United States was the supreme law of the land,[3] establish that construction which has been settled by the logic of subsequent events.

Attempts have been made to weaken the force of the use of

sat from July 10th, 1776, to April 20th, 1777, recites in nearly every resolution: "This convention, therefore, in the name and by the authority of the good people of this State, doth *ordain*, determine, and declare that." Poore's Charters and Constitutions, Part II, p. 1332.

[3] Madison Papers, Elliot's Debates, 2d ed., vol. v, p. 584.

[4] Madison Papers, Elliot's Debates, 2d. ed., vol. v, p. 584.

§ 27. [1] Articles of Confederation, III.

[2] Webster, § 16, note 14, *supra*.

[3] Constitution, Article VI.

this term by reference to the language of statesmen and public documents which speak of the Articles of Confederation as a constitution,[4] especially the resolutions of Congress recommending the Federal Convention, in order to "render the Federal Constitution adequate to the exigencies of government and the preservation of the Union."[5] But the language there used was colloquial rather than technical, and in the same sense that Blackstone and others employ when describing the statutes and common law of Great Britain in relation to the powers and composition of the Crown and Parliament as the British Constitution. The term is not used in the Articles of Confederation themselves; and, moreover, many claimed that they could not be legally dissolved.[6]

§ 28. Testimony of Contemporary Statesmen on the Nature of the Constitution.

When we examine the views of contemporary statesmen, the same conclusion is strengthened. Nowhere in the debates in the Federal or State Conventions, nor in the pamphlets on either side of the question of ratification, do we find a hint of the right of secession. Its opponents attacked the Constitution as a destruction of the States and the creation of a consolidated nation.[1] The

[4] See the commissions of the delegates to the Federal Convention, Elliot's Debates, 2d ed., vol. i, pp. 126–139; Republic of Republics, by Bernard J. Sage, 4th ed., p. 198.

[5] Quoted *supra*, § 5.

[6] See the language of Patterson, quoted *supra*, § 20.

§ 28. [1] See especially the arguments of Patrick Henry, George Mason, and others, in the Virginia Convention. George Mason prophesied with wonderful prescience the grievances which subsequently arose. He foretold the Sedition Law: "Now, suppose oppressions should arise under this government, and any writer should dare to stand forth and expose to the community at large the abuses of those powers; could not Congress, under the idea of providing for the general welfare, and under their own construction, say that this was destroying the general peace, encouraging sedition, and poisoning the minds of the people? And could they not, in order to provide against this, lay a dangerous restriction on the press?" Elliot's Debates, 2d ed., vol. iii, p. 442. He warned the South that slavery would be endangered: —

"There is a clause to prohibit the importation of slaves after twenty years, but there is no provision for securing to the Southern States those they now possess. It is far from being a desirable property; but it will involve us in great difficulties and infelicity to be ever deprived of them. There ought to be a clause in the

Federalists admitted that the new government was partly national, but claimed that the composition of the Senate and the election of the President made it also partly Federal.

"On examining the first relation, it appears, on one hand, that the Constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but, on the other, that this assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each State, — the authority of the people themselves. The act, therefore, establishing the Constitution, will not be a *national*, but a *federal* act."[2]

"The next relation is to the sources from which the ordinary powers of government are to be derived. The House of Representatives will derive its powers from the people of America; and the people will be represented in the same proportion, and on the same principle, as they are in the legislature of a particular State. So far the government is *national*, not *federal*. The Senate, on the other hand, will derive its powers from the States, as political and coequal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress. So far the government is *federal*, not *national*. The executive power will be derived from a very compound source. The immediate election of the President is to be made by the States in their political characters. The votes allotted to them are in a compound ratio, which considers them partly as distinct and coequal societies, partly as unequal members of the same society. The eventual election, again, is to be made by that branch of the legislature which consists of the national representatives; but in this particular act they are to be thrown into the form of individual delegations, from so many distinct and coequal bodies politic. From this aspect of the

Constitution to secure us that property, which we have acquired under our former laws, and the loss of which would bring ruin on a great many people." Ibid., p. 270. See also Mason's remarks to the same effect, ibid., pp. 453, 458. Madison argued that there was adequate protection by the provision for the return of fugitive slaves and the grant of no power to abolish slavery. Ibid., p. 453. Patrick Henry replied, ibid., pp. 455, 456.

The address of the minority of the Pennsylvania Convention included among the objections enumerated that there is "no declaration that the States reserve their sovereignty, freedom and independence." American Museum, November, 1787.

[2] Madison in The Federalist, No. xxxix, Lodge's ed., p. 236.

government, it appears to be of a mixed 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 supposed to consist in this, that in the former the powers operate on the political bodies composing the confederacy, in their political capacities; in the latter, on the individual citizens composing the nation, in their individual capacities. On trying the Constitution by this criterion, it falls under the *national*, not the *federal* character; though perhaps not so completely as has been understood. In several cases, and particularly in the trial of controversies to which States may be parties, they must be viewed and proceeded against in their collective and political capacities only. So far the national countenance of the government on this side seems to be disfigured by a few federal features. But this blemish is perhaps unavoidable in any plan; and the operation of the government on the people, in their individual capacities, in its ordinary and most essential proceedings, may, on the whole, designate it, in this relation, a *national* government."[3]

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

"The proposed Constitution, therefore, is, in strictness, neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and,

[3] Madison in The Federalist, No. xxxix, pp. 237, 238.

finally, in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national."[4]

Wilson said in the Pennsylvania Convention:

"We now see the great end which they proposed to accomplish. It was to frame for the consideration of their constituents one Federal and National Constitution — a constitution that would procure the advantages of good, and prevent the inconveniences of bad government — a constitution whose beneficence and energy would pervade the whole Union and bind and embrace the interests of every part — a constitution that would insure peace, freedom, and happiness to the States and people of America."[5]

"If when he says it is a consolidation, he means so far as relates to the general objects of the Union, — so far it was intended to be a consolidation, and on such a consolidation perhaps our very existence as a nation depends."[6]

"The very manner of introducing this Constitution, by the recognition of the authority of the people, is said to change the principle of the present Confederation, and to introduce a *consolidating* and absorbing government.

"In this confederated republic, the sovereignty of the states, it is said, is not preserved. We are told that there cannot be two sovereign powers, and that a subordinate sovereignty is no sovereignty.

"It will be worth while, Mr. President, to consider this objection at large. When I had the honor of speaking formerly on this subject, I stated, in as concise a manner as possible, the leading ideas that occurred to me, to ascertain whether the supreme and sovereign power resides. It has not been, nor, I presume, will it be denied, that somewhere there is, and of necessity must be, a supreme, absolute, and uncontrollable authority. This, I believe, may justly be termed the *sovereign* power; for, from that gentleman's (Mr. Findley) account of the matter, it cannot be sovereign unless it is supreme; for, says he, a subordinate sovereignty is no sovereignty at all. I had the honor of observing, that, if the question was asked, where the supreme power resided, different answers would be given by different writers. I mentioned that Blackstone would tell you that, in Britain, it is lodged in the British Parliament; and I believe there is no writer on this subject, on the other side of the Atlantic, but supposed it to be vested in that

[4] Madison in The Federalist, No. xxxix, Lodge's ed., p. 239.

[5] Elliot's Debates, 2d ed., vol. ii, p. 431.

[6] Ibid., p. 461.

body. I stated, further, that, if the question was asked of some politician, who had not considered the subject with sufficient accuracy, where the supreme power resided in our governments, he would answer, that it was vested in the State constitutions. This opinion approaches near the truth, but does not reach it; for the truth is, that the supreme, absolute, and uncontrollable authority *remains* with the people. I mentioned, also, that the practical recognition of this truth was reserved for the honor of this country. I recollect no constitution founded on this principle; but we have witnessed the improvement, and enjoy the happiness of seeing it carried into practice. The great and penetrating mind of Locke seems to be the only one that pointed towards even the theory of this great truth.

"When I made the observation that some politicians would say the supreme power was lodged in our State constitutions, I did not suspect that the honorable gentleman from Westmoreland (Mr. Findley) was included in that description; but I find myself disappointed; for I imagined his opposition would arise from another consideration. His position is, that the supreme power resides in the States, as governments; and mine is, that it *resides* in the people, as the fountain of government; that the people have not — that the people meant not — and that the people ought not — to part with it to any government whatsoever. In their hands it remains secure. They can delegate it in such proportions, to such bodies, on such terms, and under such limitations, as they think proper. I agree with the members in opposition, that there cannot be two sovereign powers on the same subject.

"I consider the people of the United States as forming one great community; and I consider the people of the different States as forming communities, again, on a lesser scale. From this great division of the people into distinct communities, it will be found necessary that different proportions of legislative powers should be given to the governments, according to the nature, number and magnitude of their objects." [7]

§ 29. Judicial Decisions as to the Nature of the Constitution.

The construction put upon the Constitution by the Federal Judiciary has been uniform in favor of this position. Six years after the adoption of the Constitution, a majority of the Supreme

[7] Elliot's Debates on the Federal Constitution, vol. ii, pp. 455, 456. See also Wilson's Works, vol. i, p. 347 and the quotation from Madison, *supra*, § 14.

Court held that they had jurisdiction of a suit against a State by a citizen of another State.[1] The dissenting judge conceded that "the United States are sovereign as to all the powers of the government actually surrendered;" and as regards "the special objects of authority of the general Government, wherein the separate sovereignties of the States are blended in one common mass of supremacy."[2] Of the majority, two held that the States had relinquished so much of their sovereignty as exempted them from suit.[3] Chief Justice Jay said that the Federal Constitution had the same effect upon the people of the United States as a State Constitution upon the people of a State.[4] Wilson held that the question for decision was this: "Do the people of the United States form a nation?"[5] which he resolved in the affirmative: —

"Whoever considers, in a combined and comprehensive view, the general texture of the Constitution, will be satisfied that the people of the United States intended to form themselves into a nation for *national purposes*. They instituted for such purposes a national government, complete in all its parts, with powers legislative, executive, and judiciary, and in all those powers extending over the whole nation."[6]

Later came the opinion of Chief Justice Marshall, who said: —

"To the formation of a league, such as was the Confederation, the State sovereignties were certainly competent. But when, 'in order to form a more perfect union,' it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged."[7]

"That the United States form, for many and for most important purposes, a single nation, has not yet been denied. In war, we are

§ 29 [1] Chisholm *v.* Georgia, 2 Dallas, 419, A.D. 1793.

[2] Justice Iredell, ibid., 435. See also his opinion in Penhallow *v.* Doane's Administrators, 3 Dallas, 54, 94.

[3] Justice Blair, ibid., p. 452. Justice Cushing, ibid., p. 468.

[4] "Every State Constitution is a compact made by and between the citizens of a State to govern themselves in a certain manner, and the Constitution of the United States is likewise a compact made by the people of the United States to govern themselves as to general objects in a certain manner." Ibid., p. 471.

[5] Ibid., p. 453.

[6] Ibid., p. 465.

[7] McCulloch *v.* Maryland, 4 Wheaton, 316, 404, A.D. 1819.

one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. It is their government, and in that character they have no other." [8]

"Reference has been made to the political situation of these States anterior to its formation. It has been said that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But when these allied sovereigns converted their league into a government, when they converted their Congress of ambassadors deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected." [9]

Even so strong an advocate of States' rights as Chief Justice Taney said, in the Dred Scott case: —

"The new government was not a mere change in a dynasty, or in a form of government, leaving the nation or sovereignty the same, and clothed with all the rights, and bound by all the obligations of the preceding one. But when the present United States came into existence under the new government, it was a new political body, a new nation, then for the first time taking its place in the family of nations." [10]

Finally, after the conclusion of the Civil War, the Supreme Court said, speaking through Chief-Justice Chase: —

"The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." [11]

§ 30. Justification for Belief in Legality of Secession.

Yet cogent as seem these arguments and precedents to members of a generation educated under the influence of the decisions of

[8] Cohen *v.* Virginia, 6 Wheaton, 264, 413, 414, A.D. 1821.

[9] Gibbons *v.* Ogden, 9 Wheaton, 1, 187, A.D. 1824.

[10] Dred Scott *v.* Sandford, 19 Howard, 393, 441.

[11] Texas *v.* White, 7 Wallace, 700, 725, quoted *supra*, § 20; White *v.* Cannon, 6 Wall. 443, 450; White *v.* Hart, 13 Wall. 646, 650; Williams *v.* Bruffy, 96 U. S. 173; Keith *v.* Clark, 97 U. S. 454.

the Supreme Court, which have, with but short periods of reaction, steadily extended the powers of the Federal government, there is no foundation for the opprobrium heaped upon the Confederates by the supporters of the Union during the Civil War and the subsequent period of Reconstruction. Nothing is more unjust than to charge with perjury men who, like Davis, Lee and Stephens, after having sworn to support the Constitution, some of them after opposition to secession, joined their fellow citizens in their own States in waging war upon the national government. They honestly believed that the Constitution justified such action. They were supported by doctrines laid down by publicists[1] as

§ 30. [1] The edition of Blackstone, by St. George Tucker, published in 1803, was usually recognized as an authority throughout the South previous to the Civil War. The publishers paid the editor $4,000 for his work, a large sum even for these times, and which shows the esteem with which he was regarded by his contemporaries. The editor was at one time Judge of the Virginia Court of Appeals, and later Judge of the District Court of the United States for the Eastern District of that State. He was the stepfather of John Randolph of Roanoke; and his own descendants have served the country with distinction.

"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 its operation is voluntary; its councils, its engagements, its authority are theirs, modified and united. Its Sovereignty is an emanation from theirs, not a flame, in 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 its 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 the union; an event which no good citizen can wish, and which no good or wise administration will ever hazard." Tucker's Blackstone, vol. i, Appendix, pp. 170, 171, 175, 187.

The first treatise on the Constitution of the United States was by William Rawle, one of the leaders of the Philadelphia bar, at the time when the phrase, "sharper than a Philadelphia lawyer," first came into use. He was appointed United States Attorney for that district by General Washington.

"Having thus endeavored to delineate the general features of this peculiar and invaluable form of Government, we shall conclude with adverting to the principles of its cohesion, and to the provisions it contains for its own duration and extension. The subject cannot, perhaps, be better introduced than by presenting, in its own words, an emphatical clause in the Constitution. 'The United States shall guarantee, to every State in the Union, a Republican form of Government; shall protect each of them against

well as statesmen [2] of authority in the North as well as the South. During the whole of the nineteenth century down to the sur-

[2] The opinions of a number of statesmen on the subject are quoted in § 31, *infra*. Southern writers have also appealed to John Quincy Adams as supporting the legality of the right of secession. The passage cited evidently recognizes not the legal right, but the moral right of secession, in case of a gross violation of the rights of the seceding section, which must be conceded by all who adopt the principles of the Declaration of Independence. See Adams' Jubilee of the Constitution. The writer has been able to find but one case decided before the war in which the legality of secession was discussed. That was State ex. rel. McCready *v.* Hunt, 2 Hill, S. C. Law, 1, decided in 1834, which is sometimes published separately in a volume entitled The Book of Allegiance. There, the Supreme Court of South Carolina held void, by a majority of two to one, the statute of that State passed in December 1833, in pursuance of the ordinance nullifying the Force Bill, which prescribed to the officers of the militia an oath of allegiance to the State. Judge O'Neall and Judge Johnson held (pp. 209, 215, 223, 226, 248), that allegiance was due to both the United States and the State, that the convention had no power to transfer allegiance, and that the statute prescribing the new oath was invalid, because not recognizing the United States, as prescribed by the Federal Constitution, Article VI., and as differing from the oath prescribed by the State Constitution. Judge Harper (at p. 248) dissented in an opinion, holding the oath constitutional, upon the ground that the United States were a confederacy only; and that allegiance was due to the State alone. His opinion contains a strong argument in favor of the right of secession. Nullification is discussed *infra*, § 33.

It is claimed by the author of The Republic of Republics, Bernard J. Sage (4th ed., at p. 33), that Rawle and Tucker, who, as has been shown above, support the legality of secession, "were text-books at West Point when Davis and Lee were cadets there." The present commanding officer at West Point has, however, informed the writer that this is untrue.

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invasion; and, on application of the Legislature, or of the Executive, when the Legislature cannot be convened, against domestic violence.' The Union is an association of the people of Republics; its preservation is calculated to depend on the preservation of those Republics. The principle of representation, although, certainly, the wisest and best, is not essential to the being of a Republic; but, to continue a member of the Union, it must be preserved; and, therefore, the guarantee must be so construed. It depends on the State itself, to retain or abolish the principle of representation; because it depends on itself, whether it will continue a member of the Union. To deny this right, would be inconsistent with the principles on which all our political systems are founded; which is, that the people have, in all cases, a right to determine how they will be governed. This right must be considered as an ingredient in the original composition of the General Government, which, though not expressed, was mutually understood; and the doctrine, heretofore presented to the reader, in regard to the indefeasible nature of personal allegiance, is so far qualified, in respect to allegiance to the United States. It was observed that it was competent for a State to make a Compact with its citizens, that the reciprocal obligations of protection and allegiance might cease on certain events;

render of Lee, the country was divided in opinion upon the

and it was further observed that allegiance would necessarily cease on the dissolution of the society to which it was due. The States may then wholly withdraw from the Union; but while they continue they must retain the character of representative republics." Rawle on the Constitution, pp. 288, 290, A. D. 1825.

"The secession of a State from the Union depends on the will of the people of such State. The people, alone, as we have already seen, hold the power to alter their Constitution. The Constitution of the United States is, to a certain extent, incorporated into the Constitutions of the several States, by the act of the people. The State Legislatures have only to perform certain organical operations in respect to it. To withdraw from the Union, comes not within the general scope of their delegated authority. There must be an express provision to that effect inserted in the State Constitutions. This is not, at present, the case with any of them, and it would, perhaps, be impolitic to confide it to them. A matter, so momentous, ought not to be intrusted to those who would have it in their power to exercise it lightly and precipitately, upon sudden dissatisfaction or causeless jealousy, perhaps against the interests and the wishes of a majority of their constituents. But in any manner by which a Secession is to take place, nothing is more certain than that the act should be deliberate, clear, and unequivocal. The perspicuity and solemnity of the original obligation require correspondent qualities in its dissolution. The powers of the General Government cannot be defeated or impaired by an ambiguous or implied Secession on the part of the State, although a Secession may, perhaps, be conditional. The people of the State may have some reasons to complain in respect to acts of the General Government; they may, in such cases, invest some of their own officers with the power of negotiation, and may declare an absolute Secession in case of their failure. Still, however, the Secession must in such case be distinctly and peremptorily declared to take place on that event, and in such case — as in the case of an unconditional Secession — the previous ligament with the Union would be legitimately and fairly destroyed. But, in either case, the people is the only moving power." Ibid, 295, 296.

"In no part of the Constitution is a specific number of States required for a legislative act. Under the Articles of Confederation, the concurrence of nine States was requisite for many purposes. If five States had withdrawn from that Union, it would have been dissolved. In the present Constitution there is no specification of numbers after the first formation. It was foreseen that there would be a natural tendency to increase the number of States with the increase of population then anticipated, and now so fully verified. It was also known, though it was not avowed, that a State might withdraw itself. The number would therefore be variable." Ibid. 297.

"To withdraw from the Union is a solemn, serious act. Whenever it may appear expedient to the people of a State, it must be manifested in a direct and unequivocal manner. If it is ever done indirectly, the people must refuse to elect Representatives, as well as to suffer their Legislature to re-appoint Senators. The Senator whose time had not yet expired, must be forbidden to continue in the exercise of his functions. But without plain, decisive measures of this nature, proceeding from the only legitimate source, the people, the United States cannot consider their Legislative powers over such States suspended, nor their Executive or Judicial powers any way impaired, and they would not be obliged to desist from the collection of

subject.[3] The Civil War, although held in law to be a rebellion, was treated by the Federal army, by the Federal courts, and by foreign nations as in fact a geographical war, giving to the combatants on both sides and the inhabitants of each section of the country the rights and liabilities of belligerents.[4] Members of the Confederate army were not punished as rebels. None of them were tried for treason.[5] A Northern jury refused to con-

revenue, within such State. As to the remaining States, among themselves, there is no opening for a doubt. Secessions may reduce the number to the smallest integer admitting combination. They would remain united under the same principles and regulations, among themselves, that now apply to the whole. For a State cannot be compelled by other States to withdraw from the Union, and, therefore, if two or more determine to remain united, although all the others desert them, nothing can be discovered in the Constitution to prevent it. The consequences of an absolute Secession cannot be mistaken, and they would be serious and afflicting. The Seceding State, whatever might be its relative magnitude, would speedily and distinctly feel the loss of the aid and countenance of the Union. The Union, losing a proportion of the National revenue, would be entitled to demand from it a proportion of the National debt. It would be entitled to treat the inhabitants and the commerce of the separated States, as appertaining to a foreign country. In public treaties already made, whether commercial or political, it could claim no participation, while foreign powers would unwillingly calculate, and slowly transfer to it, any portion of the respect and confidence borne towards the United States. Evils more alarming may readily be perceived. The destruction of the common bond would be unavoidably attended with more serious consequences than the mere disunion of the parts. Separation would produce jealousies and discord, which in time would ripen into mutual hostilities; and while our country would be weakened by internal war, foreign enemies would be encouraged to invade, with the flattering prospect of subduing in detail those whom collectively they would dread to encounter." Ibid, pp. 298, 299.

[3] As late as 1893, in a book written by a Senator from Massachusetts, is the remarkable statement: "When the Constitution was adopted by the votes of States at Philadelphia, and accepted by the votes of States in popular conventions, it is safe to say that there was not a man in the country, from Washington and Hamilton on the one side to George Clinton on the other, who regarded the new system as anything but an experiment entered upon by the States, and from which each and every State had the right peaceably to withdraw, a right which was very likely to be exercised. When the Virginia and Kentucky resolutions appeared, they were not opposed on constitutional grounds." (Henry Cabot Lodge, Life of Daniel Webster, pp. 176, 177.) That the latter statement by Senator Lodge is as erroneous as the first is shown by the citations in § 32.

[4] See The Prize Cases, 2 Black, 635; Wm. Alexander's Cotton, 2 Wall., 404; Muller v. U. S., 11 Wall., 268; Tyler v. Defrees, 11 Wall., 331.

[5] An indictment against Jefferson Davis was quashed by Chief-Justice Chase, Dec. 5, 1868, upon the ground that the Fourteenth Amendment was a bar. Judge Underwood dissented. Subsequently all indictments against Davis were dismissed on account of the procla-

vict of piracy officers of Confederate privateers.[6] No attempt was made to draw an indictment against the whole Southern people. After peace was restored the Southern States were ruled as conquered provinces until, and some even after, they ratified amendments to the Constitution that destroyed the institution to protect which they began the war, established citizenship of the United States, and gave to the Federal government full power to protect all its citizens from hostile action by the States of their residence. And finally, no one who accepts the doctrine of the Declaration of Independence can dispute the moral right of secession and of revolution when there is no other remedy against tyrannical oppression by a lawful government.[7]

mation of general amnesty, Dec. 25, 1868. (Chase's Decisions, vol. i, 122–124). The only trial for treason in connection with the Civil War was that of Greathouse, Harpending and Rubey, for fitting out a Confederate privateer. They were convicted and sentenced to fine and imprisonment, but subsequently pardoned. (U. S. *v.* Greathouse, 2 Abbott, p. 364; Greathouse's Case, ibid., p. 382. See also U. S. *v.* Grelner, 24 Law Rep. (14 Law Rep. N. S.) 91.) This subject and that of the trials before military commissions will be discussed subsequently.

[6] The trial of the officers of the Savannah in the U. S. Circuit Court, S. D. N. Y., in October, 1861, where the jury disagreed, is well worth reading. In 1862, the captain of the Jefferson Davis was found guilty of piracy and sentenced to death by the United States Court at Philadelphia, but a threat of reprisals prevented his execution. (Davis, Rise and Fall of the Confederate Government. vol. ii, pp. 11, 12.

[7] "That a state, or any other great portion of the people, suffering under long and intolerable oppressions, and having tried all constitutional remedies without the hope of redress, may have a natural right, when their happiness can be no otherwise secured, and when they can do so without greater injury to others, to absolve themselves from their obligations to the government, and appeal to the last resort, need not, on the present occasion, be denied. The existence of this right must depend upon the causes which may justify its exercise. It is the *ultima ratio*, which presupposes that the proper appeals to all other means of redress have been made in good faith, and which can never be rightfully resorted to unless it be unavoidable. It is not the right of the state, but of the individual, and of all the individuals in the state. It is the right of mankind generally to secure, by all means in their power, the blessings of liberty and happiness; but when, for these purposes, any body of men have voluntarily associated themselves under a particular form of government, no portion of them can dissolve the association without acknowledging the correlative right in the remainder to decide whether that dissolution can be permitted consistently with the general happiness. In this view, it is a right dependent upon the power to enforce it. Such a right, though it may be admitted to pre-exist, and cannot be wholly surrendered, is necessarily subjected to limitations in all free governments, and in compacts of all kinds, freely and voluntarily entered into, and in which the interest and welfare of the individual become identified with those of the community of which he is a member. In compacts

§ 31. Early Assertions of the Right of Secession.

The first threat of secession after the adoption of the Constitution was in the first Senate, June 11th, 1789, in the debate upon the first tariff bill. Senator Pierce Butler of South Carolina "flamed away and threatened a dissolution of the Union with regard to his State, as sure as God was in the firmament." [1] A similar threat was made to the House of Representatives by George Cabot of Massachusetts in case of its refusal to make the appropriations necessary to carry the Jay treaty into effect.[2]

It has been claimed by the supporters of the right of secession that in 1803 the legislature of Massachusetts resolved, on the acquisition of Louisiana, —

"That the annexation of Louisiana to the Union transcends the constitutional power of the government of the United States. It forms a new Confederacy to which the States united by the former compact are not bound to adhere." [3]

Although this assertion is probably unwarranted,[4] there can be but little doubt that at that time some of the leading Federalists in Massachusetts planned the secession of the New England States

between individuals, however deeply they may affect their relations, these principles are acknowledged to create a sacred obligation; and in compacts of civil governments, involving the liberty and happiness of millions of mankind, the obligation can not be less." Andrew Jackson, Message on Nullification, Jan. 16, 1833.

So Webster said in his reply to Hayne: "There may be extreme cases, in which the people, in any mode of assembling, may resent usurpation, and relieve themselves from a tyrannical government. No one will deny this. We, sir, who oppose the Carolina doctrine, do not deny that the people may, if they choose, throw off any government, when it becomes oppressive and unbearable, and erect a better in its stead. We all know that civil institutions are established for the public benefit, and that when they cease to answer the ends of their existence they may be changed."

§ 31. [1] Maclay's Journal of June 11, 1789. Sketches of Debate in the First Senate of the United States, by William Maclay (1st ed.) p. 77.

[2] Jefferson, Ana, Works (1st ed.), vol. ix, p. 195.

[3] Tyler, Life of Taney, p. 333. See also Stephens' History of the War between the States, vol. i, p. 510, where the author says, "Whether this resolution was in fact passed by the Massachusetts Legislature or not, I have not been able to ascertain with absolute certainty."

[4] The accomplished librarian, Mr. Francis Vaughan of the Social Law Library of Boston, has very kindly searched the indices of the journals of both Houses of the Massachusetts General Court from May, 1802, to March, 1804, and has found there no trace of such a resolution.

and the formation of a Northern Confederacy.[5] In 1811, during the debate on the bill for the admission of Louisiana as a State, Josiah Quincy, a member from Massachusetts, said in the House of Representatives: —

"It is my deliberate opinion that if this bill passes the bonds of this Union are virtually dissolved; that the States which compose it are free from their moral obligation and that, as it will be the right of all, so it will be the duty of some, definitely to prepare for separation, amicably if they can, violently if they must."

The Speaker, Joseph B. Varnum of the same State, held that the language was disorderly, but the House by a vote of fifty-six to fifty-three reversed the ruling.[6]

The war of 1812 bore with especial severity upon New England. The action of the Federal government in calling the militia thence to aid in the invasion of Canada from New York, the proposition of a compulsory draft, and other measures, created great indignation. This resulted in the famous Hartford Convention, called by Massachusetts, where delegates chosen by the legislatures of that State, Connecticut and Rhode Island, besides a few chosen by popular meetings in New Hampshire and Vermont, met in secret session during December, 1814; it was charged, to plot secession. The official preliminaries, the resolutions, and the report adopted by the convention contain nothing which directly supports the theory, although a threat of secession is clearly intimated, and nullification is expressly threatened.[7]

[5] See letters of Timothy Pickering to Higgins on Dec. 24, 1803; and to George Cabot, Jan. 29, 1804; Lodge's Life of Cabot, pp. 337–340, 442, 491; Roger Griswold to Oliver Wolcott, March 11, 1804; Judge Tapping Reeve of Connecticut, to Uriah Tracy, Feb. 7, 1804.

Henry Adams, History of the United States, vol. ii, pp. 160–163, 168, 184, 186, 188.

[6] Henry Adams, History of the United States, vol. v, p. 325.

[7] "If the Union be destined to dissolution by reason of the multiplied abuses of bad administration, it should, if possible, be the work of peaceable times and deliberate consent. Some new form of confederacy should be substituted among those States which shall intend to maintain a Federal relation to each other. Events may prove that the cause of our calamities are deep and permanent. They may be found to proceed, not merely from the blindness of prejudice, pride of opinion, violence of party spirit, or the confusion of the times; but they may be traced to implacable combinations of individuals or of States to monopolize power and office, to trample without remorse

In 1844, the legislature of Massachusetts passed a series of resolutions upon the annexation of Texas, containing the threat,—

"That the project of the annexation of Texas, unless arrested on the threshold, may drive these States into a dissolution of the Union."[8]

On the same subject, February 22d, 1845, the same body adopted another series of resolutions, which included the statement that, —

"As the powers of legislation granted in the Constitution of the United States to Congress, do not embrace the case of the admission of a foreign state, or foreign territory, by Legislation, into the Union, such an act of admission would have no binding force whatever on the people of Massachusetts."[9]

From the enactment of the tariff of abominations of 1828 to the outbreak of the Civil War, threats of secession and assertions of the right to secede were constantly made by Southern statesmen.[10]

upon the rights and interests of the commercial sections of the Union. Wherever it shall appear that the causes are radical and permanent, a separation by equitable arrangement will be preferable to an alliance by constraint among nominal friends, but real enemies." (Report of the Hartford Convention. Dwight, History of the Hartford Convention.) While the bill for a draft was pending the Connecticut legislature authorized the Governor in case of its passage, to call an extraordinary session to consider measures "to secure and preserve the rights and liberties of the people of this State, and the freedom, sovereignty and independence of the same." (Henry Adams, History of the United States, vol. ix, p. 278; citing Niles' Register, vii, Supplement, p. 107.)

"In cases of deliberate, dangerous and palpable infractions of the Constitution, affecting the sovereignty of a State and liberties of the people; it is not only the right but the duty of such a State to interpose its authority for their protection, in the manner best calculated to secure that end. When emergencies occur which are either beyond the reach of the judicial tribunals, or too pressing to admit of the delay incident to their forms, States which have no common umpire must be their own judges, and execute their own decisions. It will thus be proper for the several States to await the ultimate disposal of the obnoxious measures recommended by the Secretary of War, or pending before Congress, and so to use their power according to the character these measures shall finally assume, as effectually to protect their own sovereignty, and the rights and liberties of their citizens." (Report of the Hartford Convention. Dwight's History of the Hartford Convention, pp. 361, 362.) The language was evidently copied from the Kentucky Resolutions (*infra*, § 32).

[8] Stephens, Constitutional View of the Late War between the States, vol. i, p. 511.

[9] Ibid.

[10] See Wilson, Rise of the Slave Power in the United States, and Van Holst, Constitutional History of the United States, *passim*.

§ 32. Virginia and Kentucky Resolutions.

The enactment of the Alien and Sedition Laws [1] by the Federalists was the cause of the Kentucky and Virginia resolutions, which contained the first germ of the doctrine of nullification. The draft of the Kentucky resolutions was made secretly by Jefferson, then Vice-President, in 1798, at the request of Madison, John Breckenridge, and Wilson C. Nicholas of Kentucky; [2] in order to unite the legislatures of the Anti-Federalist States in protests against the constitutionality of those laws. It was his original intention to have them first introduced in the legislature of North Carolina; but a change in the political complexion of that State caused him to abandon this idea; [3] in which he acted wisely. For it is said that when the Virginia resolutions were first presented to the North Carolina legislature they were promptly voted under the table.[4] The original draft of the resolutions, after protesting against the Alien and Sedition Laws, and also other acts punishing crimes for causes not specifically enumerated in the Constitution, declared them "altogether void and of no force," as infringements of the Constitution for reasons therein assigned, and appointed a Committee of Conference and Correspondence to communicate the resolutions to the legislatures of the several States, with a statement of the opinion of the resolving States upon the nature of the Federal compact which contained the following language: —

"That therefore, this commonwealth is determined, as it doubts not its co-States are, to submit to undelegated, and consequently unlimited powers in no man, or body of men on earth; that in cases of an abuse of the delegated powers, the members of the General Government being

§ 32. [1] These statutes are printed in the Appendix to this chapter, *infra*.

[2] Jefferson's letter to J. Cabel Breckenridge, Dec. 11, 1821. Jefferson's Works, 1st ed., vol. vii, p. 229. In this edition of Jefferson's Works, his correspondent was erroneously described as Nicholas. The letter was in reality written to the son of John Breckinridge, and is still in the possession of his descendants. See Southern Bivouac of March, 1886, and The Kentucky Resolutions of 1798, by E. O. Warfield, pp. 136–144, where the mistake is explained and corrected.

[3] Jefferson to W. C. Nicholas, quoted by Warfield, The Kentucky Resolutions, p. 146.

[4] Madison to Jefferson, Madison's Works, vol. ii, p. 152.

chosen by the people, a change by the people would be the constitutional remedy; but, where powers are assumed which have not been delegated, a nullification of the act is the rightful remedy: that every State has a natural right in cases not within the compact (casus non foederis) to nullify of their own authority, all assumptions of power by others within their limits; that without this right, they would be under the dominion absolute and unlimited, of whosoever might exercise this right of judgment for them."

"That these successive acts of the same character, unless arrested at the threshold, must necessarily drive these States into revolution and blood."

The paper concluded with the expression of the hope —

"That the co-States recurring to their natural right in cases not made Federal, will concur in declaring these acts void, and of no force, and will each take measures of its own for providing that neither these acts, nor any others of the General Government, not plainly and intentionally authorized by the Constitution, shall be exercised within their respective territories."[5]

The State legislatures of Kentucky and Virginia, however, were at first not disposed to go so far as Jefferson suggested. The first Kentucky Resolutions passed the legislature and were approved by the Governor, November 16th, 1798. They contained the substance of Jefferson's draft; modified his language by omitting his declaration of the right of nullification; said, after condemning the Alien and Sedition Laws, —

"That these and successive acts of the same character, unless arrested on the threshold may tend to drive the States into revolution and blood;"

and concluded merely with the phrase, —

"That the co-States recurring to their natural right in cases not made Federal, will concur in declaring these acts void and of no force, and will each unite with this commonwealth in requesting their repeal at the next session of Congress."[6]

The Virginia Resolutions were drawn by Madison, and were much milder in form both as first presented and as finally adopted.

[5] Jefferson's Works, 1st ed., vol. ix, pp. 461, 471.

[6] Preston's Documents Illustrative of American History, pp. 287-295. The resolutions are printed in full in the appendix to this chapter.

They contained a protest against the obnoxious laws, and requested the other States to —

"concur with this commonwealth in declaring as it does hereby declare that the acts aforesaid are unconstitutional, and that the necessary and proper measures will be taken by each, for co-operating with this State in maintaining the unimpaired authorities, rights and liberties reserved to the States respectively, or to the people."

They further declared —

"That this Assembly doth explicitly and peremptorily declare that it views the powers of the Federal Government as resulting from the compact, to which the States are parties, as limited by the plain sense and intentions of the instrument constituting that compact; as no futher valid than they are authorized by the grants enumerated in that compact; and that in case of a deliberate, palpable and dangerous exercise of her powers not granted by the said compact, the States, who are the 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."

As first introduced by the celebrated John Taylor of Caroline County, the declaration of the unconstitutionality of the acts contained, after the word "unconstitutional," "*and not law, but utterly null, void, and of no force or effect.*" The declaration concerning the nature of the constitutionality of the compact also stated at first concerning the same: "to which the States *alone* are parties." The words in italics were stricken out in the legislature by unanimous consent.[7] The resolutions were adopted after considerable discussion by a vote in the House of Delegates of one hundred to sixty-three, December 21, 1798, and in the Senate of fourteen to three, three days later. Throughout the debate, the idea that force would be used in opposition to the Federal government was expressly repudiated by the supporters of the resolutions.[8]

[7] The Virginia Report of 1799-1800, touching the Alien and Sedition Laws, together with the Virginia Resolutions of Dec. 21, 1798, the debate and proceedings thereon in the House of Delegates in Virginia, and several other documents illustrative of the Report and Resolutions. Richmond: J. W. Randolph, 121 Main Street. Also for sale by Franck Taylor, Washington; Cushing & Brother, Baltimore; and T. & J. W. Johnson, Philadelphia, Pa. 1850; p. 148.

[8] John Mercer said, "Force is not thought of by any one" (ibid., p. 42). James Barbour: "He was for using

Seven State legislatures replied to these resolutions, condemning the same in general language, and in some cases affirming the doctrine that the Supreme Court of the United States had the ultimate authority of deciding on the constitutionality of an act of Congress.[9] Kentucky rejoined, November 14th, 1799, by a preamble and resolution which concluded in language largely taken from the omitted part of Jefferson's original draft:—

"That the several States who formed that instrument" (the Constitution), "being sovereign and independent, have the unquestioned right to judge of the infraction; and that a nullification by those sovereignties, of all unauthorized acts done under color of that instrument, is the rightful remedy. That this Commonwealth does, under the most deliberate reconsideration, declare that the said Alien and Sedition Laws are, in their opinion, palpable violations of the said Constitution; and, however cheerfully it may be disposed to surrender its opinion to a majority of its sister States, in matters of ordinary or doubtful policy, yet, in momentous regulations like the present, which so vitally wound the best rights of the citizen, it would consider a silent acquiescence as highly criminal; that, although this Commonwealth, as a party to the federal compact, will bow to the laws of the Union, yet it does, at the same time, declare, that it will not now, or ever hereafter, cease to oppose, in a constitutional manner, every attempt, at what quarter soever offered, to violate that compact: and finally, in order that no pretexts or arguments may be drawn from a supposed acquiescence, on the part of this Commonwealth, in the constitutionality of those laws, and be thereby used as precedents for similar future violations of the federal compact; this Commonwealth now enters against them its solemn protest." [10]

no violence. It is the peculiar blessing of the American People to have redress within their reach by constitutional and peaceful means. He was for giving Congress an opportunity of repealing those obnoxious laws complained of in the resolutions." In closing the debate in the Committee of the Whole, "Mr. John Taylor said he would explain in a few words what he had before said. That the plan proposed by the resolution would not eventuate in war, but might in a Convention. He did not admit or contemplate that a Convention would be called. He only said, that if Congress upon being addressed to have those laws repealed, should persist, they might, by a concurrence of three-fourths of the States, be compelled to call a Convention." Ibid, p. 148.

[9] Delaware, Rhode Island, Massachusetts, New York, Connecticut, New Hampshire, Vermont. Ibid., pp. 168–177. Elliot's Debates, 2d ed., vol. iv, pp. 532–539.

[10] See the whole Resolution in Appendix to this chapter.

The Virginia House of Delegates referred the resolutions of the other States to a committee of which Madison was the chairman. Madison's famous report defended the resolutions and contained an elaborate argument against the constitutionality of the Alien and Sedition Laws. He reasserted the right of the States to interpose in "the case of a deliberate, palpable and dangerous" breach of the Constitution by the exercise by the Federal government of powers not granted to it, without, however, stating specifically, the manner in which that interposition should be made.

He said that such action, "whether made before or after judicial decisions" upon the validity of the laws in question, can not —

"be deemed, in any point of view, an assumption of the office of a judge. The declarations, in such cases, are expressions of opinion, unaccompanied with any other effect than what they may produce on opinion, by exciting reflection. The expositions of the judiciary, on the other hand, are carried into effect by force. The former may lead to a change in the legislative expression of the general will; possibly to a change in the opinion of the judiciary; the latter enforces the general will, while that will and the opinion continue unchanged."

He stated that "the necessary and proper measures" of cooperation which had been suggested to the other States were means —

"strictly within the limits of the Constitution. The legislatures of the States might have made a direct representation to Congress, with a view to obtain a rescinding of the two offensive acts; or they might have represented to their respective Senators in Congress their wish that two-thirds thereof would propose an explanatory amendment to the Constitution; or two-thirds of themselves, if such had been their option, might by an application to Congress, have obtained a Convention for the same object. These several means, though not equally eligible in themselves, nor probably to the States, were all constitutionally open for consideration. And if the General Assembly, after declaring the two acts to be unconstitutional, the first and most obvious proceeding on the subject, did not undertake to point out to the other States a choice among the farther measures that might become necessary and proper, the reserve will not be misconstrued by liberal minds into any culpable imputation."

The legislature adopted the report and a final resolution adhering to their original resolutions.[11]

The advocates of nullification and secession have referred to these proceedings as conclusive evidence of the opinions of Jefferson and Madison in support of the doctrines which were advocated later by Calhoun and Davis. The claim, however, has no foundation. Madison, during the time of nullification, expressly denied the claim that the proceedings of the legislature of Virginia advocated a legal right of nullification; and pointed out that the proceedings suggested in his report and resolution were peaceable measures, the right to exercise which under the Constitution was universally conceded.[12] After the adoption of the resolutions and the report, the Sedition Law was enforced in the most offensive manner in Virginia without any obstruction by the State.[13]

The language of the Virginia resolutions is more ambiguous than that in the report, and this was undoubtedly intentional, in order that they might suggest a threat, the execution of which was never intended. The Kentucky resolutions, especially that of

[11] The Virginia Report of 1779–1800, touching the Alien and Sedition Laws, &c., Philadelphia, 1850, p. 233.

[12] Madison's letter to Edward Everett, August, 1830, ibid., 249–256. See also other statements by Madison, quoted in Benton's Thirty Years' View, vol. i, pp. 354–360.

[13] By the trial, conviction and sentence of Callender, the conduct of which was one of the grounds for the impeachment of Judge Chase. Governor Monroe said, in his message to the Virginian General Assembly, in December, 1800: "In connection with this subject it is proper to add, that, since your last session, the sedition law, one of the acts complained of, has been carried into effect in this commonwealth by the decision of a federal court. I notice this event not with a view of censuring or criticising it. The transaction has gone to the world, and the impartial will judge of it as it deserves. I notice it for the purpose of remarking that the decision was executed with the same order and tranquil submission on the part of the people as could have been shown by them on a similar occasion to any the most necessary, constitutional and popular acts of the government. The General Assembly and the good people of this Commonwealth have acquitted themselves to their own consciences and to their brethren in America in support of a cause which they deem a national one, by the stand which they made, and the sentiments they expressed of these acts of the general government; but they have looked for a change in that respect, to a change in the public opinion, which ought to be free; not to measures of violence, discord and disunion, which they abhor." Benton's Thirty Years' View, vol. i, p. 354.

1799, were stronger, but the right therein maintained seems clearly to have been rather the "natural right" of revolution, than the assertion of a legal right recognized by the Constitution.

The design of Jefferson was, however, accomplished, as he undoubtedly expected, by the means contemplated by the Constitution, without the use of any extraordinary proceedings.

Petitions for the repeal of the obnoxious statutes poured into Congress from all parts of the Union.[14] The powers granted by the Alien Law seem never to have been exercised. The prosecutions and convictions under the Sedition Law had no effect except to increase the unpopularity of the party that had passed it. Jefferson was chosen to the presidency a year after the adoption of the last Kentucky Resolution. Before his inauguration the two acts had expired by their terms after a futile attempt to continue the only one of them which had been applied.[15] He pardoned all convicts under the Sedition Law,[16] and the fines imposed upon them were repaid afterwards under votes of Democratic Congresses.[17] Neither Jefferson nor Madison afterwards had occasion to reassert the doctrines promulgated in the famous report and resolutions. But those papers remained the texts to which the expounders of State rights appealed till the rights of secession and nullification had both been tried and both had failed.

§ 33. The Doctrine of Nullification.

Struck by the example and taking up the cue of Jefferson, when the South was injured by an unjust and oppressive tariff, Calhoun expanded and set forth the doctrine of nullification for her relief. The reputation of its author and the solemnity of the events which it occasioned seem to demand that it be fully and fairly stated in his own language: —

"The great and leading principle is, that the General Government emanated from the people of the several states, forming distinct political communities, and acting in their separate and sovereign capacity, and not from all of the people forming one aggregate political

[14] McMaster's History, vol. ii, p. 423.
[15] Ibid., p. 532.
[16] Tucker's Life of Jefferson, vol. ii, p. 120.
[17] Act of July 4, 1840, 6 St. at L., p. 802; Act of June 17, 1844, 6 St. at L., p. 924.

community; that the Constitution of the United States is, in fact, a compact, to which each state is a party, in the character already described; and that the several states, or parties, have a right to judge of its infractions; and in case of a deliberate, palpable, and dangerous exercise of power not delegated, they have the right, in the last resort, to use the language of the Virginia Resolutions, '*to interpose for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights, and liberties appertaining to them.*' This right of interposition, thus solemnly asserted by the State of Virginia, be it called what it may — State-right, veto, nullification, or by any other name — I conceive it to be the fundamental principle of our system, resting on facts historically as certain as our revolution itself, and deductions as simple and demonstrative as that of any political or moral truth whatever; and I firmly believe that on its recognition depend the stabilty and safety of our political institutions."[1]

"To realize its perfection, we must view the General Government and those of the states as a whole, each in its proper sphere independent; each perfectly adapted to its respective objects; the states acting separately, representing and protecting the local and peculiar interests; acting jointly through one General Government, with the weight respectively assigned to each by the Constitution, representing and protecting the interest of the whole, and thus perfecting, by an admirable, but simple arrangement, the great principle of representation and responsibility, without which no government can be free or just. To preserve this sacred distribution as originally settled, by coercing each to move in its prescribed orb, is the great and difficult problem, on the solution of which the duration of our Constitution, of our Union, and, in all probality, our liberty depends. How is this to be effected?

"The question is new when applied to our peculiar political organization, where the separate and conflicting interests of society are represented by distinct but connected governments; but it is, in reality, an old question under a new form, long since perfectly solved. Whenever separate and dissimilar interests have been separately represented in any government; whenever the sovereign power has been divided in its exercise, the experience and wisdom of ages have devised but one mode by which such political organization can be preserved — the mode adopted in England, and by all governments, ancient and modern, blessed with constitutions deserving to be called free — to give to each

§ 33. [1] Mr. Calhoun's address, stating his opinion of the relation which the States and the general government bear to each other. Fort Hill, July 26, 1831. Calhoun's Speeches, 1st ed., 1843, p. 28.

co-estate the right to judge of its powers, with a negative or veto on the acts of the others, in order to protect against encroachments the interests it particularly represents: a principle which all of our Constitutions recognize in the distribution of power among their respective departments, as essential to maintain the independence of each, but which, to all who will duly reflect on the subject, must appear far more essential, for the same object, in that great and fundamental distribution of powers between the General and State Governments. So essential is the principle, that to withhold the right from either, where the sovereign power is divided, is, in fact, *to annul the division itself*, and to *consolidate* in the one left in the exclusive possession of the right *all* powers of government; for it is not possible to distinguish, practically, between a government having all power, and one having the right to take what powers it pleases. Nor does it in the least vary the principle, whether the distribution of power between co-estates, as in England, or between distinctly organized but connected governments, as with us. The reason is the same in both cases, while the necessity is greater in our case, as the danger of conflict is greater where the interests of a society are divided geographically than in any other, as has already been shown." [2]

"So far from extreme danger, I hold that there never was a free state in which this great conservative principle, indispensable to all, was ever so safely lodged. In others, when the co-estates representing the dissimilar and conflicting interests of the community came into contact, this only alternative was compromise, submission, or force. Not so in ours. Should the General Government and a state come into conflict, we have a higher remedy: the power which called the General Government into existence, which gave it all its authority, and can enlarge, contract, or abolish its powers at its pleasure, may be invoked. The states themselves may be appealed to, three-fourths of which, in fact, form a power, whose decrees are the Constitution itself, and whose voice can silence all discontent. The utmost extent, then, of the power is, that a state acting in its sovereign capacity, as one of the parties to the constitutional compact, may compel the government, created by that compact, to submit a question touching its infraction to the parties who created it; to avoid the supposed dangers of which, it is proposed to resort to the novel, the hazardous, and, I must add, fatal project, of giving to the General Government the sole and final right of inter-

[2] Mr. Calhoun's address, stating his opinion of the relation which the States and the general government bear to each other. Fort Hill, July 26, 1831. Calhoun's speeches, 1st ed., 1843, pp. 30–31.

preting the Constitution, thereby reversing the whole system, making that instrument the creature of its will instead of a rule of action impressed on it at its creation, and annihilating, in fact, the authority which imposed it, and from which the government itself derives its existence. That such would be the result, were the right in question vested in the legislative or executive branch of the government, is conceded by all. No one has been so hardy as to assert that Congress or the President ought to have the right, or deny that, if vested finally and exclusively in either, the consequences which I have stated would necessarily follow; but its advocates have been reconciled to the doctrine, on the supposition that there is one department of the General Government which, from its peculiar organization, affords an independent tribunal through which the government may exercise the high authority which is the subject of consideration, with perfect safety to all.

"I yield, I trust, to few in my attachment to the judiciary department. I am fully sensible of its importance, and would maintain it to the fullest extent in its constitutional powers and independence; but it is impossible for me to believe that it was ever intended by the Constitution that it should exercise the power in question, or that it is competent to do so; and, if it were, that it would be a safe depositary of the power.

"Its powers are judicial, and not political, and are expressly confined by the Constitution 'to all *cases* in law and equity arising under this Constitution, the laws of the United States, and the treaties made, or which shall be made, under its authority'; and which I have high authority in asserting excludes political questions, and comprehends those only where there are parties amenable to the process of the court.[8] Nor is its incompeteucy less clear than its want of constitutional authority. There may be many, and the most dangerous infractions on the part of Congress, of which, it is conceded by all, the court, as a judicial tribunal, cannot, from its nature, take cognizance. The tariff itself is a strong case in point; and the reason applies equally *to all others where Congress perverts a power from an object intended to one not intended, the most insidious and dangerous of all the infractions; and which may be extended to all of its powers, more especially to the taxing and appropriating.* But supposing it competent to take cognizance of all infractions of every description, the insuper-

[8] "I refer to the authority of Chief Justice Marshall, in the case of Jonathan Robbins. I have not been able to refer to the speech, and speak from memory." Calhoun's note.

able objection still remains, that it would not be a safe tribunal to exercise the power in question.

"It is a universal and fundamental political principle, that the power to protect can safely be confided only to those interested in protecting, or their responsible agents — a maxim not less true in private than in public affairs. The danger in our system is, that the General Government, which represents the interests of the whole, may encroach on the states, which represent the peculiar and local interests, or that the latter may encroach on the former.

"In examining this point, we ought not to forget that the government, through all its departments, judicial as well as others, is administered by delegated and responsible agents; and that the *power which really controls, ultimately, all the movements, is not in the agents, but those who elect or appoint them.* To understand, then, its real character, and what would be the action of the system in any supposable case, we must raise our view from the mere agents to this high controlling power, which finally impels every movement of the machine. By doing so, we shall find all under the control of the will of a majority, compounded of the majority of the states, taken as corporate bodies, and the majority of the people of the states, estimated in federal numbers. These, united, constitute the real and final power which impels and directs the movements of the General Government. The majority of the states elect the majority of the Senate; of the people of the states, that of the House of Representatives; the two united, the President; and the President and a majority of the Senate appoint the judges; a majority of whom, and a majority of the Senate and house, with the President, really exercise all the powers of the government, with the exception of the cases where the Constitution requires a greater number than a majority. The judges are, in fact, as truly the judicial representatives of this united majority, as the majority of Congress itself, or the President, is its legislative or executive representative; and to confide the power to the judiciary to determine finally and conclusively what powers are delegated and what reserved, would be, in reality, to confide it to the majority, whose agents they are, and by whom they can be controlled, in various ways; and, of course, to subject (against the fundamental principle of our system and all sound political reasoning) the reserved powers of the states, with all the local and peculiar interests they were intended to protect, to the will of the very majority against which the protection was intended. Nor will the tenure by which the judges hold their office, however valuable the provision in many other respects, materially vary the case. Its highest possible

effect would be to *retard*, and not *finally* to *resist*, the will of a dominant majority.

"But it is useless to multiply arguments. Were it possible that reason could settle a question where the passions and interests of men are concerned, this point would have been long since settled forever by the State of Virginia. The report of her Legislature, to which I have already referred, has really, in my opinion, placed it beyond controversy. Speaking in reference to this subject, it says: 'It has been objected' (to the right of a state to interpose for the protection of her reserved rights) 'that the judicial authority is to be regarded as the sole expositor of the Constitution. On this objection it might be observed, first, that there may be instances of usurped powers which the forms of the Constitution could never draw within the control of the judicial department; secondly, that, if the decision of the judiciary be raised above the sovereign parties to the Constitution, the decisions of the other departments, not carried by the forms of the Constitution before the judiciary, must be equally authoritative and final with the decision of that department. But the proper answer to the objection, is, that the resolution of the General Assembly relates to those great and extraordinary cases in which all the forms of the Constitution may prove ineffectual against infractions dangerous to the essential rights of the parties to it. The resolution supposes that dangerous powers, not delegated, may not only be usurped and executed by the other departments, but that the judicial department may also exercise or sanction dangerous powers, beyond the grant of the Constitution, and, consequently, that the ultimate right of the parties to the Constitution to judge whether the compact has been dangerously violated, must extend to violations by one delegated authority as well as by another — by the judiciary, as well as by the executive or legislative.'[4]

"Against these conclusive arguments, as they seem to me, it is objected that, if one of the party has the right to judge of infractions of the Constitution, so has the other; and that, consequently, in cases of contested powers between a state and the General Government, each would have a right to maintain its opinion, as is the case when sovereign powers differ in the construction of treaties or compacts, and that, of course, it would come to be a mere question of force. The error is in the assumption that the General Government is a party to the constitutional compact. The states, as has been shown, formed the compact, acting as sovereign and independent communities. The General Government is but its creature; and though, in reality, a government, with

[4] "Madison's Report on the Virginia resolutions." Calhoun's note.

all the rights and authority which belong to any other government, within the orbit of its powers, it is, nevertheless, a government emanating from a compact between sovereigns, and partaking, in its nature and object, of the character of a joint commission, appointed to superintend and administer the interests in which all are jointly concerned, but having, beyond its proper sphere, no more power than if it did not exist. To deny this would be to deny the most incontestable facts and the clearest conclusions; while to acknowledge its truth is to destroy utterly the objection that the appeal would be to force, in the case supposed. For, if each party has a right to judge, then, under our system of government, the final cognizance of a question of contested power would be in the states, and not in the General Government. It would be the duty of the latter, as in all similar cases of a contest between one or more of the principals, and a joint commission or agency, to refer the contest to the principals themselves. Such are the plain dictates of both reason and analogy. On no sound principle can the agents have a right to find cognizance, as against the principals much less to use force against them to maintain their construction of their powers. Such a right would be monstrous, and has never, heretofore, been claimed in similar cases."[5]

"How the states are to exercise this high power of interposition, which constitutes so essential a portion of their reserved rights that it *cannot be delegated without an entire surrender of their sovereignty*, and converting our system from a *federal* into a *consolidated* government, is a question that the states only are competent to determine. The arguments which prove that they possess the power, equally prove that they are, in the language of Jefferson, '*the rightful judges of the mode and measure of redress.*' But the spirit of forbearance, as well as the nature of the right itself, forbids a recourse to it, except in cases of dangerous infractions of the Constitution; and then only in the last resort, when all reasonable hope of relief from the ordinary action of the government has failed; when, if the right to interpose did not exist, the alternative would be submission and oppression on one side, or resistance by force on the other. That our system should afford, in in such extreme cases, an intermediate point between these dire alternatives, by which the government may be brought to a pause, and thereby an interval obtained to compromise differences, or, if impracticable, be compelled to submit the question to a constitutional ad-

[5] Mr. Calhoun's address, stating his opinion of the relation which the States and the general government bear to each other. Fort Hill, July 26, 1831. Calhoun's Speeches, 1st ed., 1843, pp. 31-34.

justment, through an appeal to the states themselves, is an evidence of its high wisdom; an element not, as is supposed by some, of weakness, but of strength; not of anarchy or revolulution, but of peace and safety. *Its general recognition would of itself, in a great measure, if not altogether, supersede the necessity of its exercise, by impressing on the movements of the government that moderation and justice so essential to harmony and peace, in a country of such vast extent and diversity of interests as ours;* and would, if controversy should come, turn the resentment of the aggrieved from the system to those who had abused its powers (a point all important), and cause them to seek redress, *not in revolution or overthrow, but in reformation.* It is, in fact, properly understood, *a substitute where the alternative would be force, tending to prevent, and, if that fails, to correct peaceably the aberrations to which all systems are liable, and which, if permitted to accumulate without* correction, must finally end in a general catastrophe." [6]

"I next propose to consider the practical effect of the exercise of this high and important right — which, as the great conservative principle of our system, is known under the various names of nullification, interposition, and state veto — in reference to its operation viewed under different aspects: nullification, as declaring null an unconstitutional act of the General Government, as far as the state is concerned; interposition, as throwing the shield of protection between the citizens of a state and the encroachments of the Government; and veto, as arresting or inhibiting its unauthorized acts within the limits of the state.

"The practical effect, if the right was fully recognized, would be plain and simple, and has already, in a great measure, been anticipated. If the state has a right, there must, of necessity, be a corresponding obligation on the part of the General Government to acquiesce in its exercise; and, of course, it would be its duty to abandon the power, at least as far as the state is concerned, to compromise the difficulty, or apply to the states themselves, according to the form prescribed in the Constitution, to obtain the power by a grant. If granted, acquiescence, then, would be a duty on the part of the state; and, in that event, the contest would terminate in converting a doubtful constructive power into one positively granted; but, should it not be granted, no alternative would remain for the General Government but a compromise or its permanent abandonment. In either event, the controversy would be

[6] Mr. Calhoun's address, stating his opinion of the relation which the States and the General Government bear to each other. Fort Hill, July 26, 1831. Calhoun's Speeches, 1st ed., 1843, pp. 34–35.

closed and the Constitution fixed: a result of the utmost importance to the steady operation of the government and the stability of the system, and which can never be attained, under its present operation, without the recognition of the right, as experience has shown.

"From the adoption of the Constitution, we have had but one continued agitation of constitutional questions embracing some of the most important powers exercised by the government; and yet, in spite of all the ability and force of argument displayed in the various discussions, backed by the high authority claimed for the Supreme Court to adjust such controversies, not a single constitutional question, of a political character, which has ever been agitated during this long period, has been settled in the public opinion, except that of the unconstitutionality of the Alien and Sedition Law; and, what is remarkable, that was settled *against the decision of the Supreme Court.*[1] The tendency is to increase, and not diminish, this conflict for power. New questions are yearly added without diminishing the old; while the contest becomes more obstinate as the list increases, and, what is highly ominous, more

[1] Upon this statement Judge Story remarked: "Now, in the first place, the constitutionality of the Alien and Sedition laws never came before the Supreme Court for decision, and consequently never was decided by that court. In the next place, what is meant by *public opinion* deciding constitutional questions? What public opinion? Where and at what time delivered? It is notorious that some of the ablest statesmen and jurists of America, at the time of the passage of these acts, and ever since, have maintained the constitutionality of these laws. They were upheld, as constitutional, by some of the most intelligent and able State legislatures in the Union in deliberate resolutions affirming their constitutionality. Nay, more; it may be affirmed that, at the time when the controversy engaged the public mind most earnestly upon the subject, there was (to say the least of it) as great a weight of judicial and professional talent, learning, and patriotism enlisted in their favor, as there ever has been against them. If by being settled by public opinion is meant that all the people of America were united in one opinion on the subject, the correctness of the statement cannot be admitted, though its sincerity will not be questioned. It is one thing to believe a doctrine universally admitted, because we ourselves think it clear, and quite another thing to establish the fact. The Sedition and Alien laws were generally deemed inexpedient, and therefore any allusion to them now rarely occurs, except in political discussions, when they are introduced to add odium to the party by which they were adopted. But the most serious doubts may be entertained whether, even in the present day, a majority of constitutional lawyers, or of judicial opinions, deliberately hold them to be unconstitutional." Story on the Constitution, 5th ed., § 1271, pp. 180-181, note. Under the late decisions of the Supreme Court the Alien law would certainly and the Sedition law probably be held constitutional. See Fong Yue Ting *v.* U. S., 149 U. S. 698.

sectional. It is impossible that the government can last under this increasing diversity of opinion, and growing uncertainty as to its power in relation to the most important subjects of legislation; and equally so, that this dangerous state can terminate without a power somewhere to compel, in effect, the government to abandon doubtful constructive powers, or to convert them into positive grants by an amendment of the Constitution; in a word, to substitute the positive grants of the parties themselves for the constructive powers interpolated by the agents. Nothing short of this, in a system constructed as ours is, with a double set of agents, one for local and the other for general purposes, can ever terminate the conflict for power or give uniformity and stability to its action.

"Such would be the practical and happy operation were *the right recognized;* but the case is far otherwise; and as the right is not only denied, but violently opposed, the General Government, so far from acquiescing in its exercise, and abandoning the power, as it ought, may endeavour, by all the means within its command, to enforce its construction against that of the state. It is under this aspect of the question that I now propose to consider the practical effect of the exercise of the right, with the view to determine which of the two, the state or the General Government, must prevail in the conflict; which compels me to revert to some of the grounds already established.

"I have already shown that the declaration of nullification would be obligatory on the citizens of the state, as much so, in fact, as its declaration ratifying the Constitution, resting, as it does, on the same basis. It would *to them* be the highest possible evidence that the power contested was not granted, and, of course, that the act of the General Government was unconstitutional. They would be bound in all the relations of life, private and political, to respect and obey it; and, when called upon as jurymen, to render their verdict accordingly, or, as judges, to pronounce judgment in conformity to it. The right of jury trial is secured by the Constitution (thanks to the jealous spirit of liberty, doubly secured and fortified); and, with this inestimable right — inestimable not only as an essential portion of the judicial tribunals of the country, but infinitely more so, considered as a popular, and still more, a local representation, in that department of the government, which, without it, would be the farthest removed from the control of the people, and a fit instrument to sap the foundation of the system — with, I repeat, this inestimable right, it would be impossible for the General Government, within the limits of the state, to execute, *legally*, the act nullified, or any other passed with a view to enforce it; while,

on the other hand, the state would be able to enforce, *legally and peaceably*, its declaration of nullification. Sustained by its court and juries, it would calmly and quietly, but successfully, meet every effort of the General Government to enforce its claim of power. The result would be inevitable. Before the judicial tribunal of the country, the state must prevail, unless, indeed, jury trial could be eluded by the refinement of the court, or by some other device; which, however, guarded as it is by the ramparts of the Constitution, would, I hold, be impossible. The attempt to elude, should it be made, would itself be unconstitutional; and, in turn, would be annulled by the sovereign voice of the state. Nor would the right of appeal to the Supreme Court, under the judiciary act, avail the General Government. If taken, it would but end in a new trial, and that in another verdict against the government; but whether it may be taken, would be optional with the state. The court itself has decided that a copy of the record is requisite to review a judgment of a state court, and, if necessary, the state would take the precaution to prevent, by proper enactments, any means of obtaining a copy. But if obtained, what would it avail against the execution of the penal enactments of the state, intended to enforce the declaration of nullification? The judgment of the state court would be pronounced and executed before the possibility of a reversal, and executed, too, without responsibility incurred by anyone. Beaten before the courts, the General Government would be compelled to abandon its unconstitutional pretensions, or resort to force; a resort, the difficulty (I was about to say, the impossibility) of which would very soon fully manifest itself, should folly or madness ever make the attempt.

"In considering this aspect of the controversy, I pass over the fact that the General Government has no right to resort to force against a state — to coerce a sovereign member of the Union — which I trust, I have established beyond all possible doubt. Let it, however, be determined to use force, and the difficulty would be insurmountable, unless, indeed, it be also determined to set aside the Constitution, and to subvert the system of its foundations. Against whom would it be applied? Congress has, it is true, the right to call forth the militia 'to execute the laws and suppress insurrection'; but there would be no law resisted, unless, indeed, it be called resistance for the juries to refuse to find, and the courts to render judgment, in conformity to the wishes of the General Government; no insurrection to suppress; no armed force to reduce; not a sword unsheathed; not a bayonet raised; none, absolutely none, on whom force could be used, except it be on the unarmed citizens engaged peaceably and quietly in their daily occupations.

"No one would be guilty of treason ('levying war against the United States, adhering to their enemies, giving them aid and comfort'), or any other crime made penal by the Constitution or the laws of the United States. To suppose that force could be called in, implies, indeed, a great mistake, both as to the nature of our government and that of the controversy. It would be a legal and constitutional contest — a conflict of moral, and not physical force — a trial of constitutional, not military power, to be decided before the judicial tribunals of the country, and not on the field of battle. In such a contest, there would be no object for force, but those peaceful tribunals — nothing on which it could be employed, but in putting down courts and juries, and preventing the execution of judicial process. Leave these untouched, and all the militia that could be called forth, backed by a regular force of ten times the number of our small, but gallant and patriotic army, could have not the slightest effect on the result of the controversy; but subvert these by an armed body, and you subvert the very foundation of this our free, constitutional, and legal system of government, and rear in its place a military despotism.

"Feeling the force of these difficulties, it is proposed, with the view, I suppose, of disembarrassing the operation, as much as possible, of the troublesome interference of courts and juries, to change the scene of coercion from land to water; as if the government could have one particle more right to coerce a state by water than by land; but, unless I am greatly deceived, the difficulty on that element will not be much less than on the other. The jury trial, at least the local jury trial (the trial by the vicinage), may, indeed, be evaded there, but in its place other, and not much less formidable, obstacles must be encountered. There can be but two modes of coercion resorted to by water-blockade and abolition of the ports of entry of the state, accompanied by penal enactments, authorizing seizures for entering the waters of the state. If the former be attempted, there will be other parties besides the General Government and the State. Blockade is a belligerent right: it presupposes a state of war, and unless there be war (war in due form, as prescribed by the Constitution) the order for blockade would not be respected by other nations or their subjects. Their vessels would proceed directly for the blockaded port, with certain prospects of gain; if seized under the order of blockade, through the claim of indemnity against the General Government; and, if not, by profitable market, without the exaction of duties.

"The other mode, the abolition of the ports of entry of the state, would also have its difficulties. The Constitution provides that '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:' provisions too clear to be eluded even by the force of the construction. There will be another difficulty. If seizures be made in port, or within the distance assigned by the laws of nations as the limits of a state, the trial must be in the state, with all the embarrassments of its courts and juries; while beyond the ports and the distance to which I have referred, it would be difficult to point out any principle by which a foreign vessel, at least, could be seized, except as an incident to the right of blockade, and, of course with all the difficulties belonging to that mode of coercion.

"But there yet remains another, and, I doubt not, insuperable barrier, to be found in the judicial tribunals of the Union, against all the schemes of introducing force, whether by land or water. Though I cannot concur in the opinion of those who regard the Supreme Court as the mediator appointed by the Constitution between the states and the General Government; and though I cannot doubt there is a natural bias on its part towards the powers of the latter, yet I must greatly lower my opinion of that high and important tribunal for intelligence, justice, and attachment to the Constitution, and particularly of that pure and upright magistrate who has so long, and with such distinguished honors to himself and the Union, presided over its deliberations, with all the weight that belongs to an intellect of the first order, united with the most spotless integrity, to believe, for a moment, that an attempt so plainly and manifestly unconstitutional as a resort to force would be in such a contest, could be sustained by the sanction of its authority. In whatever form force may be used, it must present questions for legal adjudication. If in the shape of blockade, the vessels seized under it must be condemned, and thus would be presented the question of prize or no prize, and, with it, the legality of the blockade; if in that of a repeal of the acts establishing ports of entries in the state, the legality of the seizure must be determined, and that would bring up the question of the unconstitutionality of giving a preference to the ports of one state over those of another; and so, if we pass from water to land, we will find every attempt there to substitute force for law must, in like manner, come under the review of the courts of the Union; and the unconstitutionality would be so glaring, that the executive and legislative departments, in their attempt to coerce, should either make an attempt so lawless and desperate, would be without the support of the judicial department. I will not

pursue the question farther, as I hold it perfectly clear that, so long as a state retains its federal relations; so long, in a word, as it continues a member of the Union, the contest between it and the General Government must be before the courts and the juries; and every attempt, in whatever form, whether by land or water, to substitute force as the arbiter in their place, must fail. The unconstitutionality of the attempt would be so open and palpable, that it would be impossible to sustain it.

"There is, indeed, one view, and one only, of the contest in which force could be employed, but that view, as between the parties, would supersede the Constitution itself: the nullification is secession, and would, consequently, place the state, as to the others, in the relation of a foreign state. Such, clearly, would be the effect of secession; but it is equally clear that it would place the state beyond the pale of all her federal relations, and, thereby, all control on the part of the other states over her. She would stand to them simply in the relation of a foreign state, divested of all federal connexion, and having none other between them but those belonging to the laws of nations. Standing thus towards one another, force might, indeed, be employed against a state, but it must be a belligerent force, preceded by a declaration of war, and carried on with all its formalities. Such would be the certain effect of secession; and if nullification be secession — if it be but a different name for the same thing — such, too, must be its effect; which presents the highly important question, Are they, in fact, the same? on the decision of which depends the question whether it be a *peaceable* and *constitutional* remedy, that may be exercised without *terminating* the *federal* relations of the state or *not*. I am aware that there is a considerable and respectable portion of our state, with a very large portion of the Union, constituting, in fact, a great majority, who are of the opinion that they are the same thing, differing only in name, and who, under that impression, denounce it as the most dangerous of all doctrines; and yet, so far from being the same, they are, unless, indeed, I am greatly deceived, not only perfectly distinguishable, but totally dissimilar in their nature, their object, and effect; and that, so far from deserving the denunciation, so properly belonging to the act with which it is confounded, it is, in truth, the highest and most precious of all the rights of the states, and essential to preserve that very Union, for the supposed effect of destroying which it is so bitterly anathematized.

"I shall now proceed to make good my assertion of their *total dissimilarity*.[8] First, they are wholly dissimilar in their nature. *One has*

[8] The italics are in the original.

reference to the parties themselves, and the other to their agents. Secession is a *withdrawal from the Union:* a separation from *partners*, and, as far as depends on the member withdrawing, a *dissolution* of the partnership. It presupposes an association: a union of several states or individuals for a common object. Wherever these exist, secession may; and where they do not, it cannot. Nullification on the contrary, *presupposes the relation of principal and agent:* the one granting a power to be executed, the other, appointed by him with authority to execute it; *and is simply a declaration on the part of the principal, made in due form, that an act of the agent transcending his power is null and void.* It is a right belonging exclusively to the relation between principal and agent, to be found *wherever it exists, and in all its forms*, between several, or an association of principals, and their joint agents, as well as between a single principal and his agent.

"The difference in their object is no less striking than in their name. The object of secession is to *free* the withdrawing member from the *obligation* of the association or union, and is applicable to cases where the object of the association or union *has failed*, either by an abuse of power on the part of *its members*, or other causes. Its *direct and immediate object, as it concerns the withdrawing member, is the dissolution of the association or union*, as far as it is concerned. On the contrary, the object of nullification is to confine the agent within the limits of his powers, by arresting his acts transcending them, *not with the view of destroying the delegated or trust power, but to preserve it, by compelling the agent to fulfil the object for which the agency or trust was created; and is applicable only to cases where the trust or delegated powers are transcended on the part of the agent.* Without the power of secession, an association or union, formed for the common good *of all* the members, might prove ruinous to some, by the abuse of power on the part of the others; and without nullification the agent might, under colour of construction, assume a power never intended to be delegated, or to convert those delegated to objects never intended to be comprehended in the trust, to the ruin of the principal, or, in case of a joint agency, to the ruin of some of the principals. Each has, thus, its appropriate object, but objects in their nature very dissimilar; so much so, that, in case of an association or union, where the powers are delegated to be executed by an agent, the abuse of power, on the part of the *agent*, to the injury of one or more of the members, would not justify secession on their part. The rightful remedy in that case would be nullification. There would be neither right nor pretext to secede: not right, because secession is applicable only to the acts of the members of the association

or union, and not to the act of the agent; nor pretext, because there is another, and equally efficient remedy, short of the dissolution of the association or union, which can only be justified by necessity. Nullification may, indeed, be succeeded by secession. In the case stated, should the other members undertake to grant the power nullified, and should the nature of the power be such as to *defeat the object of the association or union*, at least as far as the member nullifying is concerned, it would then become an abuse of power on the part of the principals, and thus present a case where secession would apply; but in no other could it be justified, except it be for a failure of the association or union to effect the object for which it was created, independent of any abuse of power.

"It now remains to show that their effect is as dissimilar as their nature or object. Nullification leaves the members of the association or union in the condition it found them — subject to all its burdens, and entitled to all its advantages, comprehending the member nullifying as well as the others — its object being, not to destroy, but to preserve, as has been stated. It simply arrests the act of the agent, as far as the principal is concerned, leaving in every other respect the operation of the joint concern as before; secession, on the contrary, destroys, as far as the withdrawing member is concerned, the association or union, and restores him to the relation he occupied toward the other members before the existence of the association or union. He loses the benefit, but is released from the burden and control, and can no longer be dealt with, by his former associates, as one of its members. Such are really the differences between them — differences so marked, that, instead of being identical, as supposed, they form a contrast in all the aspects in which they can be regarded. The application of these remarks to the political association or Union of these twenty-four states and the General Government, their joint agent, is too obvious, after what has been already said, to require any additional illustration, and I will dismiss this part of the subject with a single additional remark. There are many who acknowledge the right of a state to secede, but deny its right to nullify; and yet, it seems impossible to admit the one without admitting the other. They both presuppose the same structure of the government, that is a *Union* of the states, as forming political communities, the same right on the part of the states, as members of the Union, to determine for their citizens the extent of the powers delegated and those reserved, and, of course, to decide whether the Constitution has or has not been violated. The simple difference, then, between those who admit secession and deny nullification, and those who admit both, is, that one acknowledges that the declaration of

a state pronouncing that the Constitution has been violated, and is, therefore, null and void, would be obligatory on her citizens, and would arrest all the acts of the government within the limits of the State; while they deny that a similar declaration, made by the same authority, and in the same manner, that an act of the government has transcended its powers, and that it is, therefore, null and void, would have any obligation; while the other acknowledges the obligation in both cases. The one admits that the declaration of a state assenting to the Constitution bound her citizens, and that her declaration can unbind them; but denies that a similar declaration, as to the extent she has, in fact, bound them, has any obligatory force on them; while the other gives equal force to the declaration in the several cases. The one denies the obligation, where the object is to *preserve the Union in the only way it can be*, by confining the government, formed to execute the trust powers, strictly within their limits, and to the objects for which they were delegated, though they give *full* force where the object is *to destroy the Union itself;* while the other, in giving equal weight to both, *prefers the one because it preserves*, and *rejects the other because it destroys;* and yet the former is *the Union*, and the latter the *disunion party*. And all this strange distinction originates, as far as I can judge, in attributing to nullification what belongs exclusively to secession. The difficulty as to the former, it seems, is, that a state cannot be in and out of the Union at the same time. This is, indeed, true, if applied to secession — the throwing off *the authority of the Union itself*. To nullify the Constitution, if I may be pardoned the solecism, would, indeed, be tantamount to disunion; and, as applied to such an act, it would be true that a state could not be in and out of the Union at the same time; but the act would be secession. But to apply it to nullification, properly understood, the object of which, instead of resisting or diminishing the powers of the Union, is to preserve them as they are, neither increased nor diminished, and thereby the Union itself (for the Union may be as effectually destroyed by increasing as by diminishing its powers — by consolidation, as by disunion itself), would be, I would say, had I not great respect for many who do thus apply it, egregious trifling with a grave and deeply-important constitutional subject."[9]

All who have been convinced by the arguments against the right of secession will have little difficulty in perceiving the weakness

[9] Mr. Calhoun's letter to General Hamilton on the subject of State Interposition, dated Fort Hill, Aug. 28, 1832. Calhoun's Speeches, 1st ed., 1843, pp. 51–56.

of the position of Calhoun. Even those who claim that secession is legal find it hard to admit his doctrine of nullification.[10] For if the acts of the Union could at any time, in peace or war, be paralyzed by the objections of a single State, the Constitution would be no stronger than a rope of sand, and the work of the Federal Convention would have been indeed in vain.

If that instrument were merely a treaty which formed a league, not only is there nothing in its context, but every principle of law, municipal and international, forbids that a member of the Confederacy should retain its membership and enjoy its benefits while at liberty to violate its conditions, which require that the citizens and courts of every State shall obey the Federal laws and give to the Supreme Court of the United States the right of ultimate determination as to the constitutionality of acts of Congress.[11] Refusals by the different States to comply with the resolutions of Congress had been common under the Confederation, and for that purpose the Constitution was so shaped that the laws of the United States should operate directly upon the citizens of the States, with penalties upon them for infractions. This idea was expressed constantly in the State as well as the Federal Convention.[12] The

[10] The doctrine is expressly repudiated by B. J. Sage in The Republic of Republics, 4th ed., p. 260: "But a State or its convention has no right to withdraw some, and leave the rest of the powers; or obstruct the execution of a part; or annul a law, while adhering to the Union; for the Constitution, being a compact, is not to be partly suspended and partly executed, by one of the parties." Jefferson Davis also said, in his farewell speech in the Senate (The Rise and Fall of the Confederate Government, vol. i, pp. 221, 222): "I hope none who hear me will confound this expression of mine with the advocacy of the right of a State to remain in the Union, and to disregard its constitutional obligations by the nullification of the law. Such is not my theory. Nullification and secession, so often confounded, are indeed antagonistic principles." And again, speaking of Judge Sharkey: "He had been an advocate of nullification — a doctrine to which I had never assented, and which had been at one time the main issue in Mississippi politics." Ibid., vol. i, p. 231.

[11] The arguments against the constitutionality of nullification may be found in Webster's Reply to Hayne, Jackson's Proclamation, and Dane's Abridgement, vol. ix, Appendix.

[12] In the Connecticut convention, Oliver Ellsworth, afterwards Chief Justice of the United States, said: "How contrary, then, to republican principles, how humiliating is our present situation! A single State can rise up and put a veto upon the most important public measures. We have seen this actually take place. A single State has controlled the general voice of the Union; a minority, a very small minority, has governed us. So far is

power of the Supreme Court of the United States to determine finally as to the constitutionality of a State statute or act of Congress had been intentionally granted by the Convention; and its exercise had been repeated.[13] In one case such a decision had been enforced with the approval of President Madison against the militia of a State, called out to support an act of the State legislature directing resistance to the judgment; the State militia-men had been tried and convicted for their obedience to the State Statute;[14] and when the State legislature recommended a constitutional amendment to provide an umpire for future conflicts between State and Federal authorities, no other State concurred, and the legislature of Virginia unanimously voted: —

"That a tribunal is already provided by the Constitution of the United States, to wit the Supreme Court, more eminently qualified, from their habits and duties, from the mode of their selection, and from the tenure of office, to decide the disputes aforesaid in an enlightened and impartial manner than any other tribunal that could be created."[15]

this from being consistent with republican principles, that it is, in effect, the worst species of monarchy. Hence we see how necessary for the Union is the coercive principle. No man pretends the contrary; we all see and feel this necessity. The only question is, Shall it be a coercion of law, or a coercion of arms?" "I am for coercion by law — that coercion which acts only upon delinquent individuals." "This legal coercion singles out the guilty individual, and punishes him for breaking the laws of the Union." Elliot's Debates, 2d ed., vol. v, p. 197. In the same speech Ellsworth speaks of the power of "the national judges to declare void an act of Congress not authorized by the Constitution." Ibid., p. 196. See also the authorities cited *supra*, § 17.

[13] U. S. *v.* Peters, 5 Cranch, p. 115, A. D. 1808; Martin *v.* Hunter's Lessee, 1 Wheaton, p. 304, A. D. 1816; Cohens *v.* Virginia, 6 Wheaton, p. 304, A. D. 1821. The history of this subject will be discussed subsequently in the chapter on the Judicial Power.

[14] This was the famous case of the sloop Active. Journals of Congress, vol. v, p. 372; Ross et al. *v.* Rittenhouse, 2 Dallas, p. 160, A.D. 1792; U. S. *v.* Peters, 5 Cranch, p. 115, A.D. 1808; Trial of General Bright by Richard Peters; The whole Proceedings in the case of Olmstead *v.* Rittenhouse, Philadelphia, 1809; Olmsted's Case, Brightby (Pa.), 1; The case of the Sloop Active by Hampton L. Carson, The Green Bag, vol. vii, p. 17; Carson, History of the Supreme Court of the United States, vol. i, p. 213.

[15] Extract from the journal of the Senate of the Commonwealth of Virginia, begun and held at the Capitol in the City of Richmond, the fourth day of December, 1809: —

"Friday January 26, 1810;

"Mr. Nelson reported from the committee to whom were committed the preamble and resolutions on the amendment proposed by the legisla-

The doctrine of nullification can find no support in the language of the Constitution. It is in direct conflict with the spirit and

ture of Pennsylvania, to the constitution of the United States, by the appointment of an impartial tribunal to decide disputes between the state and federal judiciary, that the committee had, according to order, taken the said preambles and resolutions under their consideration, and directed him to report them without any amendment. And on this question being put thereupon, the same were agreed to unanimously, by the House, as follows:

"The committee to whom was referred the communication of the Governor of Pennsylvania, covering certain resolutions of the legislature of that State, proposing an amendment to the constitution of the United States, by the appointment of an impartial tribunal to decide disputes between the State and federal judiciary, have had the same under their consideration, and are of opinion that a tribunal is already provided by the constitution of the United States, to wit: The Supreme Court, more eminently qualified, from their habits and duties, from the mode of their selection, and from the tenure of their offices, to decide the disputes aforesaid in an enlightened and impartial manner, than any other tribunal which could be created. The members of the Supreme Court are selected from those in the United States, who are most celebrated for virtue and legal learning, not at the will of a single individual, but by the concurrent wishes of the President and Senate of the United States; they will therefore have no local prejudices and partialities. The duties they have to perform lead them necessarily to the most enlarged and accurate acquaintance with the jurisdiction of the federal, and several State courts, together with the admirable symmetry of our government. The tenure of their offices enables them to pronounce the sound and correct opinions they may have formed, without fear, favor, or partiality. The amendment to the constitution proposed by Pennsylvania, seems to be founded upon the idea that the federal judiciary will, from a lust of power, enlarge their jurisdiction, to the total annihilation of the jurisdiction of the state courts; that they will exercise their will instead of the law and the constitution. This argument, if it proves anything, would operate more strongly against the tribunal proposed to be created, which promises so little, than against the Supreme Court, which for the reasons given before, have everything connected with their appointment calculated to insure confidence. What security have we, were the proposed amendment adopted, that this tribunal would not substitute their will and their pleasure in place of the law? The judiciary are the weakest of the three departments of government, and least dangerous to the political rights of the constitution. They hold neither the purse nor the sword; and even to enforce their own judgments and decrees, must ultimately depend upon the executive arm. Should the federal judiciary, however, unmindful of their weakness, unmindful of their duty which they owe to themselves and their country, become corrupt and transcend the limits of their jurisdiction, would the proposed amendment oppose even a probable barrier to such an improbable state of things? The creation of a tribunal such as is proposed by Pennsylvania, so far as we are enabled to form an idea of it, from the description given in the res-

letter as well as the expressed intentions of the framers of that instrument and the precedents of half a century before its promulgation. Had it been recognized as a part of our system of government, it would have been as fatal as was the *liberum veto* in the Polish Diet; the United States would have long since suffered a partition; and the cause of civil liberty throughout the world would have met with a reverse from which it could not have recovered within the century. But although it is hard to believe that a mind so acute as that of Calhoun could have been the dupe of its own sophistry, no lawyer can fail to admire the ingenuity with which was framed his scheme for resistance to the tariff, and he well earned his reputation as a statesman by the practical result which he obtained.

§ 34. History of Nullification.

The Tariff of Abominations of 1828 [1] bore with especial severity upon the South, where there were no manufacturers who desired

olutions of the legislature of that state, would, in the opinion of your committee, tend rather to invite than prevent a collision between the federal and state courts. It might also become in process of time a serious and dangerous embarrassment to the operations of the general government.

"Resolved, therefore, that the legislature of this state do disapprove of the amendment to the constitution of the United States proposed by the legislature of Pennsylvania.

"Resolved also, that his Excellency the Governor be, and is hereby requested to transmit forthwith, a copy of the foregoing preamble and resolutions to each of the senators and representatives of this state in Congress and to the executive of the several states in the Union and request that the same be laid before the legislatures thereof."

Extract from the journal of the House of Delegates of the Commonwealth of Virginia: —

"Tuesday Jan 23, 1810;

"The House according to the order of the day, resolved itself into a committee of the whole house on the state of the commonwealth and after some time spent therein Mr. Speaker resumed the chair and Mr. Robert Stanard reported that the committee had according to order, had under consideration the preamble and resolutions of the select committee to whom were referred that part of the Governor's communication which relates to the amendment proposed to the constitution of the United States, by the legislature of Pennsylvania, had gone through the same, and directed him to report them to the House without amendment; which he handed in at the clerk's table, and the question being put on agreeing to the said preamble and resolutions, they were agreed to by the House unanimously." Pinckney's argument in Cohens *v.* Virginia, 6 Wheaton, 264, 358, note.

§ 34. [1] Act of May 19, 1828, 4 St. at L., p. 240.

protection. While it was before Congress, the legislatures of several Southern States passed resolutions declaring the unconstitutionality of a tariff for purposes of protection; and at the same time attacking appropriations for internal improvements and the American Colonization Society.[2] At a public dinner in the autumn of 1827, Colonel Hamilton of South Carolina, afterwards Governor of the State, proposed nullification as a remedy.[3] In the winter of 1828 and 1829, after the new tariff was in force, the Southern States again passed similar resolutions. South Carolina sent to the Senate its famous "Exposition and Protest" against the tariff.[4] The legislature of Georgia resolved that the State had the unquestionable right "to refuse obedience to any measure of the General Government manifestly against, and in violation of, the Constitution."[5] Meanwhile, threats of nullification were continuous, and the doctrine was maintained and combatted during December, 1829, in the great debate between Webster and Hayne.

On April 13th, 1830, Jefferson's birthday was celebrated by a subscription dinner at Washington, with the President, Vice-President and Cabinet among the guests. The twenty-four regular toasts savored of the new doctrine of nullification. At their conclusion, Jackson was called upon for a volunteer, and gave utterance to his famous sentiment: "Our Federal Union; it must be preserved." The Vice-President, Calhoun, followed with another: —

[2] Sumner's Jackson, pp. 215, 216; 3 American Annual Reg., p. 64; Georgia Laws of 1827, pp. 194–214; North Carolina, South Carolina, and Alabama also resolved against the constitutionality of the tariff. According to Professor Sumner (p. 216), who cites as his authority 3 American Annual Register, 64, Georgia affirmed the right of secession. The resolutions, however, nowhere expressly affirm the right of secession, although a threat of secession is intimated.

[3] Sumner's Jackson, p. 212.

[4] These were drafted by Calhoun, and adopted with some alterations. The original draft of the "public exposition of our wrongs and the remedies within our power to be communicated to our sister States," and the resolutions containing the protest as finally adopted, may be found in Calhoun's Works, vol. vi, pp. 1–59.

The Virginia legislature, on Feb. 24, 1829, resolved, amongst other things: "That the Constitution of the United States, being a Federative compact between the sovereign States, in construing which no common arbiter is known, each State has the right to construe the compact for itself." Acts of Virginia for 1828–1829, p. 169. See Dane's Abridgement, vol. ix, p. 589, for a contemporary answer to this doctrine. Sumner's Jackson, pp. 215, 216, contains a general account of these resolutions. See also, S. C. Laws of 1827-1828, Appendix, pp. 69-78; 1829, Appendix, pp. 71–90.

[5] Georgia Laws of 1828, p. 175.

"The Union: next to our Liberty the most dear: may we all remember that it can only be preserved by respecting the rights of the States, and distributing equally the benefit and burthen of the Union." [6]

The Secretary of State, Van Buren, then gave: —

"Mutual forbearance and reciprocal concession: through their tendency the Union was established. The patriotic spirit from which they emanated will forever sustain it." [7]

In November of the same year,[8] a bill to call a State Convention failed to obtain the necessary two-thirds vote in the legislature of South Carolina.[9] The followers of Crawford, in Georgia, had rallied and prevented any attempt at nullification there.[10] During the year 1831, an attempt was made in the United States District Court of South Carolina to test the constitutionality of the tariff by a refusal to pay duty bonds, and a plea of no consideration; but the court refused to hear evidence on the point, and the scheme failed.[11] Meanwhile, threats of nullification continued from South Carolina. Jackson, in a letter to a committee of citizens of Charleston declining an invitation to attend the Fourth of July celebration there, intimated that force would be applied to collect the obnoxious duties.[12] Calhoun followed in an address "stating his opinion of the relation which the States and general government bear to each other." [13] The twenty-second Congress met December 5th, and an attempt to revise the tariff immediately began. Twelve days later the legislature of South Carolina passed an act suspending the act for the election of members of Congress and directing the managers of the next general election not to open polls for representatives in Congress.[14] The new tariff, which was signed July 14th, 1832, but was not to take effect till the following March, modified some of the abuses in the act of 1828, but still maintained the protective system and the consequent injury to the Southern States. The day before its signature a majority of the South Carolina delegation issued a manifesto

[6] Benton's Thirty Years' View, vol. i, p. 148.

[7] Shepard's Life of Martin Van Buren, p. 161.

[8] Nov. 22, 1830.

[9] Sumner's Jackson, p. 219.

[10] Ibid., p. 216.

[11] Ibid., pp. 219, 220; 7 American Annual Register, p. 34.

[12] Sumner's Jackson, p. 220.

[13] This is quoted *supra*, § 33.

[14] Dec. 17, 1831; Laws of 1831, ch. 821, repealed Dec. 20, 1832; Laws of 1832, ch. 18.

announcing that since Congress had now made the protective system permanent, and all hope of redress from that body was irrecoverably gone, the legislative power of South Carolina must determine whether "the rights and liberties which you received as a precious inheritance from an illustrious ancestry" should be tamely surrendered without a struggle.[15] The nullifiers carried the legislature by a small majority. Hayne resigned his seat in the Senate, where, in the opinion of his constituents, he had been the victor in his conflict with Webster, and sacrificed a brilliant political future, in order to lead as governor the proceedings for nullification. Calhoun resigned the Vice-Presidency, and was chosen Senator in the place of Hayne. October 28th, an act was passed calling a convention of the people of the State: —

"at Columbia on the third Monday in November next then and there to take into consideration the several acts of the Congress of the United States, imposing duties on foreign imports, for the protection of domestic manufacturers, or for other unauthorized objects, to determine on the character thereof, and to devise the means of redress; and further, in like manner to take into consideration such acts of the said Congress laying duties on imports as may be passed in amendment of or substitution for the act or acts aforesaid; and also, all other laws and acts of the government of the United States which shall be passed or done for the purpose of more effectually executing and enforcing the same."[16]

As the Federal Constitution had been ratified by a Convention of the people, it was considered that the State should act in the same manner when it nullified the acts of the national government.[17] The Convention met and, on November 24th, adopted the Ordinance of Nullification. In that, it was declared and ordained by the people of the State of South Carolina that the several acts of Congress purporting to be laws for the imposition of duties and imposts on the importation of foreign commodities were unauthorized by the Constitution of the United States, —

"And violate the true meaning and intent thereof and are null, void, and no law, nor binding upon this State, its officers or citizens; and

[15] 7 American Annual Register, p. 44.

[16] Act of Oct. 28, 1832, Appendix to Laws of South Carolina for 1834.

[17] *Supra*, § 19, p. 95.

all promises, contracts, and obligations, made or entered into, or to be made or entered into, with purpose to secure the duties imposed by said acts, and all judicial proceedings which shall be hereafter had in affirmance thereof, are and shall be held utterly null and void."

It was further ordained that —

"It shall not be lawful for any of the constituted authorities, whether of this State or of the United States, to enforce the payment of duties imposed by the said acts within the limits of this State."

That it was the duty of the legislature "to adopt such measures and pass such acts as may be necessary to give full effect to this ordinance, and to prevent the enforcement and arrest the operation of the said acts and parts of acts of the Congress of the United States within the limits of this State, from and after the first day of February next."

"That in no case of law or equity, decided in the courts of this State, wherein shall be drawn in question the authority of this ordinance, or the validity of such act or acts of the legislature as may be passed for the purpose of giving effect thereto, or the validity of the aforesaid acts of Congress, imposing duties, shall any appeal be taken or allowed to the Supreme Court of the United States, nor shall any copy of the record be permitted or allowed for that purpose; and if any such appeal shall be attempted to be taken, the courts of this State shall proceed to execute and enforce their judgments according to the laws and usages of the State, without reference to such attempted appeal, and the person or persons attempting to take such appeal may be dealt with as for a contempt of the Court."

"That all persons now holding any office of honor, profit, or trust, civil or military, under this State (members of the legislature excepted), shall within such time, and in such manner as the legislature shall prescribe, take an oath well and truly to obey, execute and enforce this ordinance, and such act or acts of the legislature as may be passed in pursuance thereof, according to the true intent and meaning of the same; and on the neglect or omission of any such person or persons so to do, his or their office or offices shall be forthwith vacated, and shall be filled up as if such person or persons were dead or had resigned; and no person hereafter elected to any office of honor, profit, or trust, civil or military (members of the legislature excepted), shall, until the legislature shall otherwise provide and direct, enter on the execution of his office, or be in any respect competent to discharge the duties thereof, until he shall, in like manner, have taken a similar oath;

and no jurors shall be empanelled in any of the courts of this State, in any cause in which shall be in question this ordinance, or any act of the legislature passed in pursuance thereof, unless he shall first, in addition to the usual oath, have taken an oath that he will well and truly obey, execute, and enforce this ordinance, and such act or acts of the legislature as may be passed to carry the same into operation and effect, according to the true intent and meaning thereof.

"And we, the people of South Carolina, to the end that it may be lawfully understood by the government of the United States, and the people of the co-States, that we are determined to maintain this our ordinance and declaration, at every hazard, do further declare that we will not submit to the application of force on the part of the federal government, to reduce this State to obedience; but that we will consider the passage, by Congress, of any act authorizing the employment of a military or naval force against the State of South Carolina, her constitutional authorities or citizens; or any act abolishing or closing the ports of this State, or any of them, or otherwise obstructing the free ingress and egress of vessels to and from the said ports, or any other act on the part of the federal government, to coerce the State, shut up her ports, destroy or harass her commerce, or to enforce the acts hereby declared to be null and void, otherwise than through the civil tribunals of the country, as inconsistent with the longer continuance of South Carolina in the Union; and that the people of this State will henceforth hold themselves absolved from all further obligation to maintain or preserve their political connection with the people of the other States; and will forthwith proceed to organize a separate government, and do all other acts and things which sovereign and independent States may of right do." [18]

The legislature reassembled, and on December 20th, 1832, repealed the act suspending the election of members of Congress,[19] and passed three acts to carry into effect the Ordinance of Nullification. One of these authorized the governor to resist the enforcement of the tariff act, and for that purpose to order into service the whole military force of the State, to accept the services of volunteers, and to purchase ten thousand stand of small arms. He was further authorized to call out the militia, —

[18] State Papers on Nullification, pp. 28–31. The ordinance is printed in full in the appendix to this chapter, *infra*.

[19] S. C. Laws of 1832, ch. xviii. See note 14, *supra*.

"in case of any overt act of coercion or intent on the part of the government of the United States, or any officer thereof, to commit such an act manifested by an unusual assemblage of naval or military force in or near the State, or the occurrence of any circumstances indicating the probability that armed force is about to be employed against this State." [20]

The form of the oath directed by the Ordinance of Nullification was formulated in another statute as follows: —

"I do solemnly swear (or affirm) that I will well and truly obey, execute and enforce the Ordinance to nullify certain acts of the Congress of the United States, purporting to be laws laying duties and imposts upon the importation of foreign commodities, passed in Convention of this State, at Columbia, on the twenty-fourth day of November, in the year of our Lord, One thousand eight hundred and thirty-two, and all such Act or Acts of the Legislature as may be passed in pursuance thereof, according to the true intent and meaning of the same; so help me God." [21]

The most important act, however, was that regulating the action of the State courts and officers under the Nullification Ordinance, which was drawn by a thoroughly equipped lawyer with great ingenuity, and, as said at the time, "legislated the Federal government out of the State of South Carolina." [22] The consignee of imports seized and detained for the non-payment of duties exacted under the acts affected by the ordinance, was given the right to a writ of replevin, and in case of disobedience to the writ by the officer of the United States in possession, the writ of *capias in withernam*, authorizing the sheriff to distrain the latter's goods; and similar process in case of a reseizure. Suits for the recovery of money had and received to the plaintiff's use, in order to recover duties which had been paid; and writs of habeas corpus in case of arrest under process of a Federal Court for acts in violation of the tariff laws were also authorized. Sales under orders or judgments of the Federal Courts in proceeding under these acts of Congress were declared null and void. Clerks and other public officers were forbidden to furnish copies of records in cases where the validity of the ordi-

[20] S. C. Laws of 1832, ch. v.

[21] Act of Dec. 20, 1832; S. C. Laws of 1832, ch. iv.

[22] Von Holst's History, vol. i, p. 478, quoting Grundy.

nance was drawn in question, under penalty of punishment by imprisonment for a year and a fine of a thousand dollars. Higher penalties were imposed for the removal of goods to prevent their replevy under the act, resistance to the writ and attempts at recapture; and finally the keepers of State jails were forbidden to receive persons arrested for disobedience to the tariff laws, and they and all persons who permitted buildings to serve as jails for such purpose were subjected to the same penalties as clerks who should furnish copies of the obnoxious records.[23] At that time the laws of the United States did not authorize the removal to the Federal courts of such suits, and the decisions of the State courts could only be reviewed upon writ of error by the Supreme Court of the United States. The section forbidding clerks to furnish copies of records in cases where the validity of the ordinance was drawn in question was intended to prevent the operation of such writs of error. Then, as now, the United States had no prisons of its own within the States, and was accustomed to use, by permission of the States, State jails and prisons to confine Federal prisoners.

Meanwhile, on December 10, Jackson issued his famous proclamation to the people of South Carolina.[24]

The President ordered General Scott to Charleston, gathered troops within a convenient distance, and despatched two men-of-war to the same point.[25] Governor Hayne issued a proclamation in

[23] S. C. Laws of 1832, ch. iii.

[24] This was roughly drafted by Jackson, revised and expanded by Livingston, who was then Secretary of State. Sumner's Jackson, p. 282. Hunt's Livingston, p. 373. Tyler's Taney, p. 188.

Jackson subsequently feared lest some of its doctrines concerning the relations between the Federal Government and the States might be inconsistent with his earlier utterances, and consequently modified them in an inspired article published shortly afterwards by Francis P. Blair in the Washington Globe, and reprinted in Stephens, Constitutional View of the War between the States (vol. i, pp. 462–469), in which it was said that he adhered to the principles expressed in the Virginia Resolutions. Tyler's Taney, p. 188.

Taney left in his papers a memorandum as follows: "I was at Annapolis attending court when General Jackson's proclamation at the time the South Carolina nullification was prepared, and never saw it until it was in print, and certainly should have objected to some of the principles stated in it if I had been in Washington. R. B. Taney, July, 1861." Tyler's Taney, pp. 188–189.

[25] Sumner's Jackson, p. 282.

answer to that of Jackson.[26] The militia were drilled and over twenty thousand volunteers mustered in South Carolina, and the

[26] "On the 27th of November, the legislature assembled at Columbia, and, on their meeting, the governor laid before them the ordinance of the convention. In his message on that occasion, he acquaints them that 'this ordinance has thus become a part of the fundamental law of South Carolina'; that 'the die has been at last cast, and South Carolina has at length appealed to her ulterior sovereignty, as a member of this confederacy, and has planted herself on her reserved rights. The rightful exercise of this power is not a question which we shall any longer argue. It is sufficient that she has willed it, and that the act is done; nor is its strict compatibility with our constitutional obligation to all laws passed by the general government, within the authorized grants of power, to be drawn in question, when this interposition is exerted in a case in which the compact has been palpably, deliberately, and dangerously violated. That it brings up a conjuncture of deep and momentous interest, is neither to be concealed nor denied. This crisis presents a class of duties which is referable to yourselves. You have been commanded by the people, in their highest sovereignty, to take care that, within the limits of this state, their will shall be obeyed.' 'The measure of legislation,' he says, 'which you have to employ at this crisis, is the precise amount of such enactments as may be necessary to render it utterly impossible to collect, within our limits, the duties imposed by the protective tariffs thus nullified.' He proceeds: 'That you should arm every citizen with a civil process, by which he may claim, if he pleases, a restitution of his goods, seized under existing imposts, on his giving security to abide the issue of a suit at law, and, at the same time, define what shall constitute treason against the state, and, by a bill of pains and penalties, compel obedience and punish disobedience to your own laws, are points too obvious to require any discussion. In one word, you must survey the whole ground. You must look to and provide for all possible contingencies. In your own limits, your own courts of judicature must not only be supreme, but you must look to the ultimate issue of any conflict of jurisdiction and power between them and the United States.'

"The governor also asks for power to grant clearances, in violation of the laws of the Union; and to prepare for the alternative which must happen, unless the United States shall passively surrender their authority, and the executive, disregarding his oath, refrain from executing the laws of the Union, he recommends a thorough revision of the militia system, and that the governor, 'be authorized to accept, for the defence of Charleston and its dependencies, the services of two thousand volunteers, either by companies or files'; and that they be formed into a legionary brigade, consisting of infantry, riflemen, cavalry, field, and heavy artillery; and that they be 'armed and equipped, from the public arsenals, completely for the field; and that appropriations be made for supplying all deficiencies in our munitions of war.' In addition to these volunteer drafts, he recommends that the governor be authorized to accept 'the services of ten thousand volunteers from the other divisions of the state, to be organized and arranged in regiments and brigades; the officers to be selected by the commander-in-

State maintained a bold front as if actually resolved to plunge into civil war.[27] Some curiosity was expressed upon Calhoun's return to the Senate as to whether he would take the oath to support the Constitution of the United States.[28] He did this with perfect calmness and with entire consistency. For according to his theory of the Constitution, the proceedings in South Carolina were perfectly lawful. Jackson sent in a message reciting the proceedings, stating the insufficiency of the present statutes to deal with the subject, and asking for further powers. He also privately sent word to Calhoun that he would hang him higher than Haman if nullification were not abandoned.[29] Calhoun's enemies said that he was cowed and driven to abandon his position. In truth, however, he continued his action with perfect coolness and came out the victor. Threats by words and action of a precipitation of an armed conflict between the State and the United States continued in South Carolina under the direction of Hayne during January, 1832.[30] A reduction of the tariff as a compromise was adjusted after a conference between Calhoun and Clay.[31] Pending its consideration, the nullifiers at a public

chief; and that his whole force be called the state guard.'" Jackson's Nullification Message, January 16, 1833.

[27] Governor Hayne's Message to the South Carolina Legislature, Nov. 26, 1833. Legislative Proceedings of 1833, p. 2.

[28] Von Holst, Calhoun, p. 104.

[29] Benton's Thirty Years' View, ch. lxxxv, vol. i, p. 342.

[30] Sumner's Jackson, p. 289, citing American Annual Register, vol. viii, p. 290.

[31] The secret history of the compromise of 1833 is told by Benton in his Thirty Years' View, ch. lxxxv, vol. i, pp. 342-344. He thus describes the subsequent altercation between the two statesmen, in which each claims to have had the other at a disadvantage:—

"Mr. Calhoun declared that he had Mr. Clay down — had him on his back — was his master. Mr. Clay retorted: He my master! I would not own him for the meanest of my slaves. Of course, there were calls to order about that time; but the question of mastery, and the causes which produced the passage of the act, were still points of contestation between them, and came up for altercation in other forms. Mr. Calhoun claimed a controling influence, for the military attitude of South Carolina, and its intimidating effect upon the federal government. Mr. Clay ridiculed this idea of intimidation, and said the little boys that muster in the streets with their tiny wooden swords, had as well pretend to terrify the grand army of Bonaparte: and afterwards said he would tell how it happened, which was thus: His friend from Delaware (Mr. John M. Clayton), said to him one day — these South Carolinians act very badly, but they are good fellows, and

meeting postponed action under the ordinance until after the

it is a pity to let Jackson hang them. This was after Mr. Clay had brought in his bill, and while it lingered without the least apparent chance of passing — paralyzed by the vehement opposition of the manufacturers: and he urged Mr. Clay to take a new move with his bill — to get it referred to a committee — and by them got into a shape in which it could pass. Mr. Clay did so — had the reference made — and a committee appointed suitable for the measure — some of strong will, and earnest for the bill, and some of gentle temperament, inclined to easy measures on hard occasions."

Calhoun yielded but one important principle during the whole controversy; namely, his vote in favor of the assessment of ad valorem duties upon a "home valuation," which he had previously declared to be unconstitutional. "After the committee had been appointed, Mr. Clayton assembled the manufacturers, for without their consent could nothing be done; and in the meeting with them it was resolved to pass the bill, provided the Southern Senators, including the nullifiers, should vote for the amendments which should be proposed, and for the passage of the bill itself — the amendments being the same afterwards offered in the Senate by Mr. Clay, and especially the home valuation feature." "His reasons for making the nullification vote a *sine qua non* both on the amendments and on the bill, and for them all, separately and collectively, was to cut them off from pleading their unconstitutionality after they were passed; and to make the authors of disturbance and armed resistance, after resistance, parties upon the record to the measures, and every part of the measures, which were to pacify them." "Being inexorable to his claims, Mr. Clay and Mr. Calhoun agreed to the amendments, and all voted for them one by one, as Mr. Clay offered them, until it came to the last — that revolting measure of the home valuation. As soon as it was proposed Mr. Calhoun and his friends met it with violent opposition, declaring it to be unconstitutional, and an insurmountable obstacle to their votes for the bill if put into it. It was then late in the day, and the last day but one of the session, and Mr. Clayton found himself in the predicament which required the execution of his threat. He executed it, and moved to lay it on the table, with the declaration that it was to lie there. Mr. Clay went to him and besought him to withdraw the motion; but in vain. He remained inflexible; and the bill then appeared to be dead. In this extremity, the Calhoun wing retired to the colonnade behind the Vice-President's chair, and held a brief consultation among themselves; and presently, Mr. Bibb, of Kentucky, came out, and went to Mr. Clayton and asked him to withdraw his motion to give him time to consider the amendment. Seeing this sign of yielding, Mr. Clayton withdrew his motion — to be renewed if the amendment was not voted for. A friend of the parties immediately moved an adjournment, which was carried; and that night's reflections brought them to the conclusion that the amendment must be passed; but still with the belief, that, there being enough to pass it without him, Mr. Calhoun should be spared the humiliation of appearing on the record in its favor. This was told to Mr. Clayton, who declared it to be impossible — that Mr. Calhoun's vote was indispensable, as nothing would be considered secured by the passage of the bill

adjournment of Congress.[32] Meanwhile, the other State legislatures passed resolutions, most of which were against nullification, some also against the tariff; and Virginia offered to mediate between the United States and South Carolina.[33]

Webster was opposed to compromise, saying: "It would be yielding great principles to faction; and that the time had come to test the strength of the Constitution and the government."[34] He was consequently consulted no further upon the subject, and voted against the passage of the tariff bill.[35] John Quincy Adams expressed the same opinion.

Pending the negotiations for a compromise, the bill known as the Force Bill was drawn and introduced in order to meet the hostile legislation of South Carolina. It contained certain beneficial amendments to the judiciary act, which have since, with a few verbal changes, remained upon the statute-book. The jurisdiction of the Circuit Courts of the United States was extended to all cases arising under the revenue-laws for which no provision by law had previously been made. They were authorized to give

unless his vote appeared for every amendment separately, and for the whole bill collectively. When the Senate met, and the bill was taken up, it was still unknown what he would do; but his friends fell in, one after the other, yielding their objections upon different grounds, and giving their assent to this most flagrant instance (and that a new one), of that protective legislation, against which they were then raising troops in South Carolina! and limiting a day, and that a short one, on which she was to be, *ipso facto*, a seceder from the Union. Mr. Calhoun remained to the last, and only rose when the vote was ready to be taken, and prefaced a few remarks with the very notable declaration that he had then to 'determine' which way he would vote. He then declared in favor of the amendment, but upon conditions which he desired the reporters to note; and which being futile in themselves, only showed the desperation of his condition, and the state of impossibility to which he was reduced. Several senators let him know immediately the futility of his conditions; and without saying more, he voted on ayes and noes for the amendment; and afterwards for the whole bill. And this concluding scene appears quite correctly reported in the authentic debates." Benton's Thirty Years' View, ch. lxxxv, vol. 1, pp. 343–344.

[32] See letter of Gov. Robert Y. Hayne to B. W. Leigh, Governor, Commissioner of Virginia. State Papers on Nullification, p. 333.

[33] State Papers on Nullification, *passim*. The proceedings between B. W. Leigh, the Commissioner from Virginia, and the South Carolina Convention, are set forth, ibid., pp. 322–337, 347, 355–358.

[34] Benton's Thirty Years' View, vol. i, p. 342.

[35] Ibid.; Curtis' Webster, vol. i, p. 434.

relief in a suit for damages to all persons injured in person or property for any act done under any law of the United States for the collection of duties on imports. Authority was given to remove into the Circuit Courts of the United States all suits in State courts on account of acts done under color of the revenue laws of the United States. Writs of certiorari were authorized to compel the clerks of the State courts to furnish copies of the records in suits thus removed; and writs of habeas corpus *cum causa*, to compel the delivery to the United States marshal of those arrested under State process in such cases. Where no copies of the record of the State court could be obtained from the clerk, it was provided that the record might be supplied by affidavit or otherwise, and the plaintiff might be compelled to plead *de novo*. The Federal judges were authorized to grant a writ of habeas corpus to release prisoners confined under State process for obedience to the Federal statute; and marshals, where the State jails were not allowed to be used for the imprisonment of persons arrested under laws of the United States, were permitted to use other places of confinement. To meet the special case, the act contained two sections which by its terms were only to last until the end of the next session of Congress. These authorized the President, "whenever, by reason of unlawful obstruction, combination or assemblages of persons," it became impracticable, in his judgment, to execute the revenue laws and collect import duties in the usual way, to change the location of the custom-house to to another place or to a vessel within the port, and to use the army and navy to resist any attempt to remove the cargoes except under process of a Federal court; and also on the official certificate by State authorities or the Federal judge, that there was obstruction to the execution of the laws of the United States in any district, to use the army and navy to suppress the insurrection and compel obedience to the laws which were resisted.[36] Pending the consideration of these bills, Calhoun introduced into the Senate his resolutions concerning the nature of the Constitution of the United States, which were the occasion of the famous debate between him and Webster to which reference has previously been

[36] Act of March 2, 1833, U. S. St. at L., ch. lv, pp. 632-634.

made.[37] On March 2d, 1833, the President signed the bill for the compromise tariff,[38] and the enforcement bill.

March 11th, the Convention reassembled in South Carolina; repealed the Ordinance of Nullification on account of the passage of the new tariff; and on the 18th, went through the form of nullifying the enforcement act, — a perfectly safe proceeding, since obedience to the tariff prevented any test of its validity.[39] A year later, the Supreme Court of South Carolina, by a vote of two to one, held that the requirement of an oath of allegiance to the State ignoring the Constitution of the United States was a violation of the State Constitution, which forbade new qualifications for office. One of the judges held that it was also a violation of the Constitution of the United States. The dissenting judge held the act imposing the oath valid, and in his opinion maintained the rights of nullification and secession.[40] The State Constitution was subsequently amended so as to require that public officers should swear allegiance to both the State and the United States. The controversy terminated. Each side claimed a victory. Calhoun's policy had been successful, and the result encouraged his successors when they put to the test the doctrine of the right of secession.

§ 35. Constitutional Aspects of Slavery.[1]

The Constitution secured the South against discriminating taxes upon slaves.[2] It gave Congress no power to interfere with slavery within the different States, except possibly in time of war. It also ordered the return of slaves who had escaped into a free State.[3] About these points there could be no doubt; and they provoked the speech of Wendell Phillips: "The Constitution is a compact with hell. God damn the Constitution of the United States." It was clear also that Congress had power to prohibit the international slave-trade after 1808, as it did in 1807, and the slave-trade within the District of Columbia, as it did in 1850,

[37] *Supra*, § 16, note 13.

[38] 4 Stat. at L., p. 629.

[39] State Papers on Nullification, pp. 352, 358–374.

[40] State ex rel. McCready v. Hunt, 2 Hill (S. C. Law), 1, A. D. 1834. This volume is also published separately as The Book of Allegiance.

§ 35. [1] All the questions stated in this section will be discussed later under the appropriate titles.

[2] Constitution, Article I, Section 9.

[3] Constitution, Article IV, Section 2.

and to abolish slavery in the District;[4] although the Constitutional guaranty of private property might have been invoked to compel compensation in case of abolition. The free, as well as the slave States, had absolute control over slavery within their jurisdiction. According to international law, slavery is a status, the recognition of which is within the discretion of the State to which a person held as a slave elsewhere is brought, and consequently it was usually held within the free States that slaves were free when brought there voluntarily by their master, either for permanent residence or in the course of transit from one part of the country to another.[5] These points were also generally conceded. But great friction had been caused by the decisions of the Northern courts in cases of the last kind; the abolitionists attacked the fugitive slave law as unconstitutional in some of its provisions; and the slave-owners made the same objection to the personal liberty laws of the Northern States which impeded the recapture of slaves. Much complaint was made in New England against the legislation of the slave States on the coast, especially in South Carolina, which imposed restrictions upon the liberty of colored sailors on vessels from the North. These laws, also, were attacked as impairments of the privileges and immunities secured by the Constitution to citizens of other States.[6] The South claimed that this clause of the Constitution did not apply to negroes; and a majority of the Supreme Court in the Dred Scott case had concurred in this view, which was expressed in the dictum of Chief Justice Taney, that when the Constitution was adopted, it was considered that the blacks "had no rights which the white man was bound to respect."[7] The demonstration by Judge Curtis in his dissent, that this opinion was unsound, was accepted by the North. The more important questions, however, were those upon which in general controversies arose. Congress had the power to regulate interstate commerce. Did that include the power to regulate the interstate slave-trade? And could Congress thus compel a free or a slave State to allow the introduction of slaves from other States without her will? Or on the other hand, could it forbid the transportation of slaves from

[4] Constitution, Article I, Section 8.

[5] Lemmon *v.* People, 20 N. Y., 562, and cases cited in arguments of counsel.

[6] Constitution, Article IV, Section 2.

[7] Dred Scott *v.* Sandford, 19 How. 392, 407.

one State to another? A majority of the justices of the Supreme Court of the United States had agreed that the second at least could not be done.[8] Their opinions were, however, mere dicta, and the case was decided upon another point. Lincoln, in his debate with Douglas, had expressed himself as uncertain upon the subject,[9] and had the Republican party increased in power, undoubtedly some attempt at interference with slavery would have been made in that direction. The live question was as to the right of Congress to regulate slavery in the Territories. For if slavery was not extended to them, they would enter the Union as free States; and in that way enough of a majority might be obtained to amend the Constitution so as to obliterate the sections which protected property in man. By the Missouri Compromise in 1820, it had been provided that slavery should not be allowed in the territory acquired from France, north of the parallel of 36° 30′, which, when extended to the Pacific, included all but a small fraction of what are now the States of Texas, New Mexico and Arizona, the Indian Territory, Oklahoma, and a large part of Southern California.[10]

[8] Groves *v.* Slaughter, 15 Peters, 49. Dispassionate arguments in support of this power of Congress, and the consequent lack of power in the States to interfere with such interstate traffic, were made by Clay and Webster at the bar in this case. On the other hand the act of March 2, 1807 (2 St. at L., pp. 429, 430), which abolished the international slave-trade, in Sections 9 and 10, regulated the interstate slave-trade so far as the shipment of slaves on coasters was concerned. In 1818 the New Jersey legislature instructed the State delegation in Congress to procure an act prohibiting the transportation of slaves from any State whose own laws forbade it. (Schouler's History of the United States, vol. iii, pp. 143, 144, note, citing Journals of Congress, December, 1818.) One of the features of the Clay compromise of 1850, as originally introduced, was the declaration "that Congress has no power to prohibit or obstruct the trade in slaves between the slave-holding States, and that the admission or exclusion of slaves brought from one into another of them depends exclusively upon their own particular law." (Last resolution introduced by Henry Clay, Jan. 29, 1850, Colton, Last Years of Henry Clay, p. 132.)

[9] Debates between Lincoln and Douglas. Speech of Lincoln, at Freeport, Ill., April 27, 1858, p. 89.

[10] The language of the statute was as follows: —

"And be it further enacted that in all of that territory ceded by France to the United States under the name of Louisiana, which lies north of 36° and 30′ north latitude, excepting only such part thereof as is included within the limits of the State contemplated by this act, slavery and involuntary servitude, otherwise than in the punishment of the crimes whereof the party shall have been duly convicted, shall be and is hereby forever prohibited; Provided, Always, That any person escaping into

It was the general understanding at the time that this was a permanent adjustment of the dividing line between free and slave territories for the future, and it was continued, although with some opposition from the free States, upon the annexation of Texas in 1845.[11] Many in the North, however, rebelled against such a settlement, and subsequent attempts were made by their representatives to disregard it, especially when the Wilmot Proviso,[12] which affected the land subsequently acquired from Mexico, was proposed and nearly adopted.[13] The Missouri Compromise was

the same from whom labor or service is lawfully claimed in any State or Territory of the United States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid."

[11] 5 St. at L., 798; Stephens, Constitutional View of the War between the States, vol. ii, p. 164; citing Congressional Globe, 28th Congress, 2d sess., p. 193.

[12] It is said that this proviso was originated by Prince John Van Buren at a weekly dining-club of politicians in New York City. According to the story, Samuel J. Tilden then suggested that each of the free-soil representatives in Congress should have a copy of the resolution in his pocket, and at the first opportunity should claim the floor in order to present it. The Speaker recognized David Wilmot of Pennsylvania, the most moderate of the crowd, and thus his name secured a permanent place in history. (Ben. Perley Poore, in the Boston Budget, 1885.)

[13] The legislatures of New York and Vermont passed resolutions which were sent to the next session of Congress after the admission of Missouri, denying that any compact was then made between the North and South for a permanent settlement of the question of slavery. (See Stephens, Constitutional View of the War between the States, vol. ii, p. 162, citing Annals of Congress, 16th Congress, 2d Session, pp. 23, 78.) In 1838, upon the application for admission into the Union of Arkansas, which was formed south of the Compromise line out of a part of the Louisiana purchase, John Quincy Adams and a number of other Northern members voted against its admission as a slave State. (Stephens, Constitutional View of the War between the States, pp. 163, 164.) In 1846, upon the consideration of the bill appropriating $2,000,000 for use by the President in purchasing territory from Mexico, the Wilmot Proviso was moved and supported by most of the Northern Whigs and a number of the Northern Democrats. This declared it to be "an express and fundamental condition to the acquisition of any territory from Mexico that neither slavery nor involuntary servitude shall ever exist therein." At the next session, January 15th, 1847, when the bill to organize a territorial government for Oregon was under consideration, Burke of South Carolina, to test the views of the Northern members, moved an amendment to that clause of the bill excluding slavery from the Territory in the following words: "Inasmuch as the whole of said territory lies North of 36° 30′ latitude, known as the line of the Missouri Compromise." This was voted down by 113 against 82. The negative votes were all from the North. All the Southern members, and only six from the North including Stephen A. Douglas, voted for the amendment. (Ibid. pp. 165, 166.) The Wilmot Proviso, which in 1846 had passed the House and failed in the Senate, and with its failure defeated the $2,000,000 bill, was renewed and only

finally abrogated by the passage of the Kansas and Nebraska Bill in 1854.[14]

It was the contention of the North that the clause in the Constitution which gave Congress power to make all needful rules and regulations respecting the Territories or other property belonging to the United States,[15] included absolute power to regulate their domestic institutions. The South, on the other hand, maintained that the guaranty in the Fifth Amendment of pro-

defeated by a majority in the Senate of ten and five in the House, upon the consideration of the $3,000,000 bill for the same purpose in 1847. All the votes in its favor were from the free States, except that of Senator Clayton of Delaware; and all of the negatives were from the slave States, except five in the Senate, including Cass of Michigan and Dickinson of New York, and thirteen in the House, including Douglas as before. In 1848, upon the bill for organizing a territorial government for Oregon, Douglas, who was then in the Senate, moved to strike out the general restriction against slavery, and to insert the following: "That the line of 36° 30′ of north latitude, known as the Missouri Compromise Line, as defined by the eighth section of an act entitled 'An act to authorize the people of Missouri Territory to form a Constitution and State Government, and for the admission of such State into the Union on an equal footing with the original States, and to prohibit slavery in certain territories,' approved March 6th, 1820, be and the same is hereby declared to extend to the Pacific Ocean, and the said eighth section, together with the Compromise therein affected, is hereby revived and declared to be in full force and binding for the future organization of the territories of the United States in the same sense and with the same understanding with which it was originally adopted." The amendment was carried in the Senate by a vote of 33 to 21, but defeated by a vote of 82 to 121 in the House. The Senate receded from their amendment, and passed the House Bill, with an unconditional restriction against slavery, by a vote of 29 to 25. Every Southern senator present voted for the amendment in the Senate, and but seven Northern members, including Douglas and Dickinson from New York and Campbell of Pennsylvania, joined it. All those votes against it in the Senate were from the North. When the amendment was before the House, on Aug. 11th, all of the eighty-two votes in its favor were from the South, except four. Every one of the 121 against it was from the North, except that of Houston of Delaware. On the final vote in the Senate, every Northern senator voted yea, and every Southern senator nay, except Benton of Missouri. It was claimed by the South that "this was a complete and total abandonment of the Missouri Compromise so-called by both Houses of Congress. It met its final doom on the 12th of August, 1848. On that day it fell and was buried in the Senate, where it had originated twenty-eight years before, but had never quieted the abolitionists a day. It fell, too, not by Southern but by Northern men. The very States to which it owed its paternity struck the last decisive blow." (Stephens, Constitutional View of the War between the States, vol. ii, pp. 172, 173.)

[14] Act of May 30, 1854; 10 St. at L., 283.

[15] Constitution, Article IV, Section 3.

tection to private property forbade the enactment of a law which took away a man's property in slaves when he removed them to the Territories; and that the clause in the Constitution upon which the North relied merely conferred power to make regulations concerning the use and disposition of the property which the United States had in lands and chattels, and gave no power of general legislation. A compromise was the doctrine of squatter sovereignty formulated by Stephen A. Douglas, according to which the people of each Territory had the absolute right to determine whether slavery should be allowed or forbidden, and Congress had no power to interfere with them.[16] The Supreme Court, in the Dred Scott Case, decided by a majority of six to two that Congress had no power to forbid slavery in the Territories. The dissenting opinion of Judge Curtis, however, was claimed by the North to be correct; and it was, in accordance with his views, asserted that this ruling was no part of the decision of the Court, since by sustaining a plea to the jurisdiction, the case had been decided before the question arose.[17] Abraham Lincoln had vigorously repudiated the decision; and there was little doubt but that the North would refuse to respect it and seek to have it overruled. Thus stood the question at the time of the election of Lincoln to the presidency.

§ 36. History of Secession.

The election by the Northern States, for President, of a northern man who had said that the Union could not "endure permanently half slave, half free,"[1] and had publicly declared his refusal to acquiesce in the opinion in the Dred Scott Case, that slavery could not be constitutionally excluded from the Territories, convinced the South that new safeguards were necessary for the preservation of their peculiar institution. Renewed threats of a dissolution of the Union were received in such a manner by the North as to make it clear that a majority of the people were resolved to submit to no further aggressions by the slave power. The success of South Carolina more than a quarter of a century be-

[16] Debates between Lincoln and Douglas, *passim*.

[17] Dred Scott *v.* Sandford, 19 How., 293. This case is discussed at length, *infra*.

§ 36. [1] Lincoln's Speech before the Republican State Convention at Springfield, Ill., June 17, 1858.

fore made it seem probable that official action on the part of the slave States would compel concessions. The result of the presidential election had proved that nothing else could do so. A junto of members of Congress from the South, in co-operation with the other leaders of their constituents, planned a demonstration which they resolved should be more imposing, and they expected would be no less effective, than the work of Calhoun and Hayne. On December 14th, 1860, they issued a public address to their constituents, in which they said "that the honor, safety, and independence of the Southern people require the organization of a Southern Confederacy, a result to be obtained only by separate State secession."[2]

The Palmetto State, the location of which, surrounded by slave States, made invasion from the North difficult, again took the lead. On December 20th, a convention of the people of South Carolina unanimously adopted the following ordinance of secession: —

"An ordinance to dissolve the Union between the State of South Carolina and other States united with her under the compact entitled 'The Constitution of the United States of America.'

"We, the People of the State of South Carolina, in Convention assembled, do declare and ordain, and it is hereby declared and ordained, that the Ordinance adopted by us in Convention, on the Twenty-third of May, in the year of our Lord One thousand seven hundred and eighty-eight, whereby the Constitution of the United States was ratified, and also all other Acts and parts of Acts of the General Constitution, are hereby repealed, and the Union now subsisting between South Carolina and other States, under the name of the United States of America, is hereby dissolved."

Action by a convention rather than by the legislature was due to the fact that, as the people through a convention had originally ratified the Constitution, it might have been contended that the legislature had no such authority.[3] The people, however, were considered the sovereign power of the State. The ordinance was followed by a declaration of independence drawn with studied imitation of the original, to which it referred in its preamble, and

[2] This was signed by about half the members of the Southern delegations in both houses, including Jefferson Davis, Slidell, Benjamin and Wigfall (Rhodes, History of the United States, vol. iii, p. 178).

[3] See the language of Madison, quoted *supra*, § 19.

from which was copied its conclusion. The body set forth the doctrine that the Constitution was a compact, a breach of which by one party dissolved the others from their obligations. It recited those clauses inserted by way of compromise in the Constitution for the protection of the right of property in man; and emphasized the provision for the return of fugitive slaves. As infractions were set forth: the enactment by fifteen Northern States of personal-liberty laws, which interfered with the operation of the Fugitive Slave law; the refusal of their officers to enforce, and of their people to obey, this constitutional mandate; the denial of the right of transit for slaves; and the refusal of two State executives to deliver, on demand of the executives of Southern States, persons accused of having committed crimes in connection with attempts at forcible emancipation. Complaint was made of the formation of a sectional party, which, "aided in some of the States by elevating to citizenship persons who, by the supreme law of the land, are incapable of becoming citizens," had elected President a man whose opinions and purposes were hostile to slavery.

"It has announced that the South shall be excluded from the common territory; that the judicial tribunals shall become sectional, and that a war must be waged against slavery until it shall cease throughout the United States."

In conclusion it was declared that the Union was dissolved; and South Carolina had resumed her position among "the nations of the world as a free, sovereign, and independent State."[4]

The day following the action of the South Carolina convention, the representatives of that State retired from their seats in Congress. On January 5th, 1861, a caucus of the senators of seven Southern States recommended to their constituents immediate secession and the organization of a new Confederacy.[5]

[4] This was the work of R. B. Rhett (Rhodes, History of the United States, vol. iii, p. 204). It is printed at length by Preston, Documents Illustrative of American History, p. 305.

[5] The following resolutions were adopted by the Senators of Georgia, Florida, Alabama, Mississippi, Louisiana, Texas and Arkansas. Messrs. Toombs, of Georgia, and Sebastian, of Arkansas, were absent from the meeting: "*Resolved*, That, in our opinion, each of the States should, as soon as may be, secede from the Union. *Resolved*, That provision should be made for a convention to organize a confederacy of the seceding States: the convention to meet not later than the 15th of February, at the city of Montgomery, in the State of Alabama.

The second State to secede was Mississippi, which adopted an ordinance of secession, January 9th, 1861. Florida followed on the 10th, Alabama on the 11th, Georgia on the 19th, and Louisiana on the 28th. Each of these States acted through conventions, and in none was the vote unanimous. In Mississippi, Alabama, Georgia, and Louisiana, propositions to submit the question to a direct popular vote were defeated. The Texas convention passed an ordinance of secession February 1st, and on the 7th submitted it to the people, a majority of whom adopted it on the 23d.[6] All these, like South Carolina, were separated from the free by the border slave States, upon whom they relied to preserve neutrality

Resolved, That, in view of the hostile legislation that is threatened against the seceding States, and which may be consummated before the 4th of March, we ask instructions whether the delegations are to remain in Congress until that date, for the purpose of defeating such legislation. *Resolved*, That a committee be and are hereby appointed, consisting of Messrs. Davis, Slidell, and Mallory, to carry out the objects of this meeting." (Davis, Rise and Fall of the Confederate Government, vol. i, p. 204, note).

[6] McPherson, History of the Rebellion, pp. 2–6. The other ordinances of secession were similar in substance to that of South Carolina. The Georgia ordinance concluded by the declaration, "that the State of Georgia is in the possession and exercise of all those rights of sovereignty which belong and appertain to a Free and Sovereign State" (Stephens, Constitutional View of the War between the States, vol. ii, p. 314). When Tennessee finally seceded, her Legislature adopted a declaration of independence, in which she claimed the right of revolution. The so-called "Sovereignty Convention," in Kentucky, went through a similar form (see *infra*, over note 66). The Mississippi convention adopted a "Declaration of the immediate causes which induce and justify the secession of the State." The preamble to the Arkansas ordinance mentioned as one of the moving causes, Lincoln's call for troops to attack the seceded States (McPherson, History of the Rebellion, pp. 4, 5, 8; Rhodes, History of the United States, vol. iii, pp. 274, 404; Hay and Nicolay, vol. iv, p. 201). On Jan. 6, 1861, Mayor Fernando Wood addressed a message to the Common Council of New York City, in which he said that a dissolution of the Union into three or more republics seemed inevitable; that it was "folly to disguise the fact that, judging from the past, New York may have more cause of apprehension from the aggressive legislation of our own State than from external dangers"; and that "amid the gloom which the present and prospective condition of things must cast over the country, New York, as a *Free City*, may shed the only light and hope of a future reconstruction of our once blessed Confederacy." (McPherson, History of the Rebellion, pp. 42–44. Rhodes, in his History of the United States (vol. iii, p. 369), quotes a letter to Jefferson Davis by Forsyth, a Confederate Commissioner, dated April 4, 1861, in which he says that there was then a widespread conspiracy in New York for a secession and its establishment as a free city.

at least, and to protect them from the North pending the negotiations for the compromise which they expected to obtain. They were fortified, moreover, by an opinion given by the Attorney-General, Judge Jere. S. Black, to President Buchanan, that under existing laws the President could not use force against them, except to defend attacks upon the property of the government, and that the United States had no power under the Constitution to wage war upon one of the States of which they were composed.[7] In case of war they knew that the border States must be at first the battle-ground; and, many of them believed, what was said by one of their leaders, that their citizens might "go home, raise cotton and make money," leaving the discomforts of the situation to their less fortunate allies.[8] The border slave States — Maryland, Virginia, Kentucky, and Missouri — understood the perils of their situation; and one at least of them, Missouri, had some time before made preparations to maintain neutrality in case of hostilities between the States who surrounded her.[9] Such of their legislatures as were then in session, early in 1861, either declared neutrality or recommended such a compromise as the others were anxious to obtain.[10] Arkansas, Tennessee, and North Carolina, although not on the border, were more exposed than those nearer the centre of the slave States, and accordingly hesitated. The convention of Arkansas defeated the ordinance of secession, March 18th, by a majority of four; submitted the question to a vote of the people

[7] Opinion of Attorney-General Black, Nov. 20, 1860; 9 Op. A. G. 516. It is said by Jefferson Davis, that two members of the Supreme Court, Judge Campbell of Louisiana, and Judge Nelson of New York, expressed a similar view to President Lincoln. (Rise and Fall of the Confederacy, vol. i, pp. 267, 268). See also Campbell's address to the Southern Historical Society. The soundness of these views will be considered elsewhere.

[8] This remark, which was attributed to Howell Cobb of Georgia, had considerable influence in turning Kentucky towards the Northern side (Shaler's Kentucky, p. 249).

[9] In 1855 and 1856, Missouri legislated to provide means for raising fifty thousand volunteers, to be used, it was said by the promoter, in "preventing our Northern and Southern brethren from flying at each other's throats, as they probably will do at the next presidential election in 1856, or passing that, certainly in 1860, unless the border States take action such as this to keep the peace." (Carr's Missouri, pp. 300, 301).

[10] McPherson, History of the Rebellion, pp. 4–11. The separate action of each of these States is described in a subsequent part of this section.

in the following August; and provided for the appointment of delegates to an intermediate convention of the border States, in which category, on account of her abutment on the Indian Territory, she claimed to belong. In Tennessee, February 8th, and North Carolina, February 28th, a majority of the people voted against a convention.[11] In the latter State by a majority of only six hundred and sixty-one.[12]

The representatives of the seceding States in the House of Representatives retired from their seats without ceremony, although in some cases they gave written notice to the speaker.[13] A number of the Senators, however, with the dramatic instinct of the Southern people, seized the opportunity to make a scene in their assumed capacity as ambassadors from sovereign States by valedictories which announced the reasons for their retirement in a manner well calculated to impress upon the people of the North the determination of the South and the serious character of the crisis reached.[14]

The United States judges and district attorneys resigned as soon as their States seceded; but the postmasters did not before the bombardment of Fort Sumter.[15] So, there was hardly any change in the habits of the people until that time. A congress from the seceded States met, February 4th, at Montgomery, Alabama;

[11] McPherson, History of the Rebellion, pp. 4, 5; Stephens, Constitutional View of the War between the States, vol. ii, pp. 363-366.

[12] Ibid.

[13] Blaine, Twenty Years in Congress, vol. i, pp. 242, 243. John E. Bouligny of Louisiana, remained loyal and retained his seat in the House (Nicolay and Hay, Life of Lincoln, vol. iv, p. 195). Wigfall of Texas, although he openly recommended secession, retained his seat in the Senate both throughout Buchanan's term and at the special session called by Lincoln in March, 1861 (Ibid., pp. 195, 196). On July 11, after he had left the Senate, he was expelled (Taft's Senate Election Cases, continued by Furber, p. 741. See *infra*.)

[14] The Speech of Jefferson Davis, Jan. 21, which was dignified and appropriate to the occasion, is printed in The Rise and Fall of the Confederate Government, vol. i, pp. 221-225. Reference has already been made to the Speech of Judah P. Benjamin, *supra*, § 12, note 21. A summary of all of them is made by Blaine, Twenty Years in Congress, vol. i, pp. 244-254.

[15] 12 St. at L., p. 151; Rhodes, History of the United States, vol. iii, p. 142. Mr. Justice Wayne of Georgia retained his seat in the Supreme Court of the United States until his death in 1867. Mr. Justice Campbell of Louisiana resigned and became assistant secretary of war in the Confederacy.

adopted, on the 8th, a provisional Constitution;[16] on the following day elected president, Jefferson Davis of Mississippi, and vice-president, Alexander H. Stephens of Georgia,[17] of whom the latter had opposed secession, but after defeat cast his lot with that of his State;[18] continued in force and office until further legislation all statutes of the United States not inconsistent with the new Constitution,[19] and all Federal officers with similar functions in the Confederacy;[20] authorized the appointment by the President of a commission of three persons to be "sent to the government of the United States of America, for the purpose of negotiating friendly relations between that government and the Confederate States of America, and for the settlement of all questions of disagreement between the two governments, upon principles of right, justice, equity, and good faith;"[21] and shaped all their proceedings so as to facilitate a return to the Union without friction upon a compliance with their demands.[22]

It had been wisely determined that Kentucky and Virginia should lead, as in the past, to obtain concessions to the South under the plea of the danger of disruption.

In imitation of his predecessor, Henry Clay, John J. Crittenden, of Kentucky,[23] introduced into the Senate, of which he was the oldest member, a proposition for amendments to the Constitution, upon the adoption of which the Slave States were willing to remain in the Union.[24] These re-established the Missouri compromise by

[16] Davis, Rise and Fall of the Confederate Government, vol. i, p. 220. It is discussed *infra*, § 37.

[17] Ibid., p. 230.

[18] Stephens, Constitutional View of the War between the States, vol. ii, pp. 263–309.

[19] Confederate Statutes at Large, Provisional Government, p. 27.

[20] Ibid., p. 27, 28.

[21] Ibid., p. 92.

[22] *Infra*, § 37.

[23] According to the New York Herald, these were drawn by John C. Breckinridge, then Vice-President, and M. C. Johnson (McPherson, History of the Rebellion, p. 75).

[24] This is manifest from the action of Virginia, which was evidently prearranged; the minority report to the House by seven representatives of the Slave States, who recommended the Crittenden Resolutions (McPherson, History of the Rebellion, p. 58); and the address of the Virginia delegation to their constituents upon the rejection of these resolutions (ibid., pp. 39, 40). Toombs of Georgia, who knew how to demand more than he was willing to accept, in his speech in the Senate, Jan. 7, 1861, laid down as conditions upon the remanence of Georgia in the Union, that slavery should be authorized and protected in

forbidding slavery above, and establishing it with a right to protection as property by their governments below, the parallel of thirty-six degrees thirty minutes in all the Territories then held or thereafter acquired, until the admission of each as a State, when Congress was forbidden to impose any condition affecting slavery.

They expressly provided that "Congress shall have no power to interfere with slavery, even in those places under its exclusive

all Territories of the United States; and that more efficient provisions should be made for the return of fugitive slaves and criminals against slave property, and for the punishment of those who should aid or abet insurrection in another State (Blaine, Twenty Years in Congress, vol. i, pp. 246, 247). Alexander H. Stephens, the Vice-President of the Confederacy, says, in his Constitutional View of the War between the States, vol. ii. p. 321: "The truth is, in my judgment, the wavering scale in Georgia was turned by a sentiment, the key-note to which was given in the words — 'We can make better terms out of the Union than in it.' It was Mr. Thomas R. R. Cobb who gave utterance to this key-note, in his speech before the Legislature two days before my address before the same body. This one idea did more, in my opinion, in carrying the State out, than all the arguments and eloquence of all the others combined. Two-thirds, at least, of those who voted for the Ordinance of Secession, did so, I have but little doubt, with a view to a more certain Re-formation of the Union." And again speaking of Lincoln's proclamation, calling for troops (ibid., p. 356):

"The effect of this upon the public mind of the Southern States cannot be described or even estimated. The shock was not unlike that produced by great convulsions of nature ... the upheavings and rockings of the earth itself! It was not that of fright. Far from it! But a profound feeling of wonder and astonishment! *Up to this time, a majority, I think, of even those who had favored the policy of secession, had done so under the belief and conviction that it was the surest way of securing a redress of grievances, and of bringing the Federal Government back to constitutional principles.* Many of them indulged hopes that a Re-formation, or a Re-construction of the Union would soon take place on the basis of the new Montgomery Constitution, and that the Union, under this, would be continued and strengthened, or made more perfect, as it had been in 1789, after the withdrawal of nine States from the first Union, and the adoption of the Constitution of 1787. This proclamation dispelled all such hopes." He says again that when South Carolina attacked Fort Sumter, Lincoln should have called a Congress of the States which had not seceded, to consult them upon his action in the matter.

"I will now go further, and tell you what I think the Congress of States ought to have done under the circumstances, if they had been so convened by him. They should have called a Convention of all the States, with a view to a readjustment of their relations. If the seceded States had responded to that call, well and good. In that event I have but little doubt that the result would have been a peaceful adjustment of all matters in controversy, by the derelict States

jurisdiction in the Slave States;" and should never interfere with slavery in the District of Columbia, without the consent of Maryland and Virginia, so long as slavery continued in these States, without the consent of the inhabitants of the District, and without compensation to them.

Congress was also inhibited from forbidding officers of the United States, or members of Congress, to take their slaves to and from the capital, and from interference with the transport of slaves between the States or between a State and a Territory south of the Missouri line; and was empowered and directed to provide for the payment of the value of a fugitive slave to his owner where his return was prevented by force. The proposed amendments further ordained that neither these nor the provisions of the Constitution as to the ratio of representation and the return of fugitive slaves should ever be affected by any future amendment; and that no amendment should ever be made to permit Congress

heretofore referred to . . . those which had openly and avowedly refused to perform their obligations under the Constitution . . . receding from their position, (Judge Chase's opinion to the contrary, notwithstanding), and that upon this redress of grievances and righting of the wrong complained of, the seceded States would have returned to their positions; and the whole Federal machinery, at no distant day, would have been restored to its normal and harmonious action in all its parts, as peacefully and joyously as when it first went into operation." (Ibid., pp. 416, 417. See also his Speech in opposition to the secession Ordinance of Georgia, quoted ibid., pp. 306, 307.)

Stephens gives the following testimony concerning the attitude of Jefferson Davis: "I never saw a word from him recommending secession as the proper remedy against threatening dangers until he joined in the general letter of the Southern Senators and Representatives in Congress to their States advising them to take that course. This was in December, 1860, and not until after it was ascertained in the Committee of the Senate, on Mr. Crittenden's proposition for quieting the apprehensions and alarm of the Southern States, from the accession of Mr. Lincoln to power, that the Republicans, his supporters, would not agree to that measure. It is well known that both he and Mr. Toombs both declared their willingness to accept the adoption of Mr. Crittenden's measure as a final settlement of the controversy between the States and sections, if the party coming into power would agree to it in the same spirit and with the same assurance." (Ibid., vol. i, pp. 416, 417.) See also Douglas' speech in the Senate, Jan. 3d, 1861, stating the position of Toombs and Davis at that time. (Cong. Globe, 2d Sess., 36th Congress, appendix, p. 441); Report by H. P. Bell, commissioner of Georgia to Tennessee (Journal of Georgia Convention, p. 368); article by J. D. Cox in Atlantic Monthly for 1892, p. 390; *infra*, note 56.

to interfere with slavery within the States.[25] The resolutions also provided for amendments to the Fugitive Slave law, so as on the one hand to provide for the punishment of opposition to it, and on the other to give the commissioner the same fee, irrespective of his decision, and to only compel the assistance of the power of the county in case of resistance or danger of rescue. There was also a sop to the North, in a declaration that the laws for the suppression of the slave trade should be efficiently executed, and, if need be, further enactments for that purpose should be made.[26]

Meanwhile, in order to aid the cause of slavery, Virginia, mindful of her action during the experiment of nullification, on January 19th, 1861, called a conference of commissioners of —

"all such States, whether slave-holding or non-slave-holding, as are willing to unite with Virginia in an earnest effort to adjust the present unhappy controversies, in the spirit in which the Constitution was originally formed, and consistently with its principles, so as to afford to the people of the slave-holding States adequate guarantees for the security of their rights.

The resolutions for the call expressed the opinion that the propositions embraced in the Crittenden resolutions, —

"so modified as that the first article proposed as an amendment to the Constitution of the United States shall apply to all the territory of the United States now held, or hereafter acquired, south of latitude thirty-six degrees and thirty minutes, and provide that slavery of the African race shall be effectually protected as property therein during the continuance of the territorial government, and the fourth article shall secure to the owners of slaves the right of transit with their slaves between and through the non-slave-holding States and Territories, constitute the basis of such an adjustment of the unhappy controversy which now divides the States of this confederacy, as would be accepted by the people of this commonwealth." [27]

The conference, which had no powers except to affect public

[25] McPherson, History of the Rebellion, pp. 64, 65. Blaine, Twenty Years in Congress, vol. I, pp. 261, 262.

[26] Ibid.

[27] Crittenden, Report of the Debates and Proceedings of the Conference Convention, p. 9. The resolutions were passed at a special session of the legislature, called for that purpose. Tyler, Life and Times of the Tylers, vol. II, p. 580.

opinion, since, under the Constitution, amendments could only be proposed by Congress or by a convention of the States called by Congress upon the application of two-thirds of the State legislatures,[28] met at Washington, February 4th, 1861, and chose as presiding officer ex-President Tyler. The delegates were appointed by the legislatures, governors, or conventions of twenty-one States, seven of whom were slave States and fourteen free.[29] Three of the Northwestern [30] and the two Pacific States,[31] all of whom were free, together with the six who had already seceded and Texas and Arkansas, whose secession unless the rest returned, was from their location obviously inevitable, remained away.

On the 27th, the conference adopted a report which recommended the adoption of seven amendments to the Constitution,[32] and these were, on the same day, reported by their president to Congress.[33] Their opinions were greatly divided. Eight of the free States were opposed to the recommendation of any specific amendments.[34] A recommendation of the re-enactment of the Missouri Compromise was carried by the vote of a single State, and would have been defeated had not David Dudley Field left the city, under the impression that his vote in the New York delegation would be counted, and thus cast the voice of that State against the proposition.[35] In no other case were the votes of more than six free States ever in favor of any amendment which gave further protection to slavery, except that which permitted State

[28] Constitution, Article V. The invalidity of any action by the Conference was demonstrated by Roger S. Baldwin, a grandson of Roger Sherman, who had himself been formerly Governor and United States Senator of Connecticut; but his proposition to recommend all the State legislatures to unite in a request to Congress to call such a convention in the method prescribed in the Constitution was defeated by the vote of thirteen states to eight (ibid., pp. 59-67, 411-417.) The Kentucky legislature had requested Congress to call such a convention (ibid., pp. 62, 63). The Convention of Missouri had approved a similar course (Stephens, Constitutional View of the War between the States, vol. ii, p. 364), and this was Lincoln's preference as expressed in his inaugural.

[29] Chittenden, Report of the Debates and Proceedings of the Peace Convention, *passim*. Stephens, Constitutional View of the War between the States, vol. ii, p. 364.

[30] Michigan, Missouri and Minnesota.

[31] Oregon and California.

[32] Crittenden's Report, pp. 440-452.

[33] Ibid., pp. 471-473.

[34] Ibid., p. 417; *supra*, note 28.

[35] New York was recorded as divided under protest (ibid., pp. 441, 442; 596-604).

legislatures to provide for the return of fugitive slaves. This was supported by eight free States, in three of whom the delegations were not unanimous.[36] The conference, by the votes of eleven States to ten, refused to recommend an amendment to the Constitution forbidding secession,[37] and, by the votes of ten States to seven, refused to declare secession unconstitutional.[38] Their recommendations included the substance of the Crittenden resolutions; but the Missouri Compromise was limited to the Territories then existing and the language was ambiguous.[39] There was no provision compelling territorial legislatures to protect slaves as property; and it was provided that —

"no territory shall be acquired by the United States, except by discovery and for naval and commercial stations, depots, and transit routes, without the concurrence of a majority of all the Senators from States which allow involuntary servitude, and a majority of all the Senators from the States which prohibited that relation; nor shall territory be acquired by treaty, unless the votes of a majority of all the Senators from each class of States hereinbefore mentioned be cast as a part of the two-thirds majority necessary to the ratification of such treaty."

The grant of the right of transit with slaves was further protected so as to forbid a discriminating tax on the shipments of slaves, and limited so as to exclude "the right of transit in or through any State or Territory, or of sale or traffic, against the laws thereof."

It was provided that the constitutional provision for the return of fugitive slaves —

"should not be construed to prevent any of the States, by appropriate legislation, and through the action of their judicial and ministerial

[36] Crittenden's Report, p. 444.

[37] Ibid., p. 398, 409.

[38] Ibid.

[39] The language used was that "in all the present territory south of the line mentioned, the *status* of persons held to service or labor, as it now exists, shall not be changed." According to Tyler, Chase stated in the conference "that the whole interpretation of the section was that it was the *status* fixed by the Mexican law of emancipation, which had been proclaimed by the Mexican government years before the acquisition of the western territory by the United States; and he maintained that the law of New Mexico was the *status* of free soil." "I thanked him for his explanation afterwards. I went to him and said: 'You have, at all events, established your character as an honest and frank man.'" (L. G. Tyler, Letters and Times of the Tylers, vol. ii, p. 605. See also the speech of Chase, as reported by Chittenden, pp. 326, 327.)

officers, from enforcing the delivery of fugitives from labor to the person to whom such service or labor is due." [40]

Congress was directed to "provide by law for securing to the citizens of each State the privileges and immunities of citizens in the several States." [41] Amendments of the Constitution to forbid the foreign slave trade, and slave trade in the District of Columbia, both of which were already forbidden by law, were also recommended.

Slight as were these alterations of her ultimation, the South refused to accept them. Upon the presentation of their report to the State legislature, the commissioners of Virginia denounced the recommendations "as a delusion and a sham, and as an insult and an offence to the South;" [42] and but six Senators supported Crittenden when he moved to substitute them for those which he had originally proposed.[43]

The temper as well as the conscience of the North was by this time thoroughly aroused. Her leading statesmen realized that if submission was made once again, the future would produce still more arrogant demands; there would be no limit to the aggressions of the slave power; and the example would arouse similar opposition throughout the Union to unpopular legislation of every kind, so that the Federal government would become as impotent and disorganized and society as disordered as in the Spanish American republics.[44]

[40] This was for the purpose of annulling the ruling in Prigg *v.* Pennsylvania, 16 Peters, 534.

[41] This was designed to protect black sailors in Southern ports. See the discussion of the appropriate section of the Constitution, *infra*.

[42] Feb. 28, 1861 (McPherson, History of the Rebellion, p. 6).

[43] Douglas, Harlan, Andrew Johnson, Kennedy, Morrill and Thomson (ibid., p. 69).

[44] Lincoln, in a conversation, reported in the New York Tribune, Jan. 30, 1861, used these prophetic words: "I will suffer death before I will consent or advise my friends to consent to any concession or compromise which looks like buying the privilege of taking possession of the government to which we have a constitutional right; because, whatever I may think of the merit of the various propositions before Congress, I should regard any concession in the face of menace as the destruction of the government itself, and a consent on all hands that our system shall be brought down to a level with the existing disorganized state of affairs in Mexico. But this thing will hereafter be, as it is now, in the hands of the people; and if they desire to call a convention to remove any grievances

By the compromises in the Constitution, they were willing to abide. They were prepared to irrevocably agree that no amendment to the Constitution should permit the Federal government to interfere with slavery within a State.[45] They even offered to secure the effective operation of the Fugitive Slave law.[46] But they refused to imbed in the Constitution, beyond the power of amendment except by unanimity, inhibitions against interference by the United States with slavery in the District of Columbia and the Territories, and the regulation of the transit of slaves between the States; and to make similar guaranties against any constitutional amendment which might affect the original compromises.[47]

The Peace Conference, called by Virginia, failed. The Crit-

for the permanence of vested rights, it is not mine to oppose" (McPherson, History of the Rebellion, p. 67).

[45] Feb. 28, 1861, the following constitutional amendment passed the House by a vote of one hundred and thirty-three to sixty-five, and March 2, the Senate by twenty-four to twelve, the requisite two-thirds in each case:

"Article XIII. No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State" (McPherson, History of the Rebellion, pp. 59, 60). Lincoln, in his inaugural address, March 4, expressed his approval of the amendment. The Ohio and Maryland legislatures immediately ratified it. Had the South accepted this as a final settlement of the controversy, it would undoubtedly have been ratified by a sufficient number of the States. Since the peace-offering was not satisfactory, the amendment was rejected by the New England States; in many of the others it was not even considered, and it obtained no ratifications except by the two States who first acted upon the subject (Blaine, Twenty Years in Congress, vol. i, pp. 266-267). The Thirteenth Amendment, which was ratified, abolished slavery.

[46] An amendment of the Fugitive Slave Law, which transferred the hearing upon any disputed facts to the residence of the claimant, passed the House, March 1, 1861, by a vote of ninety-two to eighty-three; but was not considered by the Senate.

A conference of seven Northern governors, in December, 1860, agreed to recommend in official messages the repeal of the personal liberty laws by their respective States (Rhodes, History of the United States, vol. iii. p. 252, citing Belmont's Letters, p. 27). Banks made this recommendation in the legislature of Massachusetts. Rhode Island repealed her Personal Liberty law in January, 1861 (Rhodes, ibid., p. 253).

An act providing that a fugitive from justice should be surrendered by the United States judge of the District where he was found was defeated in the House by 125 nays to 48 yeas (McPherson, History of the Rebellion, pp. 61, 62).

[47] In Lincoln's correspondence between his election and inauguration

tenden resolutions, which embodied the demands of the slave States, were rejected by the North, March 2d, two days before the inauguration of Lincoln.[48] Two days earlier, February 28th, the Confederate Congress had passed a bill authorizing President Davis to take command of the military forces of the seceded States.[49]

Lincoln's inaugural was conciliatory in its tone. He expressed willingness to approve a constitutional amendment making it forever impossible for the Federal government to interfere with slavery within a State without its consent. He further suggested that a convention of the States was the best method of preparing amendments to the Constitution.[50] He repudiated the right of secession; and announced his determination to maintain the laws of the United States.[51] It was well known that there was a

he said again and again that he was "inflexible on the territorial question." (Lincoln to Thurlow Weed, Dec. 17, 1860, Nicolay and Hay, Lincoln, vol. iii, p. 253; to Kellogg, Dec. 11, 1860, ibid., p. 257; to Washburn, Dec. 13, 1860, ibid., p. 259; to Seward, Feb. 1, 1861, ibid., p. 260.) "Prevent as far as possible any of our friends from demoralizing themselves and their cause by entertaining propositions for compromise of any sort on slavery extension. There is no possible compromise upon it but what puts us under again, and all our work to do over again. Whether it be a Missouri line or Eli Thayer's popular sovereignty, it is all the same. Let either be done, and immediately filibustering and extending slavery recommences. On that point hold firm as a chain of steel" (Lincoln to Washburne, Dec. 13, 1860, ibid., p. 259).

He wrote: "I probably think all opposition, real and apparent, to the fugitive slave clause of the Constitution ought to be withdrawn" (Lincoln to Weed, Dec. 17, 1863, ibid., p. 253.) And later: "As to fugitive slaves, District of Columbia, slave trade among the slave States, and whatever springs of necessity from the fact that the institution is amongst us, I care but little, so that what is done be comely and not altogether outrageous. Nor do I care much about New Mexico, if further extension be hedged against" (Lincoln to Seward, Feb. 1, 1861, ibid., p. 260. See also ibid., pp. 258, 259). For a summary of the different propositions for a settlement of the controversy, see Nicolay and Hay, Life of Lincoln, vol. iv, pp. 220–222.

[48] The vote in the Senate was nineteen yeas to twenty nays, six senators from the slave States refusing to vote, since they knew that unless the amendments had the support of the North in Congress, they would not be ratified by the States. (McPherson, History of the Rebellion, pp. 66, 67).

[49] McPherson, History of the Rebellion, p. 117.

[50] This was the proposition of ex-Governor Baldwin to the Peace Conference, *supra*, note 28.

[51] He wrote this with the Constitution, Clay's speech in support of the compromise of 1850, Jackson's proclamation against nullification, and Webster's reply to Hayne before him (Herndon, Lincoln, vol. iii, p. 478). He

division in his cabinet as to the right and expediency of defending the places owned by the Federal government in the seceded States; and it was the belief of the commissioners sent by the Confederate government to negotiate upon this point, that Seward had promised that Fort Sumter would be surrendered.[52] Many of the leaders of the Republicans in the North, amongst them Horace Greeley, advised that the seceding States be permitted to depart in peace.[53] The South still believed that when she showed she was in earnest, the North would yield; and that even if Lincoln wished to resist, he was powerless to act under existing laws.[54] On April 12th, the militia of South Carolina, under the command of a Confederate general, fired upon Fort Sumter, which was held by a small company of the army of the United States, in Charleston harbor, without provisions to endure a siege, and within the range of guns from the shore. After a short resistance to save his honor, Major Anderson two days later surrendered the fort. But the victory was indeed like one by Pyrrhus. The North, roused by this blow, rose to the defense of the flag. On the 15th, Lincoln called for seventy-five thousand troops to defend the Union, and the governors of all the free States at once responded.[55] The North had received the call and refused to lay down her cards. The South had too much pride to recede. Her leaders had raised a storm which it was now too late to cease; and they were carried along by the tide.[56]

made a few alterations at the suggestion of Seward (Nicolay and Hay, Life of Lincoln, vol. iv, pp. 321–323).

[52] Davis, Rise and Fall of the Confederate Government, vol. i, pp. 263–281, 675–685.

[53] "If the Cotton States shall decide that they can do better out of the Union than in it, we insist on letting them go in peace." The Tribune, Nov. 9, 1860.

[54] See note 7, *supra*.

[55] See *infra*, § 38, note 1. The constitutional authority for this proclamation is discussed in a subsequent chapter.

[56] Although this is not the view usually taken by historians, it is difficult for the writer to see how any student with personal experience in the manœuvres of politics or of litigation can escape this conclusion. Northern writers during the war, and those who are still under the influence of the passions of that time, charge that secession was the result of a conspiracy by a few ambitious men for the permanent disruption of the Union and the establishment of a great slave empire. The evidence collected by Rhodes in his History of the United States,* vol. iii, pp. 272–280, 381–385,

* Rhodes, however, does not seem to agree with the present writer as to the original intentions of the Southern leaders.

On May 13th, the people of North Carolina elected a convention, which, on the 21st, passed an ordinance of secession. The Legislature of Tennessee, at a secret session on May 7th, passed a declaration of independence, and an ordinance dissolving the Federal relations between the State and the United States, which was submitted to the people, and adopted the 8th of June. In Virginia, which had at first proposed a compromise between the two sections of the country, on April 17th, an ordinance of secession was passed in convention, and, June 25th, was adopted by a popular vote;[57] there being an understanding with the other seceded States that they would, as hostages for her protection, remove their President and Congress to Richmond, which was, on May 21st, made the capital of the Confederacy.[58] Her people on the west of the Alleghanies, however, who abutted on the free States of Ohio and Pennsylvania, knew that their interests as well as their sympathies were on the Northern side, and broke away from the rest of the State. Two years later, June 20th, 1863, Congress admitted West Virginia into the Union, after her citizens had

404-408 (see also Stephens, Constitutional View of the War between the States, vol. ii, p. 389), proves conclusively that after the movement was under way, the people of the South went faster than their leaders wished. Jefferson Davis urged them to go more slowly, and said in private conference and by letters and telegrams that he was "opposed to secession as long as the hope of a peaceful remedy remained" (Letter of O. R. Singleton, quoted by Davis, Rise and Fall of the Confederate Government, vol. i, p. 58; see also ibid., pp. 201, 227; Life of Davis, by his wife, vol. i, p. 697). Even Toombs was accused by his constituents of brandishing a tin sword (see citations by Rhodes, ibid., vol. iii, p. 213). The evidence cited in note 24, *supra*, as well as all the contemporary reports, prove that, had the Crittenden compromise been adopted, secession would have been abandoned. On the other hand, the addresses to their constituents by the delegations at Washington show that the movement was directed by the Southern members of Congress. And the whole order of procedure, with its dramatic situations, threats by word and action, accompanied by offers of mediation by Virginia and Kentucky, in imitation of former precedents; and the measures adopted by the seceding States, even after the adoption of the permanent Constitution of the Confederacy, to make no change in the existing order and create no obstacles to a return to the Union, show that the object of the proceedings was to scare the North into further concessions, not to tear the United States apart.

[57] McPherson, History of the Rebellion, pp. 3–8.

[58] The first capital was Montgomery, Ala. See Davis, Rise and Fall of the Confederate Government, vol. i, pp. 339, 648.

expressed their wish, through a convention, and the form of obtaining the consent of the mother State had been transacted by the vote of a so-called Virginia Legislature, chosen under the control of the Union army by a minority of the whole, few if any of whom claimed to represent constituencies out of the new State, and in no manner representing the wishes of Virginia. This was, in fact, a revolutionary proceeding, justified only by the exigency of the situation.[59]

The South had relied upon the common interests of the border slave States for protection against invasion by their neutrality, if not alliance. But, ground as they were between the upper and the nether millstone, all except Virginia refused to incur martyrdom for the sake of slavery, and, after some hesitation, sided with the North.

Kentucky at first attempted to remain neutral, and her house of representatives so voted in May, 1861.[60] On April 15th, the governor, Magoffin, whose sympathies were with the South, and who had previously recommended a convention of the border States at Baltimore,[61] replied to the call for soldiers: "In answer, I say emphatically, Kentucky will furnish no troops for the wicked purpose of subduing her sister Southern States."[62]

President Lincoln, with his usual tact, at first respected this neutrality, without acknowledging its legality; and sent no new

[59] Upon the vote for the admission of the new State, Thaddeus Stevens said: "We know that it is not constitutional, but it is necessary" (Davis, Rise and Fall of the Confederate Government, vol. ii, pp. 304–308). The best history of these proceedings is by Nicolay and Hay (Lincoln, vol. iv, pp. 327-340; vol. vi, pp. 297-313). They will be described in more detail in the chapter on the admission of new States.

[60] In May, 1861, the lower house of the Kentucky Legislature adopted the following resolutions: "Considering the deplorable condition of the country, for which Kentucky is in no way responsible, and looking to the best means of preserving the natural peace and securing the laws, liberty, and property of the citizens of the State; therefore, *Resolved*, by the House of Representatives, That this State and the citizens thereof, should take no part in the Civil War now being waged, except as mediators or friends of the belligerent parties; and that Kentucky should during the contest occupy a position of strict neutrality" (Shaler's Kentucky, p. 243).

[61] Stephens, Constitutional View of the War between the States, vol. ii, p. 364.

[62] McPherson, History of the Rebellion, p. 114.

troops into the State, although he formed a recruiting camp of Kentucky Union soldiers at Camp Dick Robinson, Garrard County. Jefferson Davis offended the conservatives by the statement, in a letter to Governor Magoffin, "that the Government of the Confederate States will continue to respect the neutrality of Kentucky so long as her people will maintain it themselves."[63] The first invasion of the State's soil, by troops from other States, was made by the Confederate forces under Polk and Zollicofer, September 3d, 1861. Grant's army followed immediately from Ohio. On the 11th, the Legislature passed, over the Governor's veto, a resolution, —

"That Governor Magoffin be instructed to inform those concerned, that Kentucky expects the Confederate or Tennessee troops to be withdrawn from her soil unconditionally."

A resolution requesting the Federal troops to withdraw was defeated, and, on the 18th, the Legislature resolved, over the governor's veto, that the Kentucky troops should expel the Confederate invaders.[64] Thereafter, Kentucky co-operated with the other loyal States, although many Kentuckians joined the Southern army. A majority of the population seem to have been always loyal, but those who sympathized with the South were allowed not too much liberty to vote.[65] A so-called "Sovereignty Convention" of persons claiming to represent sixty-five counties of the State, either self-appointed or chosen by Kentuckians in the Confederate army, met for three days, in November, 1861, without any authority from the Legislature; and, on the 20th, passed an ordinance of secession, and elected State officers.[66] The Confederacy went through the form of admitting the State into their league; and representatives and senators from Kentucky, chosen by Kentucky soldiers in the Confederate army, sat in the Confederate Congress.[67] Once for a few hours the Confederate troops occupied the capital of the State and attempted to perform the ceremonial of the induction of their State government into pos-

[63] Shaler's Kentucky, pp. 235–247. See Davis, Rise and Fall of the Confederate Government, vol. i, pp. 385–402.

[64] Shaler's Kentucky, pp. 248, 250–253.

[65] Shaler's Kentucky, pp. 320, 334–336, 348.

[66] Ibid., p. 270. McPherson, History of the Rebellion, p. 8.

[67] Davis, Rise and Fall of the Confederate Government, vol. i, p. 303.

session; but in the midst of their governor's speech he was driven from the city by an attack of the Union troops.[68] Meanwhile, the State remained in the Union, and was regularly represented in the Congress and Electoral College of the United States without any intermission.

Missouri, as has been shown above, had prepared for neutrality six years before.[69] The Legislature, January 21st, 1861, passed an act for the election of a convention "to consider the relations between the government of the United States" "and the government and people of the State of Missouri; and to adopt such measures for vindicating the sovereignty of the State, and the protection of its institutions, as shall appear to them to be demanded;" but it was expressly provided that "no act, ordinance, or resolution of said convention shall be deemed to be valid to change or dissolve the political relations of this State to the government of the United States, or any other State, until a majority of the qualified voters of this State, voting upon the question, shall ratify the same."[70] In the election of delegates, on February 18th, the people, by a majority of eighty thousand, determined against secession, and not a single secessionist was chosen.[71] The convention resolved, in March, by a vote of eighty-nine to one, that there was "no adequate cause to impel Missouri to dissolve her connection with the Federal Union."[72] They also appointed delegates to the proposed convention of the border States, as well as to the Peace Conference.[73] Subsequently, under authority claimed from State militia-laws, some of which were passed for the occasion, the governor attempted to oppose the army of the United States, and left the State to seek aid from the Confederacy.[74] In the meantime he had replied to Lincoln's call for troops: "Your requisition is illegal, unconstitutional, revolutionary, inhuman, diabolical, and cannot be complied with."[75] The convention reassembled in July, declared his office vacant, appointed a new governor in his place, abrogated the laws under

[68] Shaler's Kentucky, pp. 269–272.

[69] *Supra*, note 9.

[70] Carr's Missouri, p. 278.

[71] Ibid., p. 284.

[72] Ibid., p. 289.

[73] Ibid., p. 318. See Harper's Magazine for 1861, p. 547.

[74] Stephens, Constitutional View of the War between the States, vol. ii, p. 364.

[75] McPherson, History of the Rebellion, p. 115.

which he claimed to act, and continued to exercise supreme control at intervals, until June, 1863, when they dissolved, after the adoption of an ordinance for gradual emancipation.[76] A rump of less than a quorum of the Legislature met in extra session at the summons of the deposed governor, October 21st, 1861, under the protection of the Confederate army, away from the capital of the State. They voted an ordinance of secession, which the Confederate government recognized as valid, and on November 28th the form of an admission of Missouri into the Confederacy was transacted.[77] Missouri was represented in the Congress and the Electoral College of the Union throughout the war.

Delaware, which was bounded by the free States of Pennsylvania on the north and east and the slave State of Maryland on the west and south, remained loyal throughout. Under the plea that the State law did not vest him with such authority, Governor Burton ordered no militia to aid in the invasion of the South, but recommended the formation of companies of volunteers to aid the President in the defence of Washington and the support of the Constitution and laws of the United States.[78]

The loss of the slave State of Maryland, which separated the national capital from the free States, would have been irreparable to the North. Governor Hicks refused, in November, 1860, to call a special session of the Legislature at the request of a number of citizens of the State who desired to aid the South; and December 19th, in answer to the commissioner from Mississippi, declined to assist in secession.[79] At the same time he declared his purpose "to act in full concert with the other border States."

[76] Poore's Charters and Constitutions, pp. 1123–1136.

[77] Nicolay and Hay, Lincoln, vol. iv, pp. 206–226. For the Confederate view of these proceedings, see Davis, Rise and Fall of the Confederate Government, vol. i, pp. 410–432.

[78] McPherson, History of the Rebellion, p. 114. On Jan. 3, 1861, the legislature passed a resolution stating that, "having extended to the Hon. H. Dickinson, the Commissioner of Mississippi, the courtesy due him, as the Representative of a Sovereign State of the Confederacy, as well as to the State he represents, we deem it proper, and due to ourselves and the people of Delaware, to express our unqualified disapproval of the remedy for existing difficulties suggested by the Legislature of Mississippi" (Stephens, Constitutional View of the War between the States, vol. i, p. 370).

[79] McPherson, History of the Rebellion, p. 8. Stephens, Constitutional View of the War between the States, vol. ii, p. 368.

The State's representatives in the Peace Conference and Congress voted for the concessions demanded by the South; and in the meantime a political campaign for and against secession was in active progress through the State. On April 18th, 1861, the governor informed the people by a proclamation, "that no troops will be sent from Maryland, unless it may be for the defence of the capital." On April 19th, a mob attacked the Union troops on their march through Baltimore. On the following day the common council appropriated five hundred thousand dollars for the defence of the city; and an informal understanding was had with the Federal and railroad authorities, that no troops should be marched through the city if it were practicable to bring them to Washington by another route.[80] The Legislature met April 26th, and on the following day passed a bill ratifying the Baltimore ordinance by a vote lacking only one of unanimity.[81] On April 29th, the legislature voted against secession; in one house unanimously, in the other by a majority of more than three-fourths.[82] May 14th, they passed resolutions

"to register this her solemn protest against the war which the Federal government has declared upon the Confederate States of the South, and our sister and neighbor Virginia, and to announce her resolute determination to have no part or lot directly or indirectly in its prosecution."

"That the State of Maryland desires the peaceful and immediate recognition of the independence of the Confederate States, and hereby gives her cordial consent thereto as a member of the Union, entertaining the profound conviction that the willing return of the Southern people to their former federal relations is a thing beyond hope, and the attempt to coerce them will only add slaughter and hate to impossibility;" and "That under existing circumstances it is inexpedient to call a sovereign convention of the State at this time or to take any measures for the immediate organization of the militia."

The resolutions also protested against the military occupation of the State as "a flagrant violation of the Constitution."[83]

[80] Davis, Rise and Fall of the Confederate Government, vol. 1, pp. 331, 332; Butler's Book, p. 181.

[81] McPherson, History of the Rebellion, p. 396.

[82] McPherson, History of the Rebellion, pp. 8, 9.

[83] McPherson, History of the Rebellion, p. 397.

During the discussion of these resolutions, General B. F. Butler took military possession of Baltimore on May 13th.[84] In the same month, an attempt was made to pass a bill to appoint a Board of Public Safety, with authority to spend two million dollars in the defence of the State against the Federal army. This, however, was finally defeated.[85] On June 10th, the Legislature instructed the representatives of the State in Congress "to urge and vote for a speedy recognition of the Independence of the Government of the Confederate States of America."[86] When the Legislature reassembled in September, its adoption of an ordinance of secession was prevented by the arrest of nineteen members under the order of the Secretary of War; and by military force the State was retained in the Union with regular representation in Congress and the Electoral College, while the South sought consolation in the song of "Maryland, my Maryland."[87]

The trial of the wager of battle lasted more than five years.[88] The dispute as to the construction of the Constitution was too mighty to be decided in a court of justice. The South had appealed to the final argument. In imitation of the Gallic Brennus, she had thrown her sword into the scale. To her surprise, the North, less timid than the Romans, followed her example, and the weapon of the latter proved the heavier. The result determined the character of the Constitution for all time, and compelled the conquered to consent to amendments which eradicated the evil that had been the cause of the fraternal discord. No amendment which disclaimed the right of secession was written into the great charter. Pen and paper were not needed to express what had been stamped upon it by blood and iron.[89]

[84] Butler's Book, pp. 228–231.

[85] McPherson, History of the Rebellion, pp. 9, 398.

[86] Ibid., p. 398.

[87] Ibid., pp. 152, 153. Message of Governor Hicks, Dec. 3, 1861, quoted by Davis, Rise and Fall of the Confederate Government, vol. i, p. 336; Rhodes, History of the United States, vol. iii, pp. 553, 554. Lincoln had refused to authorize such a proceeding in April (Nicolay and Hay, Lincoln, vol. iv, pp. 167, 168). The subject of military arrests is discussed later.

[88] The war closed August 20, 1866. See proclamation of President Johnson of that date; U. S. *v.* Anderson, 9 Wallace, 56, 70; The Protector, 12 Wall., 600; Adgers *v.* Alson, 15 Wall., 560; Burke *v.* Miltenberger, 19 Wall., 519, 525.

[89] A few State Constitutions adopted after the outbreak of the Civil War expressly repudiate the right of seces-

§ 37. Constitutional History of the Southern Confederacy.

Slavery was the corner-stone[1] of the Confederate Constitution, but the doctrine of State rights lay also at its foundation, and the latter was more dangerous to its advocates than its opponents.

§ 37. [1] This was frankly admitted by the Vice-President of the Confederacy, Alexander H. Stephens, in his speech of March 21, 1861, where he said: "Many governments have been founded upon the principle of the subordination and serfdom of certain classes of the same race; such were, and are in violation of the laws of nature. Our system commits no such violation of nature's laws. With us, all of the white race, however high or low, rich or poor, are equal in the eye of the law. Not so with the Negro. Subordination is his place. He, by nature, or by the curse against Canaan, is fitted for that condition which he occupies in our system. The architect, in the construction of buildings, lays the foundation with the proper material — the granite; then comes the brick or the marble. The substratum of our society is made of the material fitted by nature for it, and by experience we know that it is *best*, not only for the *Superior*, but for the *Inferior race*, that it should be so. It is, indeed, in conformity with the ordinance of the Creator. It is not for us to inquire into the wisdom of his ordinances, or to question them. For his own purposes, he has made one race to differ from another, as he has made 'one star to differ from another star in glory.' The great objects of humanity are best attained when there is conformity to his laws and decrees in the formation of governments as well as in all things else. Our Confederacy is founded upon principles in strict conformity with these laws. This stone which was rejected by the first builders, 'is become the chief of the corner' — the real 'corner-stone' — in our new edifice" (Stephens, Constitutional View of the War between the States, vol. ii, pp. 86, 521). In the case of Johnson *v.* Tomkins, 1 Baldwin, 271; S. C. Fed. Cases, No. 7416, Mr. Justice Baldwin of the Supreme Court had said of the United States: "The foundations of this Government are laid, and rest on the rights of property in slaves, and the whole fabric must fall by disturbing the corner-stone." Jefferson Davis, after the war, repudiated this metaphor (Davis, Rise and Fall of the Confederate Government, vol. i, p. 261).

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sion. In Alabama, Art. I, Sec. 35, reads: "The people of this State accept as final the *established fact* that from the Federal Union there can be no secession of any State."

In South Carolina, Art. I, Sec. 5: "This State shall ever remain a member of the American Union, and all attempts, from whatever source, or upon whatever pretext, to dissolve the said Union, shall be resisted with the whole power of the State."

In North Carolina, Art. I, Sec. 4: "That this State shall ever remain a member of the American Union; that the people thereof are a part of the American nation; that there is no right on the part of the State to secede, and that all attempts, from whatever source or upon what-

On February 4th, 1861, a congress of delegates appointed by the conventions of the seceded States of South Carolina, Georgia, Florida, Alabama, Mississippi and Louisiana, met at Montgomery, Alabama. They prepared and adopted, on February 8th, the "Constitution for the Provisional Government of the Confederate States of America." This vested all legislative powers therein "delegated" "in the Congress now assembled, until otherwise or-

ever pretext, to dissolve said Union, or to sever said Nation, ought to be resisted with the whole power of the State."

And Art. I, Sec. 5: "That every citizen of this State owes paramount allegiance to the Constitution and government of the United States, and that no law or ordinance of the State in contravention or subversion thereof can have any binding force."

In Mississippi, Art. 1, Sec. 7: "The right to withdraw from the Federal Union on account of any real or supposed grievance, shall never be *assumed* by this State, nor shall any law be passed in derogation of the paramount allegiance of the citizens of this State to the government of the United States."

In Virginia, Art. I, Sec. 2: "That this State shall ever remain a member of the United States of America, and that the people thereof are a part of the American nation, and that all attempts, from whatever source or upon whatever pretext, to dissolve said union or to sever said nation are unauthorized, and ought to be resisted with the whole power of the State."

Art. I, Sec. 3: "That the Constitution of the United States and the laws of Congress passed in pursuance thereof, constitute the supreme law of the land, to which paramount allegiance and obedience are due from every citizen, anything in the Constitution, ordinances or laws of any State to the contrary notwithstanding."

In West Virginia, Art. I, Sec. 1: "The State of West Virginia is, and shall remain, one of the United States of America. The Constitution of the United States of America, and the laws and treaties made in pursuance thereof, shall be the supreme law of the land."

In Texas, Art. I, Sec. 1: "Texas is a free and independent State, subject only to the Constitution of the United States, and the maintenance of our free institutions and the perpetuity of the Union depend upon the preservation of the right of local self-government unimpaired to all the States."

In Missouri, Art. II, Sec. 3: "That Missouri is a free and independent State, subject only to the Constitution of the United States; and as the preservation of the States and the maintenance of their governments are necessary to an indestructible Union, and were intended to coexist with it, the Legislature is not authorized to adopt, nor will the people of this State ever assent to, any amendment or change of the Constitution of the United States which will in anywise impair the right of local self-government belonging to the people of this State."

In California, Art. I, Sec. 3: "The State of California is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land."

In North Dakota, Art. I, Sec. 3: "The State of North Dakota is an inseparable part of the American Union,

dained."[2] Vacancies in the representation of any State were filled in such manner as the proper authorities of the State directed.[3] It said: "Until the inauguration of the President, all bills, orders, resolutions and votes adopted by the Congress shall be of full force without approval by him."[4] After the inauguration of the President, he had the same veto power as the President of the United States; except that he was authorized to veto separate items in appropriation bills.[5] Congress had the power of taxation "for the revenue necessary to pay the debts and carry on the Government of the Confederacy."[6] In other respects, the Provisional Congress had the same powers as the Congress of the United States, excepting legislation over the territories and any ceded district, none of which then existed in the Confederacy, and the appropriation of money from the treasury, "unless it be asked and estimated for by the President or some one of the heads of departments, except for the purpose of paying its own expenses and contingencies."[7] Express powers were also given to admit other States, and to exercise executive powers until the President was inaugurated.[8] The importation of African negroes, from any foreign country other than the slave-holding States of the United States, was forbidden; and the Congress had power to enforce this provision by legislation, and "to prohibit the introduction of slaves from any State not a member of the Con-

[2] Provisional Constitution of the Confederacy, Art. I, Sec. 1; Davis, Rise and Fall of the Confederate Government, vol. i, p. 640.

[3] Provisional Constitution, Art. I, Sec. 2.

[4] Ibid., Art. I, Sec. 2.

[5] Ibid., Art. I, Sec. 5. See *infra*, over notes 33, 34.

[6] Ibid., Art. I, Sec. 6.

[7] Ibid., Art. I, Sec. 7.

[8] Ibid., Art. I, Sec. 6.

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and the Constitution of the United States is the supreme law of the land."

In Idaho, Art. I, Sec. 3: "The State of Idaho is an inseparable part of the Union, and the Constitution of the United States is the supreme law of the land."

In Wyoming, Art. I, Sec. 37: "The State of Wyoming is an inseparable part of the Federal Union, and the Constitution of the United States is the supreme law of the land."

Art. XIX, Sec. 1: "The following article shall be irrevocable without the consent of the United States and the people of this State:

"The State of Wyoming is an inseparable part of the Federal Union, and the Constitution of the United States is the supreme law of the land." See *infra*, § 38.

federacy."[9] The President and Vice-President were elected by Congress, voting by States. Each was to hold office for one year, or until a permanent government should be established.[10] The compensation of the President was fixed at twenty-five thousand dollars a year. The judicial power was vested in a Supreme Court, and, until otherwise provided by Congress, a District Court in each State, the latter court with "the jurisdiction vested by the laws of the United States, as far as applicable, in both the District and Circuit Court of the United States for that State."[11] It provided: that "The Supreme Court shall be constituted of all the district judges, a majority of whom shall be a quorum, and shall sit at such times and places as the Congress shall appoint."[12] "The Congress shall have power to make laws for the transfer of any causes which were pending in the courts of the United States to the courts of the Confederacy, and for the execution of the orders, decrees and judgments heretofore rendered by the said courts of the United States; and also all laws which may be requisite to protect the parties to all such suits, orders, judgments or decrees, their heirs, personal representatives, or assigns."[13] This Constitution could be amended by the vote of two-thirds of Congress.[14] It directed: that "The Government hereby instituted shall take immediate steps for the settlement of all matters between the States forming it and their late confederates of the United States, in relation to the public property and public debt at the time of their withdrawal from them; these States hereby declaring it to be their wish and earnest desire to adjust everything pertaining to the common property, common liberty and common obligations of that union upon the principles of right, justice, equity and good faith."[15] Until otherwise provided by Congress, the seat of government was fixed at Montgomery, Alabama.[16] The Constitution was to continue in force one year from the inauguration of the President, or until a permanent constitution or confederation between the States should be put in operation.[17] In other respects, the instrument was a

[9] Ibid., Art. II, Sec. 7. The object of this and the corresponding clause in the permanent constitution was to coerce the border slave States.

[10] Ibid., Art. II, Sec. 1.

[11] Ibid., Art. III, Sec. 1.

[12] Ibid., Art. III, Sec. 1.

[13] Ibid., Art. III, Sec. 1.

[14] Ibid., Art. V.

[15] Ibid., Art. VI.

[16] Ibid., Art. VII.

[17] Ibid., Preamble.

substantial copy of the Constitution of the United States. At that time, nearly all expected a speedy return to the original Union, and for that reason the paper was hastily drawn, with the object of making the least practicable disturbance with the existing order, except so far as was necessary to maintain consistency with the theory under which the proceeding was justified. The first act of the Provisional Congress was passed February 9th, 1861: "That all the laws of the United States of America, in force and in use in the Confederate States of America on the first day of November last, and not inconsistent with the Constitution of the Confederate States, be and the same are hereby continued in force until altered or repealed by the Congress."[18] The next act, passed February 14th, continued in office, until April 1st, all officers connected with the collection of customs, and the assistant treasurers entrusted with the keeping of the money thus collected, who were engaged in the performance of such duties within one of the Confederate States, with the same powers and functions which they had exercised under the Government of the United States.[19] On February 9th, Jefferson Davis, of Mississippi, was elected President, and Alexander H. Stephens, of Georgia, Vice-President, of the Confederacy.[20] On the 15th, Congress passed a resolution declaring "that it is the sense of this Congress that a commission of three persons be appointed by the President-elect, as early as may be convenient after his inauguration, and sent to the Government of the United States of America, for the purpose of negotiating friendly relations between that government and the Confederate States of America, and for the settlement of all questions of disagreement between the two governments upon principles of right, justice, equity and good faith."[21] February 25th, an act was passed "to declare and establish the free navigation of the Mississippi River," which prevented any interference with the passage of Northern as well as Southern vessels upon that stream;[22] and, on February 26th, the Congress repealed all laws of the

[18] Statutes at Large, Provisional Government, Confederate States of America, p. 27.

[19] Ibid., pp. 27–28.

[20] Davis, Rise and Fall of the Confederate Government, vol. i, p. 280.

[21] Statutes at Large, Provisional Government, Confederate States of America, p. 292.

[22] Ibid., pp. 36–38.

United States which required the enrollment or licensing of coasting vessels, and imposed discriminating duties upon foreign vessels or goods imported in them.[23] Thus, there was no interruption of the existing business relations with the United States, and means were taken to prevent friction on the restoration of the Union.

The permanent Confederate Constitution was adopted March 11th, after the North had refused to accede to the amendments to the Federal Constitution which the South demanded. Even then, when the more sagacious of them at least must have foreseen the danger of a war[24] which would necessitate unity and strength in the central government where the command of their armies was reposed, the Southern statesmen did not recede from the theories which they and their predecessors had advocated for the government of the United States since the time of Jefferson. They did not realize that those checks upon the power of the central government, which seemed necessary for the protection of a domestic institution maintained in their own States, and regarded at first with suspicion and subsequently with undisguised hostility by other States of a common Union, were not needed in and must be injurious to the welfare of the new Confederacy in which all alike had a common interest in its preservation. The permanent constitution of the Confederacy was avowedly modelled upon the Constitution of the United States, with a few corrections which seemed likely to secure economy and prevent waste of the public revenues. All other changes were designed to secure the interests of slaveholders and establish those theories of State rights for which they had so long contended.

The twelve amendments were incorporated into the main body of the instrument, and the style of the new government throughout was "The Confederate States." The Preamble read: —

"We the people of the *Confederate States*, each *State* acting in its sovereign and independent character, in order to form a permanent Federal *Government*, establish justice, insure domestic tranquillity and

[23] Ibid., p. 38.

[24] A prophetic speech in the Cassandra vein was made by Alexander H. Stephens before the Georgia Convention, in which he foretold that defeat would be followed by "universal emancipation" (McPherson, History of the Rebellion, p. 25).

secure the blessings of liberty to ourselves and our posterity, *invoking the favor and guidance of Almighty God*, do ordain and establish this Constitution for the *Confederate* States of America."

The legislative powers vested in Congress were "delegated," instead of "granted."[25] The custom, in the Western States, of allowing immigrants to vote before they had been naturalized, which was criticized in the South Carolina declaration of independence, was prevented by the provision that the electors of members of the House of Representatives must be citizens of the Confederate States, and that "No person of foreign birth, not a citizen of the Confederate States, shall be allowed to vote for any officer, civil or political, State or Federal."[26] It directed that senators should be chosen by the legislatures of the several States "at the regular session next immediately preceding the commencement of the term of service;" and Congress had no power to regulate "the *times* and places of choosing senators."[27] In addition to the former provisions for impeachments, it provided, "That any judicial or other federal officer, resident and acting solely within the limits of any State, may be impeached by a vote of two-thirds of both branches of the legislature thereof." Congress had the power by law to "grant to the principal officer in each of the executive departments a seat upon the floor of either house, with the privilege of discussing any measures appertaining to his department."[28] The necessary legislation to put this provision into effect was never adopted,[29] but the practice prevailed in the provisional Congress.[30]

The President was elected for a term of six years and was not re-eligible.[31] No person was eligible who was not "a natural born

[25] Confederate Constitution, Art. I, Sec. 1.

[26] Ibid., Art. I, Sec. 2.

[27] Ibid., Art. I, Sec. 4.

[28] Ibid., Art. I, Sec. 6.

[29] Davis, Rise and Fall of the Confederate Government, vol. i, p. 260. He was of the opinion that the practice would have been beneficial. The provision was the work of Alexander H. Stephens (Constitutional View of the War between the States, vol. ii, p. 358). The point will be discussed subsequently.

[30] Wilson, Division and Reunion, p. 244.

[31] Confederate Constitution, Art. II. This article was largely the work of R. Barnwell Rhett of South Carolina, the Chairman of the Committee upon the formation of this Constitution. Most of the other changes from the text of the Federal Constitution were suggested by him, except those

citizen of the Confederate States, or a citizen thereof at the time of the adoption of this Constitution, or a citizen thereof born in the United States prior to the 20th of December, 1860," the date of the secession of South Carolina, and "who shall not have attained the age of thirty-five years, and been fourteen years a resident within the limits of the Confederate States, as they may exist at the time of his election."[32] The amount of his salary was not fixed as in the provisional Constitution. He had the power to veto any item in an appropriation bill.[33] This provision, which was also in the provisional constitution, was first adopted by the Confederacy, and has since been copied into the constitutions of nearly one-half the States in the Union.[34] The disputed question under the Federal Constitution as to the power of removal from office was settled by the provisions: —

"The principal officer in each of the executive departments, and all persons connected with the diplomatic service, may be removed from office at the pleasure of the President. All other civil officers of the executive department may be removed at any time by the President or other appointing power when their services are unnecessary, or for dishonesty, incapacity, inefficiency, misconduct, or neglect of duty; and, when so removed, the removal shall be reported to the Senate, together with the reasons therefor."[35]

The frequent evasions of that part of the Constitution which requires the consent of the Senate to certain appointments to office were prevented by the clause, "No person rejected by the Senate shall be reappointed to the same office during their ensuing recess."[36]

The Confederate Congress had in general the same powers as the Congress of the United States, but the latitudinarian construction, under which appropriations for internal improvements and protective tariffs had been passed, was prevented by the provision

the authorship of which is stated in subsequent notes (Stephens, Constitutional View of the War between the States, vol. ii, p. 358).

[32] Ibid., Art. II, Sec. 1.

[33] Ibid., Art. I, Sec. 7.

[34] The effect of such a provision will be discussed subsequently.

[35] Ibid., Art. II, Sec. 2; this subject will be discussed subsequently in the chapter on the Executive Power.

[36] Ibid., Art. II, Sec. 2; this subject will also be discussed subsequently.

that the power of taxation should be limited "for *revenue necessary* to pay the debts, provide for the common defense, and carry on the government of the Confederate States; but no bounties shall be granted from the treasury; nor shall any duties or taxes on importations from foreign nations be laid to promote or foster any branch of industry;" and after the delegation of the power to regulate commerce, it was said: "but neither this, nor any other clause contained in the Constitution, shall ever be construed to delegate the power to Congress to appropriate money for any internal improvement intended to facilitate commerce; except for the purpose of furnishing lights, beacons and buoys and other aid to navigation upon the coasts, and the improvement of harbors and the removing of obstructions in river navigation, in all which cases such duties shall be laid on the navigation facilitated thereby, as may be necessary to pay the costs and expenses thereof."[37] The power over naturalization was "to establish uniform *laws*," instead of "a uniform *rule* of naturalization";[38] and the power to pass bankrupt laws was limited so that "no law of Congress shall discharge any debt contracted before the passage of the same.[39]

Taxes on exports were permitted by a vote of two-thirds of both houses, so that in an exigency money could be raised by a tax on exported cotton. No appropriation "not asked and estimated for by some one of the heads of departments, and submitted to Congress by the President," could be made except by the vote of two-thirds of both houses of Congress, unless for the purpose of paying the expenses and contingencies of Congress, or for the payment of claims against the Confederate States, the justice of which had been judicially declared by a tribunal for the investigation of claims which it was made the duty of Congress to establish. It was provided that "all bills appropriating money shall specify in

[37] Confederate Constitution, Art. I, Sec. 8. Most of these provisions were suggested by Rhett. Robert Toombs of Georgia, however, was the author of the prohibitions upon bounties, extra allowances and internal improvements (Stephens, Constitutional View of the War between the States, vol. ii, p. 333).

[38] Ibid., Art. I, Sec. 8. The acute and learned author of The Republic of Republics has criticised this as an unnecessary abandonment by the framers of the Confederate Constitution of one of the arguments in favor of the right of secession (4th ed., pp. 398, 399).

[39] Ibid., Art. I, Sec. 8.

Federal currency, the exact amount of each appropriation, and the purposes for which it is made; and Congress shall grant no extra compensation to any public contractor, officer, agent, or servant, after such contract shall have been made or such service rendered;" [40] and that every law or resolution having the force of law, must relate to but one subject, to be expressed in its title. States were permitted to lay duties "on tonnage" "on sea-going vessels, for the improvement of rivers and harbors navigated by the said vessels": provided that such duties did not conflict with any treaties of the Confederate States with foreign nations; and that any surplus revenue, after paying for the improvement, should be paid into the common Treasury.[41] States were also permitted to make compacts to improve the navigation of rivers which flowed through two or more of them.[42]

The Confederate Courts had no jurisdiction, because parties were citizens of different States; [43] and the provision for the return of fugitives from justice was expressly limited to cases where the crime was committed against the laws of the State which demanded the return.[44]

The main provisions, however, were the guarantees of slavery, which were thorough. The old circumlocutions were abandoned, and there was no squeamishness about calling a slave a slave. The Congress was expressly forbidden to pass any law denying or impairing the right of property in negro slaves.[45] Citizens of each State were secured "the right of transit and sojourn in any State of this Confederacy, with their slaves and other property; and the right of property in said slaves shall not be impaired." The provision for the return of fugitive slaves was extended so as to cover those who might escape from Territories as well as States.[46]

The importation of negroes from any foreign country other than the slave-holding States or Territories of the United States was expressly forbidden. Congress was directed to legislate for the enforcement of this prohibition; and had the further power to pro-

[40] Confederate Constitution, Art. I, Sec. 9.
[41] Ibid., Art. I, Sec. 10.
[42] Ibid.
[43] Ibid., Art. III, Sec. 2.
[44] Ibid., Art. IV, Sec. 2.
[45] Ibid., Art. I, Sec. 9.
[46] Ibid. South Carolina and Florida were opposed to these prohibitions. (National Intelligencer, March 28th, 1861, cited by Rhodes, vol. iii, p. 322.)

hibit the introduction of a slave from any State "not a member of, or any Territory not belonging to, this Confederacy."[47] New States could be admitted only by a vote of two-thirds of each house, the Senate voting by States.[48] Express power was granted for the acquisition of new territory; and the power was delegated to Congress to legislate and provide governments for the inhabitants of all territory belonging to the Confederate States, lying without the limits of the several States; and to permit them, at such time and in such manner as should be provided by law, to form States to be admitted into the Confederacy. "In all such territory, the institution of negro slavery, as it now exists in the Confederate States, shall be recognized and protected by Congress, and by the territorial government; and the inhabitants of the several Confederate States and Territories shall have the right to take to such Territory any slaves lawfully held by them in any of the States or Territories of the Confederate States." Any three States, acting through their conventions, had the right to a convention of all the States summoned by Congress, to take into consideration such amendments as they suggested; and any proposed amendments agreed on by such convention, voting by States, and ratified by the legislatures or conventions of two-thirds of the several States, were to become thenceforth a part of the Constitution. But no State could, without its consent, be deprived of its equal "representation" in the Senate.[49] The government established by the Constitution was declared the successor of the Provisional Government. All laws passed by the latter were continued in force until repealed or modified; and all officers appointed by the same remained in office until their successors were appointed and qualified, or the offices abolished.[50] The Constitution was to be in force upon its ratification by the conventions of five States; but until the election and meeting of the new Congress, the Provisional Congress were authorized to "continue to exercise the legislative power granted them, not extending beyond the time limited by the Constitution of the Provisional Government."[51]

[47] Confederate Constitution, Art. I, Sec. 8. See *supra*, note 9.

[48] Ibid., Art. IV, Sec. 3. This clause was drawn by John Perkins, Jr., of Louisiana (Stephens, Constitutional View of the War between the States, vol. ii, p. 338).

[49] Ibid., Art. III, Sec. 3.

[50] Ibid., Art. VI.

[51] Ibid., Art. VII.

The Confederate Constitution was ratified in most States by the same Conventions which had passed the ordinances of secession. In Georgia, the convention defeated a proposition to submit it to the people. In Tennessee, it was submitted to the people and approved after it had been ratified by the Legislature.[52] Virginia and Tennessee, through commissioners appointed in the former State by her convention, in the latter by her legislature, entered into what was termed in Virginia a convention and in Tennessee a military league, by which their respective military forces, arms and supplies, were placed under the direction of the President of the Confederacy until an ordinance of secession and a ratification of the Confederate Constitution could be adopted. A similar transaction took place between the commissioners appointed by the rump legislature of Missouri and the Confederate Government.[53]

The first act to provide for the defense of the Confederacy was that of the Provisional Congress, February 28th, 1861, in which it was provided —

"That the President be further authorized to receive into the services of this government such forces now in the service of such States as may be tendered or who may be volunteered by the consent of their State, in such numbers as he may require, for any time not less than twelve months, unless sooner discharged." [54]

On March 6th, 1861, a law was passed to establish and organize a permanent army of the Confederacy, as distinct from the provisional army for which provision was made in the last-named statute. The number to be raised was nine thousand four hundred and twenty. Officers who left the army of the United States received the same relative rank in the Confederate army which they had held in the former.[55]

[52] McPherson, History of the Rebellion, pp. 1–5. Davis said that it was submitted to and ratified by the people of the respective States (Rise and Fall of the Confederate Government, vol. i, p. 258). But he evidently considered the action of these conventions the action of the people.

[53] McPherson, History of the Rebellion, pp. 5, 8, 11. Davis (Rise and Fall of the Confederate Government, vol. i, p. 299) said that these proceedings were constitutional before the secession of these States under Article I, Section 10 of the Federal Constitution, because they were "in such imminent danger" as would not admit of delay.

[54] Davis, Rise and Fall of the Confederate Government, vol. i, p. 304.

[55] Ibid., pp. 306, 307.

The weakness in time of war of a constitution full of guaranties of personal liberty and checks upon the powers of the government is manifest in the history of the Confederacy. The constitutional obstructions to direct taxation made it almost impossible to collect the funds necessary for military operations, except by borrowing through the negotiation of bonds and the issue of a paper currency.[56] The passage of a legal-tender law was prevented by constitutional objections in the minds of the President and Congress.[57] The governor of Georgia vetoed a bill to make State taxes payable in Confederate currency, amongst other reasons, because he thought it violated the constitutional prohibition against making anything but gold or silver a legal tender.[58] Other governors assisted the Confederacy by approving bills which made a tender of Confederate and State bonds and the notes of State banks sufficient to stay executions;[59] and in Florida it was enacted that a refusal to accept Confederate currency should terminate an exemption from military service.[60] A tax upon the circulation of Confederate currency, accompanied by provisions for funding the same, was subsequently passed by the Confederate Congress and

[56] Davis, Rise and Fall of the Confederate Government, vol. i, pp. 493–496. "So long as there seemed to be a probability of being able to carry out these provisions of the Constitution fully, and in conformity with the intentions of its authors, there was an obvious difficulty in framing any system of taxation. A law which should exempt from the burden two-thirds of the property of the country would be as unfair to the owners of the remaining third as it would be inadequate to meet the requirements of the public service. The urgency of the need, however, was such that, after great embarrassment, the law of April 24th, 1863, above mentioned, was framed. Still a large proportion of these sources was unavailable for some time, and the intervening exigencies permitting of no delay, a resort to further issues of treasury notes became unavoidable." (Ibid., p. 496.)

"Within six months after the passage of the war-tax of August 19th, 1861, the popular aversion to taxation by the general government had so influenced the legislation of the several States that only in South Carolina, Mississippi and Texas were taxes actually collected from the people. The quotas from the remaining States had been raised by the issue of bonds and State treasury notes. The public debt of the country was thus actually increased instead of being diminished by the taxation imposed by Congress." (Ibid., p. 495.)

[57] J. C. Schwab, The Finances of the Confederacy, a valuable monograph, Pol. Sc. Quar., vol. ii, pp. 43–50.

[58] Dec. 15, 1863; ibid., p. 51.

[59] Ibid., p. 51.

[60] Florida Act of Dec. 3, 1863; ibid., p. 51.

justified under the tax power against constitutional objections.[61] Finally, against the protests of many leaders of the people,[62] they were obliged to resort to a practice to which Washington was driven during the revolution,[63] and an act was passed March 26th, 1863, which authorized the impressment of property of all kinds, including slaves, needed for military operations, with certain exemptions, at arbitrary prices fixed by joint commissioners appointed by the State and the Confederacy, or in certain cases by appraisers, upon payment in certificates of indebtedness.[64] This practice was the cause of many desertions from their cause.[65] The Supreme Court of Georgia once issued an injunction against the impressment by the Confederate army of a hotel for use as a hospital.[66]

On August 6th, 1861, an act was passed "for the sequestration of the estates, property and effects of alien enemies, and for the indemnity of citizens of the Confederate States, and persons aiding the same in the existing war against the United States." Under this, which was subsequently held by the courts of the United States to be void as an infringement of the Federal Constitution,[67] debts due to citizens of the free States, the border slave States being expressly excepted, and to all persons, irrespective of their citizenship, who aided the United States, were confiscated. Nearly two millions of dollars were collected from this source.[68] Obedience to the law was, however, refused by many under the claim that it was an infringement of the Confederate Constitution; and the celebrated Petigru, whose position at the

[61] Ibid., p. 50. See Davis, Rise and Fall of the Confederate Government, vol. i, pp. 489–492.

[62] Vice-President Alexander H. Stephens protested against this practice (Constitutional View of the War between the States, vol. ii, p. 570).

[63] See the remarks of Governor Clinton in the New York Convention of ratification (Elliot's Debates, 2d ed., vol. ii, p. 360), and of Grayson in the Virginia Convention (ibid., vol. iii, p. 290).

[64] This is reprinted in Chase's Decisions, p. 597.

[65] Alexander H. Stephens' testimony before the Joint Committee on Reconstruction (Report of that Committee, Part III, p. 165).

[66] White *v.* Ivey, 34 Ga., 186.

[67] Williams *v.* Bruffy, 96 U. S., 176; S. C. 102 U. S., 248; Stevens *v.* Griffith, 111 U. S., 48.

[68] The amount collected up to Sept. 30, 1863, was $1,862,550.27, as reported by the Confederate Secretary of the Treasury (McPherson, History of the Rebellion, pp. 203, 205). The law is reprinted in Chase's Decisions, p. 584.

bar of the South was similar to that of Charles O'Conor in the North, led a vigorous opposition, in which he was finally overruled by the courts.[69] On the recommendation of Congress, the States ceded to the Confederacy all the land and other property of the United States within their jurisdictions. This included the sum of $536,000 in coin at the New Orleans mint and custom-house, for which the State of Louisiana received a vote of thanks.[70]

It was found necessary to regulate, if not restrain, the liberty of the press by an act passed in January, 1862, which forbade, under the penalty of a fine of one thousand dollars and one year's imprisonment, the publication of news concerning the number, disposition, movement, or distribution of the land or naval forces, or a description of vessels, battery, fortification, engine of war, or signal, unless first authorized by the President or Congress, or the secretary of war or navy, or commanding officer of post, district or expedition;[71] and in the same year to pass a bill to "regulate the destruction of property under military necessity."[72]

The Confederate Government was obliged to follow the example of the United States by a compulsory draft of soldiers made by the authorities at Richmond, under an act of the Confederate Congress.[73] The conscription was vigorously opposed by the State authorities and high Confederate officers, upon the ground that the Confederate Government had no such constitutional powers, and that drafts could only be made by the State authorities. The arguments for and against the right were similar to those used at the same time in the North.[74] The subsequent conscription law,

[69] An interesting report of his argument is to be found in McPherson's History of the Rebellion, pp. 205, 206. For the decisions, see Richmond Examiner, Oct. 19 and Nov. 8, 1861; Richmond Whig, Nov. 8, 1861; Savannah Republican, Dec. 21, 1861; Charleston Courier, Oct. 25, 1861; cited by Rhodes, History of the United States, vol. iii.

[70] Ibid., vol. iii, p. 322.

[71] McPherson, History of the Rebellion, p. 117.

[72] Ibid., p. 117.

[73] See act of April 16, 1862; act of February, 1864. Abstracts of these are published in McPherson's History of the Rebellion, pp. 117-119. The first act is reprinted in Chase's Decisions, p. 579.

[74] See the very able argument in the letter of Jefferson Davis in answer to the constitutional objections of Governor Joseph E. Brown, of Georgia, dated May 29, 1862, the style of which is so logical and temperate, and in that respect so different from the other writings of Jefferson Davis, as to suggest the suspicion that it was the work of his attorney-general, that

which annulled the statutory right to exemption from military service obtained by the purchase of substitutes, was likewise vigorously attacked, but was supported by the decisions of the highest courts of Virginia, North Carolina, Georgia, and Alabama.[75]

It was held, however, that the Confederate government had no power to draft any State officer, not even a policeman or a justice of the peace.[76] The discharge by State courts of conscripts by writs of habeas corpus was common.[77] It was held that a Confederate soldier was not exempt from arrest on civil process.[78] Much friction was also caused by the objections of the militia to serve under officers of other States,[79] and at one time the governor of Mississippi refused to order them to leave the State.[80] The doctrine of State rights was also a formidable obstruction to the military operations. It was said of Davis, by one well qualified to judge him, that he was a man of narrow views of constitutional construction. "A straw of construction across his path

eminent lawyer, Judah P. Benjamin. It is reprinted in full in Davis, Rise and Fall of the Confederate Government, pp. 505–514.

This measure was also vigorously opposed by Alexander H. Stephens, both on constitutional grounds and on those of expediency (Constitutional View of the War between the States, vol. ii, pp. 570–574, 790, 791). This constitutional question is subsequently discussed in the chapter on the war-powers of the United States.

[75] Burroughs *v.* Peyton, 16 Grattan (Va.), 470; Gatlin *v.* Walton, 1 Winston (N. C.), 333; Daly *v.* Harris, 33 Ga. Supp. 38; *Ex parte* McCants, 38 Ala., 107. This subject will be discussed subsequently under the War-Power and Impairment of the Obligation of Contracts.

[76] Andrews *v.* Strong, 33 Ga. Supp., 166; Johnston *v.* Mallett, 2 Winston (N. C.), 13; Burroughs *v.* Peyton, 16 Grattan (Va.), 470, 483.

[77] Matter of Bryan, 1 Winston (N. C.), 1; Matter of Guyer, 1 Winston (N. C.), 66; Matter of Ritter, 1 Winston (N. C.), 76; Matter of Hine, 1 Winston (N. C.), 165; Matter of Boyden, 1 Winston (N. C.), 175; Matter of Curtis, 1 Winston (N. C.), 180; Matter of Took, 1 Winston (N. C.), 186; Matter of Prince, 1 Winston (N. C.), 195; Matter of Hunter, 1 Winston (N. C.), 447; Matter of Wyrick, 1 Winston (N. C.), 450; Matter of Bradshaw, 1 Winston (N. C.), 454; Matter of Somers, 1 Winston (N. C.), 459; Matter of Russell, 1 Winston (N. C.), 463; Matter of Cunningim, 1 Winston (N. C.), 664; Johnston *v.* Mallett, 2 Winston (N. C.), 13; Upchurch *v.* Scott, 2 Winston (N. C.), 137; Cobb *v.* Stallings, 34 Ga., 72; *Ex parte* Cain, 39 Ala. (N. S.), 440; *Ex parte* Graham, 13 Law and 12 Eq., Rich. (S. C.), 277.

[78] *Ex parte* Harlan, 39 Ala., N. S., 563.

[79] Davis, Rise and Fall of the Confederate Government, vol. i, p. 544.

[80] Cox, Three Decades of Federal Legislation, p. 312.

would stop him from the most darling wish of his heart."[81] At the outset of the war he could probably have seized Washington had he not been unwilling to invade the soil of Virginia and Maryland during their deliberations over secession.[82] He continually vetoed war measures because he thought them unconstitutional. But the State governors considered him a dangerous latitudinarian. Governor Vance formally threatened to call out the State militia to resist the unconstitutional acts of the Confederate government on North Carolina soil.[83] A conference of State governors was planned in order to organize opposition to him.[84] Once when General Lee's orders were obstructed by the attempts of local authorities in North Carolina to compel his observance of their quarantine regulations, he said that, although while the town was in existence he might perhaps be obliged to respect its quarantine, if there was further trouble he would, as an act of military necessity, be obliged to order all inhabitants to leave the place.[85]

The convention of Virginia, in July, 1861, passed an ordinance which provided that any citizen of the State, holding office under the Government of the United States after the first of July, 1861, with the exception of those holding office outside of the United States and Confederate States, upon whom it did not take effect until after July 1st, 1862, should be forever banished from the State; and that any citizen thereafter undertaking to represent the State in the Congress of the United States, should, in addition to banishment, be liable to be punished by the confiscation of his property, and be guilty of treason.[86] On August 14th, 1861, President Davis issued a proclamation requiring every male citizen of the United States, fourteen years of age, then within the Confederate States, who adhered to and acknowledged the authority of the United States, and was not a citizen of the Confederacy, to depart from the Confederate States within forty days. The border slave States were excepted from this proclamation.[87]

[81] Testimony of John B. Baldwin, Speaker of the Virginia House of Delegates, before the Joint Committee on Reconstruction, Part II, p. 107.

[82] Rhodes, History of the United States, vol. iii, pp. 374–381.

[83] Cox, Three Decades of Federal Legislation, p. 312.

[84] Ibid.

[85] This story was told the writer by a Confederate officer.

[86] McPherson, History of the Rebellion, p. 8.

[87] Ibid., p. 121.

In Davis' inaugural at the institution of their permanent constitution, February 22d, 1862, he said: —

"Through all the necessities of an unequal struggle, there has been no act on our part to impair personal liberty or the freedom of speech, of thought, or of the press. The courts have been open, the judicial functions fully executed, and every right of the peaceful citizen maintained as securely as if a war of invasion had not disturbed the land." [88]

Within five days he approved an act which authorized the suspension of the writ of habeas corpus. On March first he placed Richmond under martial law, and passports were required from those who wished to enter or leave the Confederate capital until his government abandoned it.[89] Two later acts extended his powers in this respect,[90] under which arbitrary arrests were made throughout the whole Confederacy. These statutes and proceedings were denounced as unconstitutional in the Congress, the State legislatures, and the courts, and created much opposition to the Confederacy, although the courts upheld them.[91] The Vice-President, Alexander H. Stephens, was their vigorous opponent.[92] When a Confederate general had appointed a civil governor of the city of Atlanta, he wrote to the latter: "Your office is unknown to the law. General Bragg had no more authority for appointing you civil governor of Atlanta than I had; and I had, or have, no more authority than any street-walker in your State. Under his appointment, therefore, you can rightfully exercise no more power than if the appointment had been made

[88] Rhodes, History of the United States, vol. iii, p. 601.

[89] Acts of First Confederate Congress, p. 1; Rhodes, ibid., p. 601.

[90] Ibid., pp. 601-603.

[91] See McPherson, History of the Rebellion, pp. 121, 187, 188, 618, 619. The Supreme Court of North Carolina were divided upon the subject, with a majority in favor of the constitutionality of the suspension (McPherson, History of the Rebellion, p. 120). Garfield said, in his argument in Milligan's Case (4 Wall. 2, 57): "When civilians arrested by military authority petitioned for release by the writ of *habeas corpus*, in every case, save one, the writ was granted, and it was decided that there could be no suspension of the writ or declaration of martial law by the executive or by any other than the supreme legislative authority."

[92] Stephens, Constitutional View of the War between the States, vol. ii, p. 570. The State legislature of Georgia, in March, 1864, when the Confederacy was in desperate straits, passed resolutions protesting against the suspension of the writ of habeas

by a street-walker."[93] The doctrine of State rights further injured the Confederacy, by attempts in the State legislatures to institute separate negotiations for peace[94] and secessions from the Confederacy.[95] In but one case did it prove beneficial. Davis and Lee, than whom no one was more competent to pass judgment upon such a subject, were strongly of the opinion that negroes should be employed in the Southern army. The opposition in the Confederate senate was so strong that Davis finally said, in his exasperation, "If the Confederacy dies, there should be written on its tombstone, 'Died of a theory.'" At the close of the war, when it was too late to prove of much value or mischief, the measure was finally carried through their Congress by the votes of the senators of Virginia, who believed the measure dangerous as well as inexpedient, but yielded to the instructions of their State Legislature.[96]

The last act under the Confederate Constitution was at Charlotte, North Carolina, on April 24th, 1865, — the approval by President Davis of the terms of the agreement between Generals Johnston and Sherman that the Confederate army should disband, peace be restored, amnesty granted, and the Confederate States return to the United States with their former political rights and the rights of person and property of their inhabitants unimpaired. He obtained a written opinion from each member of his cabinet

corpus and the proceedings under the same, declaring, "That in the judgment of this general assembly, the said act is a dangerous assault upon the constitutional power of the courts, and upon the liberty of the people, and beyond the power of any possible necessity to justify it" (ibid., vol. ii, pp. 788, 789). Similar resolutions were passed by the legislature of Mississippi (McPherson, History of the Rebellion, p. 399). More than one-third of the lower house of the Confederate Congress supported a resolution protesting against the suspension of the writ of habeas corpus; and a new bill extending its power of suspension was at first defeated in the senate (ibid., pp. 618, 619). See also Stephens' testimony before the Joint Committee on Reconstruction (Report of that Committee, Part III., p. 165).

[93] Stephens, Constitutional View of the War between the States, vol. ii, p. 786.

[94] See the letter of Jefferson Davis to the State senators of Georgia, on State negotiations for peace (McPherson, History of the Rebellion, pp. 616, 617). See also ibid., p. 456, 614-622.

[95] Cox, Three Decades of Federal Legislation, p. 313.

[96] Davis, Rise and Fall of the Confederate Government, vol. i, pp. 515-519.

recommending his action before he signed the paper. They further recommended that he should afterwards request the States to ratify his action, which was considered to be beyond his constitutional powers, and only justified by the emergency.[97] The government of the United States relieved them from further embarrassment by a refusal to approve the agreement, a destruction of the Confederate government and the capture of its President.[98]

§ 38. Reconstruction.

The restoration of peace and order after the close of the Civil War, and the readmission of the conquered people to their former relations with the Federal government, presented the most difficult political and constitutional problem which the United States has had to solve. It was accomplished only by what was, in fact as well as name, a complete reconstruction of the Union. The result had established the illegality of secession, and the proceedings by the successful army had been justified upon the position that the war was made, not upon the seceding States, which could not be, and had not been, in law or fact separated from the Union, but upon such of the people in them as had combined to oppose the laws of the United States.[1] When the

[97] The opinions of the Confederate cabinet were reprinted in the New York Sun, Feb. 14, 1886. No student should fail to examine the files of that periodical, which contain more valuable historical material and more accurate information concerning constitutional questions than any other newspaper in the world.

[98] *Infra*, § 38. The decisions of the courts upon the validity of the acts of the Confederate Government are discussed subsequently under the War Power.

For an interesting account of the secession of Sparta from the Achaian League because of the demand for some Lacedemonian filibusters who had attacked another Federal city; — "*decreverunt renunciandam societatem Achaeis*" —; and the consequent war against it by the League, B. C. 189–188, which resulted in the surrender of the malefactors, of whom seventeen were immediately massacred, and the rest, sixty-three in number, executed the following day, after a trial before the military assembly of the League: see Livy, xxxviii, pp. 31–33: Freeman, History of Federal Government, pp. 641–643. Sparta later resumed her former relations with the confederacy without any reconstruction (ibid).

§ 38. [1] In Lincoln's Proclamation of April 15, 1861, calling for troops (*supra*, § 36, over note 55, and *infra*): "Whereas the laws of the United States have been for some time past, and now are opposed, and the execution thereof obstructed, in the States of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana and

battles were over, the South and their friends in the North rejoined that, now it had been established that they had not gone out, these States must be still within the Union, and as such they were entitled to immediate representation in both houses of Congress, and complete local self-government, including full authority to regulate the right of suffrage, to determine the status and civil rights of the blacks within their boundaries, and even to pay the debts incurred for the prosecution of war against the national government.[2] The victors felt their moral obligation not only to protect from the vengeance of a majority, embittered by defeat, their white allies in the South, who had risked their property and lives in support of the Union through the war, but

Texas by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by law; now, therefore, I, Abraham Lincoln, President of the United States, in virtue of the power in me vested by the Constitution and the laws, have thought fit to call forth, and do call forth, the militia of the several States of the Union to the aggregate number of 75,000, in order to suppress said combinations and to cause the laws to be duly executed."

[2] The best statement of this position is in the minority report of the Joint Committee on Reconstruction (McPherson, History of Reconstruction, pp. 93–101. See also Pollard, The Lost Cause Regained, p. 51). Ex-Senator Henry L. Dawes, of Massachusetts, thus describes a scene in the Senate during October, 1861, speaking of Breckinridge of Kentucky:—

"One of the debates in which he took part in that session was so dramatic in some of its features that the impression it made upon me is still vivid. It occurred a few days before the disaster at Ball's Bluff, in which the lamented Baker, one of the most effective orators who ever sat in the Senate, was killed. Breckinridge had taken the position in debate that the Constitution had made no provision for the exigency which confronted us, and was pressing for an answer to his question, 'What will you do with us if you do conquer us? We can still vote. What hinders the vanquished from marching from the battle-field in solid column to the ballot-box, and beating you there, if we shall number there more than you do? You may defeat us in the field, but you cannot disfranchise us till after conviction and judgment of court; and you cannot do that till you have tried us by twelve of our own peers in the very State whose people have themselves revolted. So while you may conquer us in arms, we will afterward conquer you at the ballot-box.' At that moment, Baker entered the Senate-chamber in full uniform, fresh from his command at Ball's Bluff, and, placing his sword across his desk, plunged at once into the debate. The garb of the warrior in which he stood, strangely emphasized the words of the legislator when he fiercely hurled back the answer, 'We will govern you as conquered provinces.'" (The Century, July, 1895, vol. l, p. 464.)

also to care for the blacks to whom they had given freedom, and who, untrained to self-support, and without civil rights recognized by law, must, if abandoned, sink, if not into actual slavery, into practical serfdom to their former masters. The situation was further complicated by the clause in the Constitution which would, if unamended, give to the Southern whites representation in the House of Representatives based upon the whole number of free inhabitants, although by the State laws then upon their statute-books, the blacks, who were, in Mississippi, Louisiana and South Carolina, more than half the population, could not vote, so that, if the result of the war left that unchanged, the conquered section would have gained a stronger voice in the national councils than before.[3] The disorder inevitable from the passions and habits engendered during five years of internecine strife, during which the courts had been so often closed, and the greater portion of the property of the whites had been destroyed, was moreover heightened by the presence of the mass of freedmen, untrained in that self-restraint without which liberty is intolerable, not accustomed to voluntary labor or respect for contracts and the rights of property; and to preserve order appeals were continually made for interference by the Union army.[4] In

[3] "A large proportion of the population had become, instead of mere chattels, free men and citizens. Through all the past struggle these had remained true and loyal, and had, in large numbers, fought on the side of the Union. It was impossible to abandon them without securing them their rights as free men and citizens. The whole civilized world would have cried out against such base ingratitude, and the bare idea is offensive to all right-thinking men. Hence it became important to inquire what could be done to secure their rights, civil and political. It was evident to your Committee that adequate security could only be found in appropriate constitutional provisions. By an original provision of the Constitution, representation is based on the whole number of free persons in each State, and three-fifths of all other persons. When all become free, representation for all necessarily follows. As a consequence, the inevitable effect of the Rebellion would be to increase the political power of the insurrectionary States whenever they should be allowed to resume their position as States in the Union." Report of the Joint Committee on Reconstruction. (McPherson, History of Reconstruction, p. 88. See also the speech of Thaddeus Stevens, in the House, Dec. 18, 1865, quoted by Blaine, Twenty Years in Congress, vol. ii, pp. 128–130.)

[4] The condition of affairs is described in the testimony before the Joint Committee on Reconstruction.

such a state of affairs, it was the belief of many that local self-government was impossible. The theories propounded to meet the situation may be reduced to five: The Southern theory; the theory of conquered provinces; the theory of State suicide; the presidential theory; and the theory of forfeited rights.[5]

The Southern theory has just been explained.

The theory that the seceded States were conquered provinces, with no constitutional rights, whose boundaries, if need were, might be obliterated, which was that of Thaddeus Stevens,[6] was only logical if the legality of secession was conceded, and the North admitted the original contention of the South, that the war was waged by them for conquest, and not to uphold the Constitution.

The theory of State suicide was ingenious as a legal fiction invented to meet the purposes of the situation, but without support in legal precedent, history, or the language of the Constitution. It was formulated by Charles Sumner, in a series of resolutions tabled in the Senate in 1862. These declared: —

"That any vote of secession or other act by which any State may undertake to put an end to the supremacy of the Constitution within its territory is inoperative and void against the Constitution, and when sustained by force it becomes a practical abdication by the State of all rights under the Constitution, while the treason it involves still further works an instant forfeiture of all those functions and powers essential to the continued existence of the State as a body politic, so that from that time forward the territory falls under the exclusive jurisdiction of Congress as other territory, and the State being, according to the language of the law, *felo-de-se*, ceases to exist."

"That the termination of a State under the Constitution necessarily causes the termination of those peculiar local institutions which, having no origin in the Constitution or in those natural rights which exist independent of the Constitution, are upheld by the sole and exclusive authority of the State."

"That slavery, being a peculiar local institution, derived from local laws, without any origin in the Constitution or in natural rights, is upheld by the sole and exclusive authority of the State, and must

[5] Dunning, The Constitution in Reconstruction, Political Science Quarterly, vol. I, pp. 558, 580.

[6] See his speech in the House, Dec. 18, 1865.

therefore cease to exist legally or constitutionally when the State on which it depends no longer exists; for the incident cannot survive the principal." [7]

The presidential theory was, that the President as commander-in-chief had the constitutional right to organize temporary governments in the States which had been the seat of the insurrection, until in his opinion they were capable of self-government; that by his power to pardon he had the discretion to determine the time when the insurgent people should receive immunity for their treason and restoration to any rights which they had forfeited by rebellion; and that by the imposition of conditions upon the grant of these privileges he could compel such changes in the State constitutions as were demanded by the new situation.

The theory of forfeited rights was that upon which Congress finally acted. It was a compromise between the other views, and had little support in the logical interpretation of the Constitution, although great practical advantages. According to this, the insurgent States had never left, could not go out of the Union, and had always retained their political existence, but by their rebellion they had forfeited their political right to share in the councils of the nation and even to complete local self-government. In the enforcement of his plan the President had the absolute power to grant pardons [8] and the power to control the army as commander-in-chief, [9] although Congress claimed the right to regulate by law [10] the exercise of the latter executive function. On the other hand, Congress was vested with the powers to exercise exclusive jurisdiction over the admission and exclusion of members,[11] to suppress insurrections,[12] and to guarantee to each State a republican form of government.[13] The clause containing this last grant was called by Sumner "the sleeping giant of the Constitution."

[7] McPherson, History of the Rebellion, pp. 322, 323. This theory is advocated by John C. Hurd in his Theory of our Natural Existence, and Brownson in The American Republic. The idea was of course suggested by the English proceedings in 1688; and was equally revolutionary.

[8] Constitution, Art. II, Sec. 2.

[9] Ibid.

[10] Constitution, Art. I, Sec. 8, concluding clause.

[11] Constitution, Art I, Sec. 5.

[12] Constitution, Art. I, Sec. 8.

[13] Constitution, Art. IV, Sec. 4, Luther *v.* Borden, 7 How., 1, 42.

During the early stages of the Civil War, Congress proclaimed the theory upon which the South subsequently relied. In July, 1861, the following resolution, introduced by Crittenden in the House and Andrew Johnson in the Senate, was passed with but two dissentients in the former and five in the latter body: —

"*Resolved*, That the present deplorable Civil War has been forced upon the country by the disunionists of the Southern States, now in revolt against the Constitutional government, and in arms around the capital. That in this national emergency Congress, banishing all feelings of mere passion or resentment, will recollect only its duty to the whole country; that this war is not waged upon our part in any spirit of oppression, or for any purpose of conquest or subjugation, or purpose of overthrowing or interfering with the rights or established institutions of those States, but to defend and maintain the supremacy of the Constitution and preserve the Union," [in the Senate the resolutions here said, "and all laws made in pursuance thereof"], "with all the dignity, equality, and rights of the several States unimpaired; and that as soon as these objects are accomplished the war ought to cease."[14]

The existence in the Union of the seceded States was recognized in the imposition of the direct tax of 1861, when their proportion was assigned to them and the amount of the deficiency of each was made a charge upon the land within its jurisdiction.[15]

At first, no attempt was made by the United States to organize a civil government in any except Virginia, as described in a preceding section.[16] Before the organization of the State of West Virginia, senators and one representative elected under the auspices of the Pierpoint government were admitted to seats in Congress, from Virginia,[17] but no other representatives from that State received seats until its reconstruction. Andrew Johnson was admitted as a senator and Maynard and Clements as representatives from Tennessee while it was still the seat of war.[18] On February 9th, 1863, at the close of the thirty-seventh

[14] McPherson, History of the Rebellion, p. 286. See, however, note 2, *supra*.

[15] 12 St. at L., 295, 422.

[16] *Supra*, § 36, over note 59. See also *infra*, over notes 33, 54, and 58.

[17] Segur's Case, Bartlett, Contested Election Cases, 414–418; Nicolay and Hay, Life of Lincoln, vol. ix, p. 437.

[18] Ibid., vol. ix, p. 438; vol. vi, p. 348.

Congress, two representatives, chosen in the previous December at an election held under the direction of a military governor of Louisiana, were admitted to seats in the House; but there was considerable opposition to this proceeding, and it was not intended to establish a binding precedent.[19]

The insurgent territory, when subjected, was governed under martial law by the officers of the army of the United States or military governors appointed by the President, and justice was administered by judges detailed either from the military service or civil life, whose decrees were subject to revision by the officer in command of the district. In some cases, taxes, or rather requisitions, were levied upon the inhabitants by the officers in charge. Of the constitutionality of these acts under the war-power and the power to suppress insurrections, during the pendency of actual war, there can be no doubt; and the proceedings were sustained by the Supreme Court of the United States.[20]

The standing in those States of the blacks and the disloyal whites, who were not prisoners of war or actually in arms against the Union, was, however, a question of serious difficulty. That of the whites was settled by acts of Congress which imposed a test-oath, called the iron-clad oath, upon all officers of the United States [21] and grand and petit jurors,[22] under which all persons were disqualified from office and the jury-box who were unable to swear that they had not voluntarily assisted the Confederate Government or the insurrection. Both houses of Congress, through their power to determine the qualifications of their members, excluded all persons who, in their opinion, were guilty of disloyalty.[23] Several senators from the Confederate States,

[19] Case of Flanders and Hahn. Blaine; Twenty Years in Congress, vol. ii, p. 36.

[20] Cross *v.* Harrison, 16 How., 164, 190; Hamilton *v.* Dillon, 21 Wall., 73; Leitensdorfer *v.* Webb, 20 How., 176; The Grapeshot, 9 Wall., 129; Mechanics and Traders Bank *v.* Union Bank, 22 Wall., 276; New Orleans *v.* N. Y. Mail Steamship Co., 20 Wall., 387. This subject will be discussed subsequently in the chapter on the War Power.

[21] Act of June 17, 1862, 12 St. at L., p. 430.

[22] Act of July 2, 1862, 12 St. at L., p. 502.

[23] Case of Philip F. Thomas, of Maryland, Taft's Senate Election Cases, continued by Furber, p. 237, and cases cited *infra* in the section on the subject of qualifications for members of Congress.

and one from the loyal State of Kentucky, were expelled for treason.[24] The validity of this action by the House and Senate is beyond dispute. The law prescribing a test-oath for grand jurors remained upon the statute-book until May 14th, 1884, when it was repealed,[25] after the clear intimation by the Supreme Court that although it might be a constitutional exercise of the war-power, it was unconstitutional in time of peace.[26] The constitutionality of the act imposing such a test-oath upon officers of the United States has never been brought before the Supreme Court for review. An extension of the act so as to apply to attorneys in the Courts of the United States was subsequently held unconstitutional as an *ex post facto* law.[27]

The status of the blacks was a subject of greater difficulty. At the outbreak of hostilities, neither President Lincoln nor a majority of the Republican party was prepared to do any act which might make it appear as if the object of the war were to abolish slavery. The negroes left behind by such of their former owners as had fled within the Confederate lines, and those who had escaped thence to the Union army, and sought protection, were, however, capable of affording valuable assistance; and, moreover, the consciences of the Northern civilians, as well as soldiers, were offended at the thought of returning them to slavery. Orders by General Fremont, in Missouri, August 31st, 1861, and General Hunter, May 9th, 1862, of which the former emancipated the slaves of all persons in the State of Missouri who had taken up arms against the United States, and the latter all slaves in the States of Georgia, Florida, and South Carolina, were rescinded by President Lincoln, who said: "That whether it be competent for me, as Commander-in-Chief of the army and navy, to declare the slaves of any State or States free, and whether, at any time, in any case, it shall have become a necessity indispensable to the maintenance of the government, to exercise such supposed power, are questions which, under my responsibility, I reserve to myself,

[24] See the subsequent section on expulsion from Congress.

[25] 23 St. at L., 22.

[26] U. S. *v.* Gale, 109 U. S. 65, 73. See also Burt *v.* Panjaud, 99 U. S., 180, 183; Atwood *v.* Weems, 99 U. S., 183, 187, 188.

[27] *Ex parte* Garland, 4 Wall., 323. This subject will be discussed subsequently.

and which I cannot feel justified in leaving to the decision of commanders in the field."[28] A temporary solution of the problem was afforded by the ingenuity of General Benjamin F. Butler, who refused to return slaves that had escaped to the Union lines, upon the plea that they were contraband of war.[29] Finally, September 22d, 1862, Lincoln issued his Emancipation Proclamation, which declared that, on the first day of January, 1863, "all persons held as slaves within any State, or designated part of a State, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and forever free"; and, at the appointed time, a second proclamation, declaring the freedom of all slaves in the insurgent territory.[30] Destitute freedmen were supported by the War Department, in which a Freedmen's Bureau was established.[31]

The President observed the same care in preventing the officers of the Union army from committing him to any course of action towards the insurgent States after the restoration of peace. General Grant was instructed —

"to have no conference with General Lee, unless it be for the capitulation of General Lee's army, or on some minor and purely military matter"; and "not to decide, discuss, or confer upon any political question. Such questions the President holds in his own hands, and will submit them to no military conferences or conventions."[32]

He had previously disapproved the action of General Butler in ordering municipal elections in the district under his command, to decide whether the local governments organized by Pierpoint in Virginia should be continued. In his letters he said: —

[28] McPherson, History of the Rebellion, pp. 245-251.

[29] Butler's Book, p. 257. His action was approved by the Department of War. He was directed to keep a list of the fugitives employed by him, with the names of their masters, in order that loyal masters might receive compensation from Congress after the War (McPherson, History of the Rebellion, pp. 244, 245).

[30] McPherson, History of the Rebellion, pp. 227, 228. The legality of this proclamation will be considered subsequently. Later statutes emancipated "able-bodied colored persons" drafted into the army, and also their wives and children, with provisions for compensation to loyal owners (13 St. at L., 11, 29).

[31] The abandoned land in the South was temporarily appropriated for their support (McPherson, History of the Rebellion, pp. 594, 595).

[32] Stanton's telegram to Grant, Nov. 3, 1866 (McPherson, History of the Reconstruction, p. 122).

"Nothing justifies the suspending of the civil by the military authority but military necessity, and of the existence of that necessity the military commander, and not a popular vote, is to decide. And whatever is not within such necessity should be left undisturbed." "The course here indicated does not touch the case when the military commander, finding no friendly civil government existing, may, under the sanction or direction of the President, give assistance to the people to inaugurate one." [33]

Upon the collapse of the Confederacy, the Southern States assumed that their former position in the Union remained unimpaired; and their governors summoned meetings of their legislatures to adopt such measures as seemed appropriate to them. These proceedings were, however, suppressed by the Union army.[34] In Virginia, the President at first suggested that "the gentlemen who have acted as the Legislature of Virginia, in support of the rebellion, should meet, under the protection of the army, withdraw the Virginia troops and other support from resistance to the General Government"; but, upon finding that such permission by him would be construed as a recognition of the legal authority of the legislature, he promptly recalled his proposition.[35]

The shot which killed Lincoln was more injurious to the South than any other fired in the Civil War. It was his earnest desire to restore the insurgent States to their normal condition as soon as possible, without any more change than was absolutely necessary in the fundamental law. That the validity of the Proclamation of Emancipation should be recognized he was determined; but, beyond that, he was not disposed to impose further material conditions upon their return, although there can be little doubt but that he would have found some means of protecting the freedmen from oppression.[36] And his consummate tact and

[33] Lincoln to Butler, Aug. 9, 1864; not sent till Dec. 21, 1864; Nicolay and Hay, Life of Lincoln, vol. ix, p. 443.

[34] Davis, Rise and Fall of the Confederate Government, vol. ii, pp. 746, 757; Dunning, The Constitution in Reconstruction, Pol. Sc. Q., vol. ii., p. 558.

[35] McPherson, History of the Reconstruction, p. 26.

[36] In a speech by President Johnson, February 22, 1866, he said: "Shortly after I reached Washington, for the purpose of being inaugurated Vice-President, I had a conversation with Mr. Lincoln. We were talking about the condition of affairs, and in

firmness, supported by the confidence reposed in him by the people, and the use of the executive powers and patronage, would have made him successful in any conflict in which the opponents of his policy in Congress or the South might have engaged.[37] On December 8th, 1863, he issued a proclamation of amnesty, granting pardon to all persons who should swear that they would support, protect and defend the Constitution of the United States and the Union of the States thereunder, and abide by and faithfully support all existing acts of Congress and proclamations of the President made during the Rebellion, with reference to slaves, "so long and so far as not modified or declared void by the decision of the Supreme Court." Persons who had held high office, civil or military, under the Confederate Government, or who had left seats on the bench or in the Congress, or resigned commissions in the army or navy of the United States in order to aid the Rebellion, and all who had engaged in any way in treating Union colored soldiers or sailors, or their officers, otherwise than lawfully as prisoners of war, were excepted from the proclamation. He then continued: —

"And I do further proclaim, declare, and make known that whenever in any of the States of Arkansas, Texas, Louisiana, Mississippi, Tennessee, Alabama, Georgia, Virginia, Florida, South Carolina, and North Carolina, a number of persons, not less than one-tenth in number of the votes cast in such State at the presidential election of the

reference to matters in my own State. I said we had called a convention and demanded a constitution, abolishing slavery in the State, which provision was not contained in the President's proclamation. This met with his approbation, and he gave me encouragement. In thinking upon the subject of amendments to the Constitution, he said, 'when the amendment to the Constitution now proposed is adopted by three-fourths of the States, I shall be pretty nearly or quite done as regards forming amendments to the Constitution, if there should be one other adopted.' I asked what that other amendment suggested was, and he replied, 'I have labored to preserve this Union. I have toiled four years. I have been subjected to calumny and misrepresentation, and my great and sole desire has been to preserve these States intact under the Constitution, as they were before; and there should be an amendment to the Constitution which would *compel* the States to send their Senators and Representatives to the Congress of the United States'" (McPherson, History of the Reconstruction, p. 61).

[37] See Blaine, Twenty Years in Congress, vol. ii, pp. 43, 44; Riddle, Recollections of War Times.

year of our Lord one thousand eight hundred and sixty, each having taken the oath aforesaid and not having since violated it, and being a qualified voter by the election law of the State existing immediately before the so-called act of secession, and excluding all others, shall re-establish a State government which shall be republican, and in no wise contravening said oath, such shall be recognized as the true government of the State, and the State shall receive thereunder the benefits of the constitutional provision which declares that 'the United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and, on application of the legislature, or the executive (when the legislature cannot be convened), against domestic violence.'

"And I do further proclaim, declare, and make known that any provision which may be adopted by such State government in relation to the freed people of such State, which shall recognize and declare their permanent freedom, provide for their education, and which may yet be consistent, as a temporary arrangement, with their present condition as a laboring, landless, and homeless class, will not be objected to by the National Executive. And it is suggested as not improper, that, in constructing a loyal State government in any State, the name of the State, the boundary, the subdivisions, the Constitution, and the general code of laws, as before the rebellion, be maintained, subject only to the modifications made necessary by the conditions heretofore stated, and such others, if any, not contravening said conditions, and which may be deemed expedient by those framing the new State government.

"To avoid misunderstanding, it may be proper to say that this Proclamation, so far as it relates to State governments, has no reference to States wherein loyal State governments have all the while been maintained. And for the same reason, it may be proper to further say, that whether members sent to Congress from any State shall be admitted to seats constitutionally, rests exclusively with the respective Houses, and not to any extent with the Executive. And still further, that this Proclamation is intended to present the people of the States wherein the national authority has been suspended, and loyal State governments have been subverted, a mode in and by which the national and loyal State governments may be re-established within said States, or in any of them; and, while the mode presented is the best the Executive can suggest, with his present impressions, it must not be understood that no other possible mode would be acceptable."

The only conditions imposed for the benefit of the blacks were that the new State governments should recognize the validity of

the Emancipation Proclamation; and Lincoln even expressed his approval of a temporary arrangement by which they might be kept for a limited period of time in compulsory apprenticeship, in order to gradually habituate them to freedom.[38] In explanation of this suggestion, he said, in his message to Congress contemporary with the proclamation: —

"The proposed acquiescence by the National Executive in any reasonable temporary State arrangement of the freed people is made with a view of finally modifying the confusion and destitution which must, at best, attend all classes by a total revolution of labor throughout whole States. It is hoped that the already deeply afflicted people in those States may be somewhat more ready to give up the cause of their affliction, if, to this extent, this vital matter be left to themselves; while no power of the National Executive to prevent an abuse is abridged by the proposition."[39]

He suggested, subsequently, to the governor elected in Louisiana that the right of suffrage should be extended to a part of the blacks.[40]

[38] McPherson, History of the Rebellion, pp. 147, 148. In explanation of this proclamation, he said in his annual message to Congress of the same date: "But why tender the benefits of this provision only to a State government, set up in this particular way? This section of the Constitution contemplates a case wherein the element within a State, favorable to republican government, in the Union, may be too feeble for an opposite and hostile element external to or even within the State; and such are precisely the cases with which we are now dealing. An attempt to guarantee and protect a revived State government, constructed in whole, or in preponderating part, from the very element against whose hostility and violence it is to be protected, is simply absurd. There must be a test by which to separate the opposing elements so as to build only from the sound; and that test is a sufficiently liberal one, which accepts as sound whoever will make a sworn recantation of his former unsoundness" (McPherson, History of the Rebellion, p. 146). In his speech of April 11th, 1865, Lincoln said: "This plan was, in advance, submitted to the then Cabinet, and distinctly approved by every member of it. One of them suggested that I should then, and in that connection, apply the Emancipation Proclamation to the theretofore excepted parts of Virginia and Louisiana; that I should drop the suggestion about apprenticeship for free people, and that I should omit the protest against my own power, in regard to the admission of members of Congress; but even he approved every part or parcel of the plan which has since been employed or touched by the action of Louisiana" (Ibid., p. 609). This was Chase.

[39] McPherson, History of the Rebellion, p. 146.

[40] "I barely suggest for your private consideration, whether some of

Pursuant to this proclamation, in the spring of 1864, under the protection of the army, State governments were organized by a minority of the inhabitants of Arkansas and Louisiana,—in the former State by more than a fifth, and in the latter by about an eighth of the number of voters at the last presidential election.[41] In Arkansas, senators and representatives were elected, and applied for admission to Congress.

The members of the National Legislature, however, were by no means satisfied with the action of the President in thus taking the initiative without consulting with them. Many of their leaders, moreover, not only cherished feelings of bitterness against the South, but were more impressed than he with the necessity of ensuring protection for the emancipated but helpless blacks, and providing in the conquered States indemnity for the past and security for the future. The scheme of Lincoln was derided as a short-hand method of reconstruction by means of ten-per-cent governments.[42]

The Senate, June 24th, 1864, refused admission to the senators chosen by Arkansas upon the following ground, stated in the report of the committee of the judiciary:

"While a portion of Arkansas is at this very time, as the Committee are informed, in the actual possession and subject to the control of the enemies of the United States, other parts of the State are only held in subordination to the laws of the Union by the strong arm of military power. While this state of things continues, and the right to exercise armed authority over a large part of the State is claimed and exerted by the military power, it cannot be said that a civil government, set up and continued only by the sufferance of the military, is that republican form of government which the Constitution requires the United States to guarantee to every State in the Union." [43]

the colored people may not be let in; as for instance, those who have fought gallantly in our ranks." Lincoln to Michael Hahn, March 15, 1864 (Blaine, Twenty Years in Congress, vol. ii, p. 39).

[41] In Arkansas, for the new Constitution, 12,177; against it, 226. Fishback's Case, Taft's Senate Election Cases, continued by Furber, p. 205. In Louisiana, 6,836 against 1,566. Blaine, Twenty Years in Congress, vol. ii, p. 40.

[42] Blaine, Twenty Years in Congress, vol. ii, pp. 40-43, 79.

[43] Case of Fishback and Baxter, Taft's Senate Election Cases, continued by Furber, pp. 202-205.

Similar action was taken by the House.[44] At the same session of Congress at which these senators elect were refused admission, a bill was passed which authorized the President to appoint provisional governors of each of the States declared to be in rebellion, with authority to organize State governments through an election by the white male citizens whenever a majority had taken the oath of allegiance, with the exclusion from the franchise and from eligibility as delegates of all persons who had held office under the Confederate Government. It required that such conventions should insert in the State constitutions disfranchisement from the rights to vote and hold office in the legislature or as governor of all persons who had held civil office or a military office of the grade of colonel or higher under the Confederacy; the abolition of slavery; and the repudiation of the Confederate debt and the State debt incurred during the war. Upon the adoption of such a Constitution, the government so established was to be recognized by the President as legitimate, and representatives in both houses of Congress and the Electoral College were to be received from the State. Subsequent sections abolished slavery in the States affected by the bill and declared members of the disfranchised class not to be citizens of the United States. The main points of difference between the presidential and congressional plans at this time were that the latter required the action of a majority and the former that of only about ten per cent of the white male citizens to entitle the new State government to recognition; and that Congress also required the adoption by the States of certain constitutional provisions permanently excluding from political power their natural leaders, besides repudiating the debts incurred in aid of the insurrection. Lincoln failed to sign this bill, and issued a proclamation, which stated as his reasons: —

"While I am unprepared, by a formal approval of this bill, to be inflexibly committed to any single plan of restoration; and, while I am also unprepared to declare that the free State constitutions and governments already adopted and installed in Arkansas and Louisiana shall be set aside and held for nought, thereby repelling and discouraging the loyal citizens who have set up the same as to further effort, or to declare a constitutional competency in Congress to abolish

[44] Blaine, Twenty Years in Congress, vol. ii, p. 41.

slavery in States, but am at the same time sincerely hoping and expecting that a constitutional amendment abolishing slavery throughout the nation may be adopted, nevertheless I am fully satisfied with the system for restoration contained in the bill as one very proper plan for the loyal people of any State choosing to adopt it, and that I am, and at all times shall be, prepared to give the executive aid and assistance to any such people, so soon as the military resistance to the United States shall have been suppressed in any such State, and the people thereof shall have sufficiently returned to their obedience to the Constitution and laws of the United States, in which case military governors will be appointed, with directions to proceed according to the bill." [45]

[45] McPherson, History of the Rebellion, pp. 317–319. "Congress was to adjourn at noon, on the Fourth of July; the President was at work in his room at the Capitol, signing bills, which were laid before him as they were brought from the two Houses. When this important bill was placed before him, he laid it aside and went on with the other work of the moment. Mr. Sumner and Mr. Boutwell, while their nervousness was evident, refrained from any comment. Zachariah Chandler, who was unabashed in any mortal presence, roundly asked the President if he intended to sign the bill. The President replied: 'This bill has been placed before me a few minutes before Congress adjourns. It is a matter of too much importance to be swallowed in that way.' 'If it is vetoed,' cried Mr. Chandler, 'it will damage us fearfully in the Northwest. The important point is that one prohibiting slavery in the reconstructed States.' Mr. Lincoln said: 'That is the point on which I doubt the authority of Congress to act.' 'It is no more than you have done yourself,' said the Senator. The President answered: 'I conceive that I may in an emergency do things on military grounds which cannot be done constitutionally by Congress.' Mr. Chandler, expressing his deep chagrin, went out, and the President, addressing the members of the Cabinet who were seated with him, said, 'I do not see how any of us now can deny or contradict that Congress has no constitutional power over slavery in the States.' Mr. Fessenden expressed his entire agreement with this view. 'I have even had my doubts,' he said, 'as to the constitutional efficacy of your own decree of emancipation, in those cases where it has not been carried into effect by the actual advance of the army.' The President said: 'This bill and the position of these gentlemen seem to me, in asserting that the insurrectionary States are no longer in the Union, to make the fatal admission that States, whenever they please, may of their own motive dissolve their connection with the Union. Now we cannot survive that admission I am convinced. If that be true, I am not President; these gentlemen are not Congress. I have laboriously endeavored to avoid that question ever since it first began to be asserted, and thus to avoid confusion and disturbance in our own councils. It was to obviate this question that I earnestly favored the movement for an amendment abolishing slavery, which passed the Senate and failed in the House. I thought it much better if it were possible to restore the Union

Meanwhile his lenient treatment of the Southern States had caused considerable ill-feeling towards him among leaders of the Republican party out of Congress as well as in it. A movement to secure his defeat in the convention and the nomination in his place of Governor Tod of Ohio had been supported by a number of other war governors; but the will of the people was too strong for them.[46] After Lincoln's renomination, and the adjournment of Congress, Senator Benjamin F. Wade of Ohio, and Henry Winter Davis of Maryland, the chairmen of the Committees on the Rebellious States of the two houses of Congress, united in a protest published in the New York Tribune, August 5th, 1864, against his refusal to sign the Reconstruction Bill;[47] but the paper had no effect except to aid in defeating the renomination of Davis.[48]

Before the presidential election, Tennessee had also organized a government under Lincoln's proclamation, and presidential electors were chosen in Tennessee and Louisiana. February 4th, 1865, Congress passed the following: —

"Joint Resolution declaring certain States not entitled to representation in the electoral college: Whereas the inhabitants and local authorities of the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas, and Tennessee rebelled against the government of the United States, and were in such condition on the 8th day of November, 1864, that no valid election for President and Vice-President of the United States according to the Constitution and laws thereof was held therein on said day: Therefore, *Be it resolved*, That the States mentioned in the preamble to this joint resolution are not entitled to representation in the electoral college, and no electoral votes shall be received or counted from said States."[49]

without the necessity of a violent quarrel among its friends as to whether certain States have been in or out of the Union during the war — a merely metaphysical question, and one unnecessary to be forced into discussion'" (Nicolay and Hay, Life of Lincoln, vol. ix, pp. 120, 121).

[46] The writer learned this from the late Judge Dwight Foster, who was then Attorney-General of Massachusetts under Governor Andrew, who sympathized with this movement.

[47] McPherson, History of the Rebellion, p. 332.

[48] Blaine, Twenty Years in Congress, vol. ii, p. 44.

[49] McPherson, History of the Rebellion, pp. 577–579.

Lincoln signed this resolution and informed Congress that it — "has been signed by the Executive in deference to the view of Congress implied in its passage and presentation to him. In his own view, however, the two Houses of Congress, convened under the twelfth article of the Constitution, have complete power to exclude from counting all electoral votes deemed by them to be illegal; and it is not competent for the Executive to defeat or obstruct that power by a veto, as would be the case if his action were at all essential in the matter. He disclaims all right of the Executive to interfere in any way in the matter of canvassing or counting electoral votes, and he also disclaims that, by signing said resolution, he has expressed any opinion on the recitals of the preamble, or any judgment of his own upon the subject of the resolution." [50]

His last public speech was a defence of this plan of reconstruction, in which, however, he said that he was not inflexibly committed to it.[51]

Lincoln's death, however, on April 15th, 1865, placed the presidency in the hands of Andrew Johnson, who was by no means qualified to acquire the leadership, or even to command the respect of the party who had chosen him Vice-President in order to acknowledge their obligations to the Union men of the South. The difficulties of the situation were increased by the action of General Sherman, who, flushed with the triumph of his unparalleled march to the sea, three days after Lincoln's death, assumed to solve the problem of reconstruction in an agreement for an armistice with General Johnston in North Carolina. In this, he individually and officially pledged himself to procure the necessary acts by his superiors for a general amnesty and the immediate restoration of the seceded States to their political position before the war; "the people and inhabitants of all these States to be guaranteed, so far as the Executive can, their political rights and franchises, as well as their rights of person and property, as defined by the Constitution of the United States, and of the States respectively"; a clause which, if executed, might have restored slavery; in return for the disbandment of the Confederate army and the resumption of peaceful pursuits by its officers and pri-

[50] McPherson, History of the Rebellion, pp. 577–579.

[51] Ibid., pp. 608–610.

vates. This agreement was promptly ratified by Jefferson Davis, on behalf of the Confederacy, with the approval of his cabinet; but, as soon as received in Washington, it was disapproved by the President and cabinet, and Sherman was ordered to resume hostilities immediately.[52]

After at first inclining to severer measures against the South, influenced by the persuasion of Seward,[53] who was still Secretary of State, Johnson pursued the policy instituted by his predecessor. On May 29th, 1865, he issued a proclamation which directed the administrative and judicial officers of the United States to enforce the laws in Virginia, and said —

"that, to carry into effect the guaranty of the Federal Constitution of a republican form of State government, and afford the advantage and security of domestic laws, as well as to complete the re-establishment of the authority of the laws of the United States, and the full and complete restoration of peace within the limits aforesaid, Francis H. Pierpoint, Governor of the State of Virginia, will be aided by the Federal Government, so far as may be necessary, in the lawful measures which he may take for the extension and administration of the State government throughout the geographical limits of said State." [54]

On May 29th he issued a proclamation of amnesty similar to that of Lincoln, with, however, more stringent exceptions, including in the excepted classes all "persons who have voluntarily participated in said rebellion, and the estimated value of whose taxable property is over twenty thousand dollars." [55] He immediately appointed provisional governors of the States of North Carolina, Mississippi, Georgia, Texas, Alabama, South Carolina, and Florida, with instructions to each —

[52] McPherson, History of the Reconstruction, pp. 121, 122. The opinions of the Confederate Cabinet on the subject are published in the New York Sun, Feb. 14, 1886; *supra*, § 37, over note 97.

[53] Blaine, Twenty Years in Congress, vol. ii, pp. 67–68. As early as Nov. 24, 1863, however, Johnson had written to the Postmaster-General, Montgomery Blair: "I hope that the President will not be committed to the proposition of States relapsing into Territories and held as such." "The institution of slavery is gone, and there is no good reason for destroying the States to bring about the destruction of slavery." (McPherson, History of Reconstruction, p. 199.)

[54] McPherson, History of the Reconstruction, p. 8. See *infra*, over note 58.

[55] Ibid., p. 10.

"at the earliest practicable period, to prescribe such rules and regulations as may be necessary and proper for convening a convention, composed of delegates to be chosen by that portion of the people of said State who are loyal to the United States, and no others, for the purpose of altering or amending the constitution thereof; and with authority to exercise, within the limits of said State, all the powers necessary and proper to enable such loyal people of the State of North Carolina to restore said State to its constitutional relations to the Federal Government, and to present such a republican form of State government as will entitle the State to the guaranty of the United States therefor, and its people to protection by the United States against invasion, insurrection, and domestic violence; that in any election that may be hereafter held for choosing delegates to any State convention, as aforesaid, no person shall be qualified as an elector, or shall be eligible as a member of such convention, unless he shall have previously taken the oath of amnesty, as set forth in the President's proclamation of May 29, A. D. 1869, and is a voter qualified as prescribed by the Constitution and laws of the State of North Carolina, in force immediately before the twentieth day of May, 1861, the date of the so-called ordinance of secession; and the said convention, when convened, or the legislature that may be thereafter assembled, will prescribe the qualification of electors, and the eligibility of persons to hold office under the constitution and laws of the State, — a power the people of the several States composing the Federal Union have rightfully exercised from the origin of the government to the present time.

"And I do hereby direct: —

"*First*, That the military commander of the department, and all officers and persons in the military and naval service, aid and assist the said Provisional Governor in carrying into effect this proclamation; and they are enjoined to abstain from in any way hindering, impeding or discouraging the loyal people from the organization of a State government, as herein authorized.

"*Second*, That the Secretary of State proceed to put in force all laws of the United States, the administration whereof belongs to the State Department, applicable to the geographical limits aforesaid.

"*Third*, That the Secretary of the Treasury proceed to nominate, for appointment, assessors of taxes and collectors of customs and internal revenue, and such other officers of the Treasury Department as are authorized by law, and put in execution the revenue laws of the United States within the geographical limits aforesaid. In making appointments, the preference shall be given to qualified loyal persons residing

within the districts where their respective duties are to be performed. But if suitable residents of the districts shall not be found, then persons residing in other States or districts shall be appointed.

"*Fourth*, That the Postmaster-General proceed to establish post-offices and post-routes, and put into execution the postal laws of the United States within the said State, giving to loyal residents the preference of appointment; but if suitable residents are not found, then to appoint agents, &c., from other States.

"*Fifth*, That the district judge for the judicial district in which North Carolina is included, proceed to hold courts within said State, in accordance with the provisions of the act of Congress. The Attorney-General will instruct the proper officers to libel, and bring to judgment, confiscation and sale, property subject to confiscation, and enforce the administration of justice within said State in all matters within the cognizance and jurisdiction of the Federal courts.

"*Sixth*, That the Secretary of the Navy take possession of all public property, belonging to the Navy Department, within said geographical limits, and put in operation all acts of Congress in relation to naval affairs having application to the said State.

"*Seventh*, That the Secretary of the Interior put in force the laws relating to the Interior Department applicable to the geographical limits aforesaid." [56]

Under the immediate supervision of the President, who sent constant instructions in telegrams signed by himself or the Secretary of State, and issued thirteen thousand pardons within nine months to members of the excepted classes who seemed willing to aid his policy, the governors called conventions which proceeded to amend the State constitutions. These repealed or declared null and void the ordinances of secession. All but Mississippi declared slavery to be abolished; and most, under pressure by the President, annulled their war-debts and ratified the Thirteenth Amendment, which abolished slavery, although some with the qualification that the ratification was "with the understanding that it does not confer upon Congress the power to legislate upon the political status of freedmen in this State." [57] Thereupon they immediately elected members of Congress and

[56] McPherson, History of the Reconstruction, pp. 11-12.

[57] Alabama. Similar are the ratifications of South Carolina and Florida. Ibid., pp. 18-28; Blaine, Twenty Years in Congress, vol. ii, p. 76.

State legislatures which elected senators. In Virginia, Johnson had recognized the Pierpoint government, headed by Francis H. Pierpoint, who had been elected governor in 1861 by a convention composed mostly of residents of what subsequently became West Virginia.[58] All its archives and property were taken from Alexandria to Richmond in an ambulance.[59] Pierpoint called together a legislature which reorganized the government without a convention, after having obtained by a vote of the people authority to amend the State Constitution.[60] In Louisiana, Arkansas, and Tennessee, Johnson respected the State governments organized during the life of Lincoln. All these proceedings were instituted, and most of them completed, while Congress was not in session. When the Thirty-ninth Congress assembled in December, 1865, senators and representatives from nearly all these States were ready to present their credentials for admission. Many of them could not take the iron-clad oath and were excepted from the proclamations of amnesty. Amongst these was Alexander H. Stephens, the Vice-President of the late Confederacy. The President informed Congress in his message that a restoration of loyal State governments, accompanied by the abolition of slavery and obedience to the laws and government of the United States, had been established in all the seceded States, except Florida and Texas, where —

"the people are making commendable progress in restoring their State governments, and no doubt is entertained that they will at an early period be in a condition to resume all their practical relations with the Federal government." [61]

He said further: —

"The full assertion of the powers of the General Government requires the holding of Circuit Courts of the United States within the districts where their authority has been interrupted. In the present posture of our public affairs, strong objections have been urged to holding those courts in any of the States where the rebellion has

[58] McPherson, History of the Reconstruction, p. 8; *supra*, over notes 17, 33, 54; and § 36, over note 59.

[59] Blaine, Twenty Years in Congress, vol. ii, p. 79.

[60] McPherson, History of the Reconstruction, p. 26; Cox, Three Decades of Federal Legislation, pp. 422-424.

[61] McPherson, History of the Reconstruction, p. 67.

existed: and it was ascertained, by inquiry, that the Circuit Court of the United States would not be held within the district of Virginia during the autumn or early winter, nor until Congress should have 'an opportunity to consider and act on the whole subject.' To your deliberations the restoration of this branch of the civil authority of the United States is therefore necessarily referred, with the hope that early provision will be made for the resumption of all its functions. It is manifest that treason, most flagrant in character, has been committed. Persons who are charged with its commission should have fair and impartial trials in the highest civil tribunals of the country, in order that the Constitution and the laws may be fully vindicated; the truth clearly established and affirmed that treason is a crime, that traitors should be punished and the offence made infamous; and, at the same time, that the question be judicially settled, finally and forever, that no State of its own will has the right to renounce its place in the Union." [62]

On December 5th Georgia ratified the Thirteenth Amendment. The United States were then thirty-six in number, of which twenty-seven constituted three-fourths. Georgia was the twenty-seventh State to ratify, and on December 18th, Seward, the Secretary of State, filed a certificate under the seal of his department, stating that the amendment had been adopted. Subsequently, four of the loyal States and one of the former members of the Confederacy also ratified this amendment. But even after the votes by those four loyal States were added, it has never obtained the requisite ratification by three-fourths of the States, unless the validity of this action by the governments of the former insurgent States, organized by Lincoln and Johnson, is recognized.[63]

The majority of both Houses lost no time in manifesting their opposition to the policy of the President. The usual courtesy of the privileges of the floor pending the decision as to their admission, was not extended to the Southern representatives.[64] On December 13th, 1865, a joint committee on Reconstruction was appointed, with instructions to "inquire into the condition of the

[62] Ibid., p. 65.

[63] Ibid., p. 6. Seward was criticized at the time for his recognition of the validity of this action by the insurgent States. (Dunning, The Constitution in Reconstruction, Pol. Sc. Q., vol. ii, p. 591.)

[64] Blaine, Twenty Years in Congress, vol. ii, pp. 112, 113.

States which formed the so-called Confederate States of America and report whether they or any of them are entitled to be represented in either House of Congress, with leave to report by bill or otherwise." The report was not made until June 18th, 1866. In the meantime, the legislatures and people of the former Confederate States under their new constitutions had acted with great indiscretion, in view of the perils of their situation. They refused to comply with Johnson's recommendation to "extend the elective franchise to all persons of color who can read the Constitution of the United States in English and write their names, and to all persons of color who own real estate, valued at not less than two hundred and fifty dollars and pay taxes thereon."[65] Many persons who had not received amnesty were elected to high office, and different statutes were enacted grossly oppressive to the freed blacks, which made them liable to be "hired out" for six months to the highest bidder, as vagrants, and their children to apprenticeship to their former owners; subjected them to arrest and compulsory service in case of a breach of a contract of employment; and in one State, Louisiana, compelled agricultural laborers to make labor contracts within the first ten days of January, to be in force for an entire year, compliance with which could be compelled by justices of the peace. Poll-taxes without representation were also imposed upon them, in some States, and in one State at least were collected by the compulsory labor of the delinquents.[66]

[65] Johnson recommended this in a circular letter to the provisional governors whom he appointed. In a telegram to Governor W. L. Sharkey of Mississippi, August 15, 1865, he said that by such action "You would completely disarm the adversary and set an example the other States will follow. This you can do with perfect safety, and you thus place the Southern States, in reference to free persons of color upon the same basis with the free States. I hope and trust your convention will do this, and as a consequence, the radicals, who are wild upon negro franchise, will be completely foiled in their attempt to keep the Southern States from renewing their relations to the Union by not accepting their senators and representatives." (Ibid., pp. 81-82; McPherson, History of the Reconstruction, pp. 19, 20.)

[66] See abstracts of these statutes in McPherson, History of the Reconstruction, pp. 29-44; Blaine, Twenty Years in Congress, vol. ii, pp. 94-106; and Cox, Three Decades of Federal Legislation, pp. 414-416. This subject will be considered subsequently in the discussion of the Fourteenth Amendment.

The report of the Joint Committee on Reconstruction, like most important state documents of the Anglo-Saxon race, was based upon compromise, and mentioned without too much regard to logical consistency, each theory that could be applied to support the measures which it recommended. The beginning stated the condition of the insurgent States at the close of the Civil War and the declaration of the President that they were "deprived of all civil government." The Committee continued: —

"These Confederate States embrace a portion of the people of the Union who had been in a state of revolt, but had been reduced to a state of obedience by force of arms. They were in an abnormal condition, without civil government, without commercial connections, without national or international relations, and subject only to martial law. By withdrawing their representatives in Congress, by renouncing the privilege of representation, by organizing a separate government, and by levying war against the United States, they destroyed their State Constitutions in respect to the vital principle which connected their respective States with the Union and secured their federal relations; and nothing of those constitutions was left of which the United States were bound to take notice. For four years they had a *de facto* government, but it was usurped and illegal. They chose the tribunal of arms wherein to decide whether or not it should be legalized, and they were defeated. At the close of the Rebellion, therefore, the people of the rebellious States were found, as the President expresses it, 'deprived of all civil government.' Under this state of affairs it was plainly the duty of the President to enforce existing national laws, and to establish, as far as he could, such a system of government as might be provided for, by existing national statutes. As commander-in-chief of a victorious army, it was his duty, under the law of nations and the army regulations, to restore order, to preserve property, and to protect the people against violence from any quarter until provision should be made by law for their government. He might, as President, assemble Congress and submit the whole matter to the law-making power; or he might continue military supervision and control until Congress should assemble on its regular appointed day. Selecting the latter alternative, he proceeded, by virtue of his power as commander-in-chief, to appoint provisional governors over the revolted States." "It cannot, we think, be contended that these governors possessed, or could exercise, any but military authority. They had no power to organize civil governments nor to exercise any authority except that which inhered in

their own persons under their commissions. Neither had the President, as commander-in-chief, any other military power. But he was in exclusive possession of the military authority. It was for him to decide how far he would exercise it, how far he would relax it, when and on what terms he would withdraw it. He might properly permit the people to assemble, and to initiate the local governments, and to execute such local laws as they might choose to frame not inconsistent with, nor in opposition to, the laws of the United States. And, if satisfied that they might safely be left to themselves, he might withdraw the military forces altogether, and leave the people of any or all of these States to govern themselves without his interference." "But it was not for him to decide upon the nature or effect of any system of government which the people of these States might see fit to adopt. This power is lodged by the Constitution in the Congress of the United States, that branch of the government in which is vested the authority to fix the political relations of the States to the Union, whose duty is to guarantee to each State a republican form of government, and to protect each and all of them against foreign or domestic violence, and against each other. We cannot, therefore, regard the various acts of the President in relation to the formation of local governments in the insurrectionary States, and the conditions imposed by him upon their action, in any other light than as intimations to the people that, as commander-in-chief of the army, he would consent to withdraw military rule just in proportion as they should, by their acts, manifest a disposition to preserve order among themselves, establish governments denoting loyalty to the Union, and exhibit a settled determination to return to their allegiance, leaving with the law-making power to fix the terms of their final restoration to all their rights and privileges as States of the Union." After referring to the message of the President urging the speedy restoration of these States to their former condition in the Union, the report continued: "The impropriety of proceeding wholly on the judgment of any one man, however exalted his station, in a matter involving the welfare of the republic in all future time, or of adopting any plan, coming from any source, without fully understanding all its bearings and comprehending its full effect, was apparent." The fact that military force was still employed and the writ of habeas corpus not yet restored in the States affected was then stated. The southern theory was summarized and rejected as "not only wholly untenable, but, if admitted, would tend to the destruction of the government." "Whether legally and constitutionally or not, they did, in fact, withdraw from the Union and made themselves subjects of another govern-

ment of their own creation." "Your committee does not deem it either necessary or proper to discuss the question whether the late Confederate States are still States of the Union, or can even be otherwise. Granting this profitless abstraction about which so many words have been wasted,[67] it by no means follows that the people of those States may not place themselves in a condition to abrogate the powers and privileges incident to a State of the Union, and deprive themselves of all pretence of right to exercise those powers and enjoy those privileges. A State within the Union has obligations to discharge as a member of the Union. It must submit to federal laws and uphold federal authority. It must have a government republican in form, under and by which it is connected with the General Government, and through which it can discharge its obligations. It is more than idle, it is a mockery, to contend that a people who have thrown off their allegiance, destroyed the local government, which bound their States to the Union as members thereof, defied its authority, refused to execute its laws, and abrogated every provision which gave them political rights with the Union, still retain, through all, the perfect and entire right to resume, at their own will and pleasure, all their privileges within the Union, and especially to participate in its government, and

[67] In his last speech, March 17, 1865, Lincoln had said: "I have been shown a letter on this subject, supposed to be an able one, in which the writer expresses regret that my mind has not seemed to be definitely fixed on the question whether the seceded States, so-called, are in the Union or out of it. It would, perhaps, add astonishment to his regret were he to learn that, since I have found professed Union men endeavoring to make that question, I have *purposely* forborne any public expression upon it. As appears to me, that question has not been, nor yet is, a practically material one, and that any discussion of it, while it thus remains practically immaterial, could have no effect other than the mischievous one of dividing our friends. As yet, whatever it may hereafter become, that question is bad as the basis of a controversy, and good for nothing at all — a merely pernicious abstraction. We all agree that the seceded States, so-called, are out of their proper practical relation with the Union, and that the sole object of the Government, civil and military, of those States, is to again get them into that proper practical relation. I believe it is not only possible, but in fact easier to do this without deciding, or even considering, whether these States have ever been out of the Union, than with it. Finding themselves safely at home, it would be utterly immaterial whether they had ever been abroad. Let us all join in doing the acts necessary to restoring the proper practical relations between those States and the Union, and each forever after innocently indulge his own opinion, whether, in doing the acts, he brought the States from without into the Union, or only gave them proper assistance, they never having been out of it." (McPherson, History of the Rebellion, p. 609.)

to control the conduct of its affairs. To admit such a principle for one moment would be to declare that treason is always master and loyalty a blunder. Such a principle is void by its very nature and essence, because inconsistent with the theory of government, and fatal to its very existence. On the contrary, we assert that no portion of the people of this country, whether in State or Territory, have the right, while remaining on its soil, to withdraw from or reject the authority of the United States. They must obey its laws as paramount, and acknowledge its jurisdiction. They have no right to secede; and while they can destroy their State government, and place themselves beyond the pale of the Union, so far as the exercise of State privileges is concerned, they cannot escape the obligations imposed upon them by the Constitution and the laws, nor impair the exercise of national authority. The Constitution, it will be observed, does not act upon the people; while, therefore, the people cannot escape its authority, the States may, through the act of their people, cease to exist in an organized form, and thus dissolve their political relations with the United States." The obligations of the North to the freedmen and the difficulties arising from the original provisions of the Constitution concerning the proportion of representatives were then stated. Objections were raised to the regularity of the proceedings for the election of representatives from the south, and it was said: "Your committee are accordingly forced to the conclusion that the States referred to have not placed themselves in a condition to claim representation in Congress, unless all the rules which have, since the foundation of the Government, been deemed essential in such cases should be disregarded." The disloyal temper of the South, as proved by the evidence taken before them, was then set forth:

"With such evidence before them, it is the opinion of your committee —

"I. That the States lately in rebellion were, at the close of the war, disorganized communities, without civil government, and without constitutions or other forms, by virtue of which political relations could legally exist between them and the Federal Government.

"II. That Congress cannot be expected to recognize as valid the election of representatives from disorganized communities, which, from the very nature of the case, were unable to present their claim to representation under those established and recognized rules, the observance of which has been hitherto required.

"III. That Congress would not be justified in admitting such communities to a participation in the government of the country without

first providing such constitutional or other guarantees as will tend to secure the civil rights of all citizens of the Republic; a just equality of representation; protection against claims founded in rebellion and crime; a temporary restoration of the right of suffrage to those who have not actively participated in the efforts to destroy the Union and overthrow the Government; and the exclusion from positions of public trust of at least a portion of those whose crimes have proved them to be enemies to the Union, and unworthy of public confidence."

It was said that the State of Tennessee occupied a position apart from all the other insurrectionary States; and it was the subject of a separate report which recommended its immediate restoration to full rights in the Union.

"The conclusion of your committee, therefore, is, that the so-called Confederate States are not at present entitled to representation in the Congress of the United States; that, before allowing such representation, adequate security for future peace and safety should be required; that this can only be found in such changes of the organic law as shall determine the civil rights and privileges of all citizens in all parts of the Republic, shall place representation on an equitable basis, shall fix a stigma upon treason, and protect the loyal people against future claims for the expenses incurred in support of rebellion and for manumitted slaves, together with an express grant of power in Congress to enforce these provisions. To this end, they offer a joint resolution for amending the Constitution of the United States, and the two several bills designed to carry the same into effect, before referred to."

The minority report, which was signed by the three Democratic members of the committee, set forth the Southern theory, and claimed that the excluded States were entitled to immediate unconditional admission.[68]

Accompanying the report of the majority was the Fourteenth Amendment of the Constitution in a form slightly different from its final adoption. This had, in fact, been reported on April 30th,

[68] Both reports are printed in McPherson, History of Reconstruction, pp. 84–101. The majority report with the evidence, which is well worth careful study, was printed by the Government Printing Office. The majority were W. P. Fessenden, James W. Grimes, Ira Harris, J. M. Howard, George H. Williams, Thaddeus Stevens, Elihu B. Washburne, Justin S. Morrill, John A. Bingham, Roscoe Conkling, George S. Boutwell, Henry T. Blow. The minority, Reverdy Johnson, A. J. Rogers, Henry Grider.

1866, more than a month before the presentation of the full report of the Committee. The Committee also reported to their respective houses two bills. Of these, one declared certain persons therein designated, including high Confederate officials and Confederates who had held high Federal office, ineligible to office under the Government of the United States. The other was "A bill to provide for restoring the States lately in insurrection to their full political rights." It provided that whenever the Fourteenth Amendment should have become a part of the Constitution of the United States, the senators and representatives duly elected from any State lately in insurrection, which should ratify the same and modify its constitution and laws in conformity therewith, should be admitted into Congress upon taking the required oaths of office.[69] Neither of these bills was passed; but Congress subsequently enforced their provisions.

The Fourteenth Amendment finally passed through Congress, June 13th, 1866. It would have been well for the Southern States had they immediately accepted it. For then each would have retained the control of the right of suffrage within its jurisdiction; the country would have been saved the evils that resulted from the sudden entrance of a horde of ignorant blacks into the enjoyment of a right which most of them were unfit to exercise; and the provisions for an increase of representation in proportion to enfranchisement, together with the influence of the democratic spirit of the people and the age, would have undoubtedly produced a method by which universal suffrage would have been gradually extended to their children. The Southern people, however, had too great confidence in the power of the Executive to obtain, by the use of his patronage and prerogatives, those rights to which they thought themselves entitled by the Constitution. Contrary to the hope of the North, the amendment was rejected between October, 1866, and March, 1867, by the almost unanimous votes of the legislatures of all the insurrectionary States except Tennessee, while it received the ratification of all the loyal States, except the border States of Delaware, Maryland and Kentucky, and the Pacific State of California, the last of whom rejected it in 1868. On July 20th, 1868, after its adoption by six of the

[69] McPherson, History of the Reconstruction, pp. 103, 104.

excluded States under the pressure of the new reconstruction legislation, it was finally declared adopted by the Secretary of State on that day, and by Congress July 21st. It was subsequently ratified by the other disfranchised States as a condition to their restoration to representation in Congress.

This established citizenship of the United States with the right of protection for its privileges and immunities from the laws of any State. It also imposed upon the States the inhibition previously in force against the United States, and existing in most, if not all, State constitutions which forbade the taking of life, liberty, or property without due process of law, and further forbade them to deny any person within their jurisdiction the equal protection of their laws. It provided that representation should be apportioned according to population, excluding Indians not taxed, but that whenever the right to vote for the choice of presidential electors, representatives in Congress, or the executive, judicial, or legislative officers of the State, was denied to any male inhabitants twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime; the basis of represention therein should be reduced in the proportion that the number of such male citizens bore to the whole number of male citizens twenty-one years of age. The pardoning power of the President was limited by imposing a disability to hold the office of member of either house of Congress, presidential elector, or any civil or military office under the United States, or under any State, upon any person who after taking an oath as a member of Congress, officer of the United States, or State officer, to support the Federal Constitution, had taken part in the rebellion. But Congress was permitted, by a vote of two-thirds of each house, to remove such disability. The validity of the public debt of the United States, including debts incurred for pensions and bounties for services in the Civil War, was affirmed, but it was ordained that neither the United States nor any State should assume or pay any debt or obligation incurred in time of insurrection against the United States, or any claim for the loss or emancipation of any slaves.[70]

During the investigation by the Joint Committee on Recon-

[70] The construction of the Fourteenth Amendment is discussed subsequently.

struction, Johnson had vetoed, February 17th, 1866, an act to establish a new Freedmen's Bureau, which reorganized and gave new powers to a branch of the War Department established for the relief of the freedmen and refugees during the war; and March 27th, a civil rights bill which sought to secure equality in civil rights for whites and blacks.

The latter, which was passed under color of the Thirteenth Amendment, was clearly unconstitutional.[71] Support for the former was sought under the war-power. The President, in his message, thus protested against such an assumption: "Let us not unnecessarily disturb the commerce and credit and industry of the country by declaring to the American people, and to the world, that the United States are still in a condition of civil war." His position was, however, weakened by the fact that the writ of habeas corpus was still suspended in the South, and that, while the bill was before him, the army there was taking measures for the suppression of disloyal papers.[72]

Congress retaliated by the joint resolution: "That, in order to close agitation upon a question which seems likely to disturb the action of the government, as well as to quiet the minds of the people of the eleven States which have been declared to be in insurrection, no senator or representative shall be admitted into either branch of Congress from any of said States, until Congress shall have declared such State entitled to such representation."[73]

On April 2d, Johnson issued a proclamation declaring "that the insurrection which heretofore existed in the States of Georgia, South Carolina, Virginia, North Carolina, Tennessee, Alabama, Louisiana, Arkansas, Mississippi, and Florida, is at an end, and is henceforth so to be regarded."[74] The preamble recited the congressional resolution previously quoted,[75] and contained an argument in support of his theory of reconstruction. Texas was

[71] Civil Rights Cases, 109 U. S., 3. A similar act, however, was upheld at Circuit by Chief Justice Chase, in Turner's Case, 1 Abbott, U. S. 20, and Mr. Justice Swayne in U. S. *v.* Rhodes, 1 Abbott, U. S. 28.

[72] See McPherson, History of the Reconstruction, p. 123.

[73] This passed the House, Feb. 20, 1866, by a vote of 109 to 43; and the Senate, by a vote of 29 to 18, March 2d (McPherson, History of the Reconstruction, p. 72).

[74] Ibid., pp. 15–17.

[75] *Supra*, over note 14.

excepted by him. On August 20th, 1866, he issued another proclamation, in which he declared that the insurrection in Texas was at an end, and was to be henceforth so regarded; and concluded: "I do further proclaim that the said insurrection is at an end, and that peace, order, tranquillity and civil authority now exist throughout the whole of the United States of America."[76] That this established the date of the close of the Civil War was subsequently recognized by Congress and the courts.[77]

In the meantime, by the consent of the Chief-Justice of the United States, the district and circuit courts, then held by the district judges and the justices of the Supreme Court, resumed their jurisdiction in the South, under the direction of the President, as fast as the provisional organizations were effected.[78] Congress, by an act passed July 23d, 1866,[79] divided them into judicial circuits, and the Senate confirmed nominations by the President of district judges, district attorneys, and marshals for them.[80] The Chief-Justice himself, and Mr. Justice Wayne, the other Supreme Court justice assigned to hold court there, declined themselves to sit in these States while the protection of the army was needed.[81] On April 3d, 1866, the Supreme Court ordered that the writs of errors and appeals from the circuit and district courts, in the States previously declared to be in rebellion, be called at the next term.[82]

Meanwhile, public sentiment in the North was crystallizing against Johnson; and his opponents in Congress consequently increased in power. An act to continue the former Freedmen's Bureau, which was vetoed by him July 16th, 1866, was on the same day re-passed by the necessary two-thirds of both houses.[83] On the 23d, Congress passed the following —

[76] McPherson, History of the Reconstruction, pp. 194–196.

[77] U.S. *v.* Anderson, 9 Wall., 56. The Protector, 12 Wall., 700; Adger *v.* Alson, 15 Wall., 560. Burke *v.* Miltenberger, 19 Wall., 519, 525; March 2, 1867, 14 St. at L., 422, § 2.

[78] Dunning, The Constitution in Reconstruction, Pol. Sc. Q., vol. ii, p. 570.

[79] 14 St. at L., 209.

[80] Johnson's veto of the Second Supplement to the Reconstruction Bill, July 19, 1867.

[81] See letter of Chief Justice Chase to President Johnson, Oct. 12, 1865. (Chase's Decisions, p. 9; Appleton's Annual Encyclopædia for 1866, p. 514;) and Address of Chief Justice Chase to the bar of North Carolina, in June, 1867, Chase's Decisions, p. 152.

[82] 3 Wall., viii.

[83] McPherson, History of the Reconstruction, p. 151; 14 St. at L. 361.

"Joint Resolution restoring Tennessee to her relations to the Union: —

"Whereas in the year eighteen hundred and sixty one, the government of the State of Tennessee was seized upon and taken possession of by persons in hostility to the United States, and the inhabitants of said State, in pursuance of an act of Congress, were declared to be in a state of insurrection against the United States; and whereas said State government can only be restored to its former political relations in the Union by the consent of the law-making power of the United States; and whereas the people of said State did, on the twenty-second day of February, eighteen hundred and sixty five, by a large popular vote, adopt and ratify a constitution of government whereby slavery was abolished and all ordinances and laws of secession, and debts contracted under the same, were declared void; and whereas a State government has been organized under said constitution which has ratified the amendment to the Constitution of the United States abolishing slavery, also the amendment proposed by the Thirty-ninth Congress, and has done other acts proclaiming and denoting loyalty; Therefore

"Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the State of Tennessee is hereby restored to her former proper, practical relations to the Union, and is again entitled to be represented by Senators and Representatives in Congress."

The next day, the President approved the bill; but accompanied his approval with a message protesting against the preamble: —

"Among other reasons recited in the preamble for the declarations contained in the resolution is the ratification by the State government of Tennessee, of 'the amendment to the constitution of the United States abolishing slavery, and also the amendment proposed by the Thirty-ninth Congress.' If, as is also declared in the preamble, 'said State government can only be restored to its former political relations in the Union by the consent of the law-making power of the United States,' it would really seem to follow that the joint resolution which, at this late day has received the sanction of Congress, should have been passed, approved and placed on the statute books before any amendment to the Constitution was submitted to the Legislature of Tennessee for ratification. Otherwise, the inference is plainly deducible that while, in the opinion of Congress, the people of a State may be too strongly disloyal to be entitled to representation, they may, nevertheless, during the suspension of their 'former proper practical relations to the Union,' have an equally potent voice with other and loyal States in propositions

to amend the Constitution, upon which so essentially depend the stability, prosperity, and very existence of the nation."[84]

During the summer, Johnson weakened his policy in the North by a series of injudicious speeches made by him when he was "swinging around the circle," as well as at Washington. In one of these he said: "We have seen hanging upon the verge of the Government, as it were, a body called, or which assumes to be, the Congress of the United States, while, in fact, it is a congress of only a part of the States."[85] The elections in the fall largely increased the Republican majority in the loyal States, while the excluded States went heavily Democratic, and rejected the terms of readmission which had been proposed to them.

At the meeting of Congress in December, 1866, the dominant party now felt that they had gained sufficient strength to overcome the influence of the Executive. The control of the purse and the means of starving the President into submission were in their hands, for use if they believed that their constituents would approve such a revolutionary measure. Each house had the exclusive power to determine as to the admission or exclusion of its members; but the first steps in the organization of the lower house and the consequent control of the later proceedings lay in a majority of those who were on the roll which was called by the clerk of the preceding body. It was known that Johnson had considered the plan of recognizing a House and Senate in the next Congress composed of the members from the Southern States and the followers of his policy in the North. In that way, he might have obtained a quorum of both, and could then have claimed that the Northern majority was a rump which had no legal right to act alone. As commander-in-chief of the army, he might use force to install the bodies which he recognized in the Capitol, leaving the rest to organize in some outside hall. It was rumored that he had sought to tamper with General Grant in order to induce the

[84] McPherson, History of the Reconstruction, pp. 152, 153.

[85] Johnson's speech from the executive mansion at Washington, Aug. 18, 1866, quoted in his articles of impeachment, X (Impeachment Trial, vol. i, p. 8). There is a marked difference between Johnson's speeches, which were usually undignified and sometimes vulgar, and his veto messages and other State papers, which are dignified and masterly. In the preparation of the latter he had the assistance of Seward and Stanbery.

latter to aid him in such a contest, but that Grant not only refused aid but threatened to drive such a body out of the Capitol at the point of the bayonet, though recognized by Johnson as a lawful Congress.[86]

[86] Grant testified as follows before the House Committee on the Judiciary, July 18, 1867: "Q. Have you at any time heard the President make any remarks in reference to admission of members of Congress from the rebel States into either house? A. I cannot say positively what I heard him say on the subject. I have heard him say as much, perhaps, in his published speeches last summer, as I ever heard him say at all upon that subject. I have heard him say — and I think I have heard him say it twice in his speeches — that if the North carried the elections by members enough to give them, with the southern members, a majority, why would they not be the Congress of the United States? I have heard him say that several times.

"By Mr. Williams: Q. When you say 'the North' you mean the democratic party of the North, or in other words the party favoring his policy? A. I mean if the North carried enough members in favor of the admission of the South. I did not hear him say that he would recognize them as Congress. I merely heard him ask the question, 'Why would they not be the Congress?'

"By the Chairman: Q. When did you hear him say that? A. I heard him say that in one or two of his speeches. I do not recollect where.

"By Mr. Boutwell: Q. Have you heard him make a remark kindred to that elsewhere? A. Yes; I have heard him say that aside from his speeches, in conversation. I cannot say just when. It was probably about that same time.

"Q. Have you heard him, at any time, make any remark or suggestion concerning the legality of Congress with the Southern members excluded? A. He alluded to that subject frequently on his tour to Chicago and back last summer. His speeches were generally reported with considerable accuracy.

"Q. Did you hear him say anything in private on that subject, either during that trip or at any other time? A. I do not recollect specially.

"Did you at any time hear him make any remark concerning the executive department of the government? A. No. I never heard him allude to that.

"Q. Did you ever hear him make any remark looking to any controversy between Congress and the Executive? A. I think not" (McPherson, History of the Reconstruction, p. 303). Blaine was convinced that Grant's testimony established the falsity of this rumor about Johnson (Twenty Years in Congress, vol. ii, pp. 343–344).

On the other hand Grant afterwards told the following story, as reported by Chauncey M. Depew, in The New York Sun of Oct. 21, 1865, and corroborated by Frederick D. Grant.

"He had perfected a scheme to accomplish this result, and with General Grant's assistance its success was assured. He would by proclamation direct the rebel States to send to Washington their full quota of Senators and Representatives. He had assurances from enough members from the North, who, united with them would make a quorum of one House at least if not both. The Congress thus

One of the first steps of Congress was to provide for the legality of the organization of the succeeding House of Representatives in favor of the North. A bill passed the House, December 11th, 1866, and the Senate, February 1st, 1867, by a vote of more than two-thirds of each, which became a law without the President's signature, and provided: —

"That before the first meeting of the next Congress, and of every subsequent Congress, the clerk of the next preceding House of Representatives shall make a roll of the representatives-elect, and place thereon the names of all persons claiming seats as representatives-elect from States which were represented in the preceding Congress, and of such persons only, and whose credentials show that they were regularly elected in accordance with the laws of their States respectively, or the laws of the United States." [87]

A bill was also passed directing that the Fortieth Congress meet on March 4th, 1867, immediately upon the close of the

formed he would recognize and install at the Capitol. If the other Northern members did not choose to join they would be a powerless rump meeting in some hall. To the General's suggestion that this would start the civil war afresh, the President replied: 'They who do it will be rebels, but if you sustain me resistance is impossible.'

"He appealed to Grant to stand by him in the crisis and they would be the saviors of the republic. After endeavoring for a long time in vain to convince the President of the folly of such a course and its certain failure, no matter who sustained it, Grant finally told him that he (Grant) would drive the Congress so constituted out of the Capitol at the point of the bayonet, give possession of the building to the Senators and Representatives from the loyal States and protect them. If necessary he would appeal to the country and the army he had so recently mustered out of service. Mr. Johnson asked him if he did not recognize the powers vested in the President by the Constitution, and if he would refuse to obey the Commander-in-chief. Gen. Grant said that under such circumstances he most certainly would.

"Shortly afterward, the President sent for Grant and said to him that the relations of our Government with Mexico were very delicate, and he wished him to go to the City of Mexico at once on a very important mission. The General knew that this was to get him out of the way and put it in the power of the President to call as his successor to Washington some officer upon whom he could rely. He replied that if the appointment was a diplomatic one, he declined it. If it was a military one, he refused to obey, because the General of the army could not be ordered to a foreign country with which we are at peace. The interview was a stormy one, but the subject was dropped." See as to this last suggestion by Johnson to Grant, Blaine, Twenty Years in Congress, vol. ii, p. 351.

[87] 14 St. at L. 397.

Thirty-ninth Congress, so that the President might not have a vacation between March and December in which to act without congressional control.[88]

The powers upon which the President relied in his controversy were the power to pardon those whom Congress had determined to deprive of political rights; the power to remove from office such Federal officials as opposed his views; and the power to control the army as commander-in-chief. Each of these powers was attacked in turn. The power to pardon was expressly granted by the Constitution.[89] An act passed during the war[90] had expressly authorized the President to grant pardons by proclamation. This statute was repealed by a vote of more than two-thirds of both houses, and the repeal became a law without the signature of the President.[91] It was generally believed that this repeal was ineffectual, since the constitutional power to pardon might be exercised by proclamation as well as by letters patent; and the President after the repeal exercised the power by proclamation as freely as before.[92] On September 7th, 1867, and July 4th, 1868, he issued proclamations which pardoned all except those under indictment for treason or other felony; and on December 25th, 1868, by proclamation he pardoned all the rest.[93] The Fourteenth Amendment, however, prevented his pardons from restoring to full civil rights the most influential persons affected without the consent of two-thirds of Congress. Such relief from disability was extended by Congress sparingly during his administration. Since then Congress has gradually removed the disabilities of nearly all.

The powers of the President as Commander-in-Chief were effectually limited. A section in the Army Appropriation bill provided that the headquarters of the general of the army should be in Washington; that all orders and instructions relating to

[88] 14 St. at L. 377.

[89] Constitution, Art. II, Sec. 2.

[90] Act of July 17, 1862; 12 St. at L. 592.

[91] 14 St. at L. 377. The bill passed the House, Dec. 3, 1866, and the Senate, Jan. 7, 1867. McPherson, History of the Reconstruction, p. 183.

[92] See Blaine, Twenty Years of Congress, vol. ii, pp. 281, 282. This subject will be considered subsequently in the chapter on The Executive Power.

[93] McPherson, History of the Reconstruction, pp. 342, 344, 419.

military operations issued by the President or Secretary of War should be issued through him; that he should not be removed or assigned to duty elsewhere, except at his own request with the previous approval of the Senate; that any orders relating to military operations issued by the President or Secretary of War, otherwise than through him, should be null and void; that any officer who issued such orders should be deemed guilty of a misdemeanor in office; and that any officer of the army who knowingly transmitted or obeyed such orders should be liable to imprisonment upon conviction in any court of competent jurisdiction. This practically made General Grant commander-in-chief, and reduced the powers of the President in this respect to the level of those of the British queen. Another section in the same bill directed that the militia then organized in the excluded States should be disbanded, and that no further militia be organized in them until further authorized by Congress.[94] The President signed the bill, March 2d, 1867, but sent this protest in a message to the House: —

"These provisions are contained in the second section, which in certain cases virtually deprives the President of his constitutional functions as commander-in-chief of the army, and in the sixth section, which denies to ten States of the Union their constitutional right to protect themselves, in any emergency, by means of their own militia. These provisions are out of place in an appropriation act. I am compelled to defeat these necessary appropriations if I withhold my signature from the act." [95]

At the same time, the power of the Executive to control his subordinates was restrained by the Tenure of Office bill, which made the consent of the Senate necessary to the removal of all officers to whose appointment their consent was required, except members of the cabinet in certain cases.[96] This bill was vetoed by the President as unconstitutional, but passed again over his veto. An alleged violation of it was the main ground of the articles of impeachment subsequently presented against him.[97]

[94] 14 St. at L., 486, 487. Both these sections were subsequently repealed.

[95] McPherson, History of the Reconstruction, p. 178. The constitutionality of this act will be considered subsequently.

[96] 14 St. at L., 430.

[97] The constitutionality of this act will be considered subsequently.

Meanwhile, proceedings had been instituted at this time to investigate the conduct of the President to see if he had committed any impeachable offense; more, however, with the object by the majority of intimidating him than with the intention of an actual impeachment,[98] which was not seriously contemplated till after his attempt to remove Stanton from the Department of War in the following summer. To guard against the danger of his filling the Supreme Court with men who construed the Constitution in the same manner as his advisers, an act had been passed in the previous July which forbade any more appointments to that bench until after three vacancies had occurred.[99]

The working majority in both Houses of Congress was further strengthened by the admission of the State of Nebraska, over a veto, February 8th, 1867.[100] The veto of the bill for the admission of Colorado was not overridden.[101] A bill granting the right of suffrage to negroes in the District of Columbia was likewise vetoed, and then passed by the requisite two-thirds of each House.[102]

In March, 1867, the majority had sufficient strength to pass two reconstruction acts over the veto of the President, who claimed that they were unconstitutional. The title and preamble of the first was: —

"An Act to provide for the more efficient government of the rebel States. Whereas no legal State governments or adequate protection for life or property now exists in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas; and whereas it is necessary that peace and good order should be enforced in said States until loyal and republican State governments can be legally established: Therefore, *Be it enacted*," "That said rebel States shall be divided into military districts and made subject to the military authority of the United States, as hereinafter prescribed."

The President was instructed to assign to the command of each district an officer of the army not below the rank of Brigadier-General,

[98] The proceedings are briefly reported in McPherson, History of the Reconstruction, pp. 187–190. They will be considered subsequently in the chapter on Impeachment.

[99] Act of July 23, 1866. 14 St. at L., p. 209.

[100] Act of Feb. 9, 1867.

[101] McPherson, History of the Reconstruction, p. 164.

[102] Act of Jan. 8, 1867.

and to detail a sufficient military force to enable him to perform his duties and enforce his authority. It was the duty of the officer to preserve order and to punish

"all disturbers of the public peace and criminals, and to this end he may allow local civil tribunals to take jurisdiction of and to try offenders, or, when in his judgment it may be necessary for the trial of offenders, he shall have power to organize military commissions or tribunals for that purpose; and all interference under color of State authority with the exercise of military authority under this act shall be null and void."

The approval by the officer in command of any sentence of the military commission or other tribunal affecting the life or liberty of any person, was required before its execution, and the approval of the President was required before the execution of any sentence of death. It was provided: —

"That when the people of any one of said rebel States shall have formed a constitution of government in conformity with the Constitution of the United States in all respects, framed by a convention of delegates elected by the male citizens of said State twenty-one years old and upward, of whatever race, color, or previous condition, who have been resident in said State for one year previous to the day of such election, except such as may be disfranchised for participation in the rebellion or for felony at common law, and when such constitution shall provide that the elective franchise shall be enjoyed by all such persons as have the qualifications herein stated for electors of delegates, and when such constitution shall be ratified by a majority of the persons voting on the question of ratification who are qualified as electors for delegates, and when such constitution shall have been submitted to Congress for examination and approval, and Congress shall have approved the same, and when said State, by a vote of its legislature elected under said constitution, shall have adopted the amendment to the Constitution of the United States, proposed by the Thirty-ninth Congress, and known as Article Fourteen, and when said article shall have become a part of the Constitution of the United States, said State shall be declared entitled to representation in Congress, and Senators and Representatives shall be admitted therefrom on their taking the oaths prescribed by law, and then and thereafter the preceding sections of this act shall be inoperative in said State: *Provided*, That no person excluded from the privilege of holding office by said proposed amendment to the Constitution of the United States shall be eligible to election as a member of the convention to frame a constitution for any of said rebel States, nor shall any such person vote for members of such

convention." "That until the people of said rebel States shall be by law admitted to representation in the Congress of the United States, any civil governments which may exist therein shall be deemed provisional only, and in all respects subject to the paramount authority of the United States at any time to abolish, modify, control, or supersede the same; and in all elections to any office under such provisional governments all persons shall be entitled to vote, and none others, who are entitled to vote under the provisions of the fifth section of this act; and no person shall be eligible to any office under any such provisional governments who would be disqualified from holding office under the provisions of the third article of said constitutional amendment."[103]

The Fortieth Congress immediately passed over Johnson's veto a supplementary reconstruction act with specific provisions for the registration in accordance with the former act and for the language of a test-oath then to be administered. This act further provided that the State conventions should have the power to provide for taxation to pay their expenses.[104] A second supplement was passed over the President's veto, which declared that it had been the true intent and meaning of the former reconstruction acts "that the governments then existing in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas and Arkansas, were not legal State governments; and that thereafter said governments, if continued, were to be continued subject in all respects to the military commanders of the respective districts, and to the paramount authority of Congress." Power was given to each district commander, subject to the disapproval of the general of the army, to remove any officer or person holding any civil or military office in such district under any power granted by any so-called State or municipal government. The acts of officers of the army in previously removing such officers were confirmed. It was made the duty of the district commanders to remove from office all persons disloyal to the government of the United States, or who used their official influence in any manner to hinder, delay, prevent or obstruct the due and proper administration of the reconstruction acts; and finally it directed that "No district commander or member of the Board of Registration, or any of the

[103] Act of March 2, 1867, 14 St. at L., 428.

[104] Act of March 23, 1867, 15 St. at L., 2.

officers or appointees acting under them, shall be bound in his action by the opinion of any civil officer of the United States." [105]

This last provision was intended to weaken the authority of the Attorney-General, who, in his previous opinions,[106] had criticized the action of some of the district commanders and had limited the construction of the acts in favor of constitutional rights and civil liberty. In Johnson's veto he argued that this forbade them to even follow a judicial decision when in conflict with a military order. "These military appointees would not be bound even by a judicial opinion. They might very well say, even when their action is in conflict with the Supreme Court of the United States, 'that court is composed of civil officers of the United States, and we are not bound to conform our action to any opinion of any such authority.'" [107] By these acts the late Confederate States, with the exception of Tennessee, were not only excluded from representation in Congress, but absolutely denied civil government and placed under military rule of the most despotic character until they had, in addition to the ratification of the Fourteenth Amendment, extended the right of suffrage to the colored race; and the army was used to compel immediate action to that effect. After their enactment over his veto, Johnson executed the statutes with fidelity, although he believed that they were unconstitutional. Under them the Southern States were treated as conquered provinces, and twelve millions of people were ruled by military satraps, who interfered with and overruled in the most arbitrary manner the acts of the State executives, legislatures and judiciary, as well as of those who had formerly exercised the right of suffrage there.

State governors,[108] State judges,[109] a State attorney-gen-

[105] 15 St. at L., 14.

[106] 12 Op. A. G., 186, 193; quoted *infra*, note 112.

[107] Johnson's veto of the Second Supplement to the Reconstruction Act, July 19, 1867.

[108] In Mississippi, June 15th, 1868 (Davis, Rise and Fall of the Confederate Government, vol. ii, p. 754). In Virginia, March, 27, 1869 (McPherson, History of the Reconstruction, p. 425). In Louisiana, June 3, 1867 (Davis, Rise and Fall of the Confederate Government, vol. ii, p. 756). In Texas, July 30, 1867 (McPherson, History of the Reconstruction, p. 323).

[109] In South Carolina, in September, 1867 (Davis, Rise and Fall of the Confederate Government, vol. ii, p. 744). In Louisiana, March 27, 1867 (McPherson, History of the Reconstruction, p. 206). In Virginia also, (Cox, Three

eral[110] and a State treasurer,[111] as well as local officers of every description, were removed, and in many cases soldiers detailed to discharge their duties, to administer the laws of the State, to determine controversies affecting liberty and property without any qualifications from previous study or experience in their systems of jurisprudence, and to collect and disburse the taxes and other revenues of the State without filing any bond.[112] Legislatures

Decades of Federal Legislation, p. 489).

[110] In Louisiana, March, 27, 1867 (McPherson, History of the Reconstruction, p. 206).

[111] Attorney-General Stanbery, 12 Op. A. G., 194. Davis, Rise and Fall of the Confederate Government, vol. ii, p. 759.

[112] "In one of these districts, the governor of a State has been deposed under a threat of military force, and another person, called a governor, has been appointed by a military commander to fill his place. Thus presenting the strange spectacle of an official intrusted with the chief power to execute the laws of the State whose authority is not recognized by the laws he is called upon to execute.

"In the same district, the judge of one of the criminal courts of the State has been summarily dealt with. In this instance, the judge has, by military order, been ejected from his office, and a private citizen has been appointed judge in his place by military authority, and is now in the exercise of criminal jurisdiction 'over all crimes, misdemeanors and offences' committed within the territorial jurisdiction of the court. This military appointee is certainly not authorized to try any one for any offence as a member of a military tribunal, and he has just as little authority to try and punish any offender as a judge of a criminal court of the State. It happens that this private citizen, thus placed on the bench, is to sit as the sole judge in a criminal court whose jurisdiction extends to cases involving the life of the accused.

"If he has any judicial power in any case, he has the same power to take cognizance of capital cases, and to sentence the accused to death, and order his execution. A strange spectacle, when the judge and the criminal may very well 'change places'; for if the criminal has unlawfully taken life, so too does the judge. This is the inevitable result, for the only tribunal, the only judges, if they can be called judges, which a military commander can constitute and appoint under this act, to inflict the death penalty, is a military court composed of a board, and called in the act 'a military commission.'

"I see no relief for the condemned against the sentence of this agent of the military commander. It is not the sort of court whose sentence of death must be first approved by the commander and finally by the President, for that is allowed only where the sentence is pronounced by a 'military commission.' Nor is it a sentence pronounced by the rightful court of a State, but by a court and by a judge not clothed with authority under the laws of the State, but constituted by the military authority. As the representative of this military authority, this act forbids interference, 'under color of State authority,' with the exercise of his functions." (12 Op.

were forbidden to meet.[113] The people were, in some cases, forbidden to elect local officers,[114] or even to go through the form of choosing presidential electors;[115] and voters qualified by the State constitutions were disfranchised by an ex post facto law upon charges of treason of which they had never been convicted.

Taxation, national and local,[116] without representation, was imposed upon them. A tribute was thus levied by the imposition of a cotton-tax, which affected no property outside of the disfranchised States, and escaped annulment by a tie vote of the Supreme Court.[117] Taxes imposed by State legislatures were reduced or set aside.[118] Public meetings were suppressed.[119] The right of the people to bear arms was infringed by the act of Congress disbanding the State militia[120] and the orders of generals addressed to private citizens.[121] Meanwhile, when it suited the pleasure of the district commanders, State officers were obliged to continue to discharge their functions even after the expiration of their terms.[122] Judges who had been sworn to administer the

A. G., pp. 193–194. See also ibid., pp. 186–187.) On March 29th, 1869, General Stoneman reported: that out of 5,446 offices in Virginia 139 of the incumbents were able to take the test-oath, and consequently were undisturbed; 532 had been filled by his predecessor, and 1,972 by himself; and that 2,613 remained, the incumbents of which were disqualified by Congress, and that he was unable to find eligible men who were competent to discharge their duties. (McPherson, History of the Reconstruction, p. 425.)

[113] See Davis, Rise and Fall of the Confederate Government, vol. ii, pp. 746, 757; McPherson, History of the Reconstruction, p. 325.

[114] McPherson, History of the Reconstruction, pp. 208, 428.

[115] In Texas, Sept. 29, 1868, ibid., p. 429.

[116] Cox, Three Decades of Federal Legislation, p. 550.

[117] The Act of March 7, 1864 (13 St. at L., 14), first imposed a tax of two cents a pound on unmanufactured cotton. This was continued by the act of June 30, 1864 (ibid., p. 223); increased to three cents a pound by the act of July 13, 1866 (14 St. at L., 98); reduced to two and a half cents a pound by the act of March 2, 1867 (ibid., p. 169); and repealed by the act of Feb. 3, 1868 (15 St. at L., 34). The constitutionality of the tax was affirmed by a divided court Feb. 20, 1871, in the unreported case of Farmington *v.* Saunders, after two arguments, the first in December, 1869, in which its opponents claimed that it was a direct tax and a tax upon exports.

[118] McPherson, History of the Reconstruction, p. 429.

[119] McPherson, History of the Reconstruction, p. 429; Davis, Rise and Fall of the Confederate Government, vol. ii, pp. 733.

[120] Act of March 2, 1867, 14 St. at L., 487; *supra*, over note 95.

[121] McPherson, History of the Reconstruction, pp. 204, 316.

[122] McPherson, History of the Reconstruction, pp. 206, 208, 428.

laws of their States were directed to violate them;[123] to empanel juries out of a class disqualified by their State statutes;[124] to take testimony which was by statute made incompetent; and to deny remedies to which suitors were entitled by law; and in some cases they were imprisoned for their refusal.[125] Punishments prescribed by the State statutes were forbidden.[126] A new code of penal law was in some cases set up by the will of the general.[127] Permission to pardon, as provided by the State constitutions, was in some cases given to the State governors, and in others withheld.[128] And many persons, in violation of the constitution,[129] were tried upon criminal charges before military commissions and imprisoned under sentences thus illegally imposed. In one case a civilian was sentenced to death by such a commission, although he was at the time under indictment by the State court for the same offences; and the Attorney-General advised the President to approve the sentence; but the execution was prevented by an escape,[130] which it may be hoped was collusive.

The interference of the military with the civil government was not confined to the maintenance of order, the elevation of the colored race, and the promotion of the policy of Congress. The administration of justice relating to private rights between private citizens was arbitrarily controlled. Executions and judicial sales were stayed.[131] Exemptions from attachments, arrests, and executions, unknown to the State laws, were ordered.[132] Decrees

[123] See Davis, Rise and Fall of the Confederate Government, vol. ii, p. 733.

[124] Davis, Rise and Fall of the Confederate Government, vol. ii, p. 744; Opinion of Henry Stanbery, 12 Op. A. G., 186, 187.

[125] McPherson, History of the Reconstruction, pp. 202–204.

[126] McPherson, History of the Reconstruction, p. 204. Justification for many of these acts was sought under the Civil Rights Bill, which had not then been declared unconstitutional.

[127] Ibid.

[128] Ibid.

[129] Ex-parte Milligan, 4 Wall., 3. For an opinion of Attorney General Hoar, sustaining such a practice. See 13 Op. A. G., 59; McPherson, History of the Reconstruction, p. 475.

[130] See Weaver's Case, 13 Op. A. G., 59; McPherson, History of the Reconstruction, p. 475. M.S. letter by E. R. Hoar to the writer, Oct. 1, 1894.

[131] Such orders in South Carolina were justified under an act of the State Legislature, which was afterwards held unconstitutional (State v. Carew, Rich. S. C. 13 Law. 12 Eq. 277).

[132] Order of General Sickles in North and South Carolina, April 11, 1867. McPherson, History of the Re-

of State courts in suits affecting rights of property were set aside,[133] and in one case the Federal army resisted the enforcement of the decree of a Federal court.[134]

In marked contrast with this conduct of other district commanders was that of General Winfield Scott Hancock, whom, on August 26th, 1867, Johnson detailed to the command of Louisiana and Texas, in the place of General Philip H. Sheridan. His first step was the promulgation, on November 29th, 1867, of his famous General Order No. 40, which is replete with the doctrines essential to constitutional liberty: —

"The General Commanding is gratified to learn that peace and quiet reign in this Department. It will be his purpose to preserve this condition of things. As a means to this great end, he regards the maintenance of the civil authorities in the faithful execution of the laws as the most efficient under existing circumstances. In war, it is indispensable to repel force by force, and overthrow and destroy opposition to lawful authority. But when insurrectionary force has been overthrown and peace established, and the civil authorities are ready and willing to perform their duties, the military power should cease to lead, and the civil administration resume its natural and rightful dominion. Solemnly impressed with these views, the General announces that the great principles of American liberty are still the lawful inheritance of the people, and ever should be. The right of trial by jury, the habeas corpus, the liberty of the press, the freedom of speech, the natural rights of persons, and the rights of property, must be preserved.

"Free institutions, while they are essential to the prosperity and happiness of the people, always furnish the strongest inducements to peace and order. Crimes and offences committed in this district must be referred to the consideration and judgment of the regular civil tribunals, and those tribunals will be supported in their lawful jurisdiction.

construction, pp. 202–204. See also the order in Virginia, March 12, 1868, ibid. p. 317.

[133] Davis, Rise and Fall of the Confederate Government, vol. ii, p. 739, 743–744. These proceedings were held by the Supreme Court to be void because not authorized by the Reconstruction Acts, Raymond *v.* Thomas, 91 U. S. 712.

[134] This action in North Carolina was disapproved at Washington, and held by the Acting Attorney-General John M. Binckley, to be "simply a case of high misdemeanor, legally contemplated." Davis, Rise and Fall of the Confederate Government, vol. ii, p. 739; Appleton's Annual Encyclopædia for 1867, p. 548.

"Should there be violations of existing laws which are not inquired into by the civil magistrates, or should failure in the administration of justice by the courts be complained of, the cases will be reported to these headquarters, when such orders will be made as may be deemed necessary. While the General thus indicates his purpose to respect the liberties of the people, he wishes all to understand that armed insurrection or forcible resistance to the law will be instantly suppressed by arms."

This was followed by a series of special orders in which he forbade interference by the military at the polls, disclaimed judicial functions in civil cases and sustained the jurisdiction of the civil courts over the rights of private property and the trial of offenses against the State laws.[135] The day after President Grant's inauguration he removed Hancock from this command and sent Sheridan back to follow the practice of the other district commanders.[136]

Thus, under the intimidation of armed force at the polls, State conventions were elected by the ignorant blacks and by those of the white race who were least trained in public affairs and had little interest in the protection of private property and the maintenance of order. These organized under the control of the army, which in some cases was obliged to interfere and keep order in their proceedings,[137] prepared new State constitutions in accordance with the commands of the dominant party at Washington, and ratified the Fourteenth Amendment to the Federal Constitution. On June 22d, 1868, the State of Arkansas was admitted to representation in Congress by a bill passed over the President's veto, which was based upon objections to the unconstitutional principle therein recognized, and also to the necessity of legislation upon a subject which each House of Congress had the power to determine for itself. The recitals said that the people of the State in pursuance of the reconstruction acts, had "formed and adopted

[135] General Order, No. 40, and Hancock's letter in defence of it to Governor Pease of Texas, which is a masterpiece of dignified and crushing argument, are republished in Forney's Life of Hancock, pp. 232-246. See also McPherson, History of the Reconstruction, p. 324. They are said to have been written by Jere. S. Black.

[136] Blaine, Twenty Years in Congress, vol. iii. p. 299.

[137] Davis, Rise and Fall of the Confederate Government, vol. ii, p. 749.

a Constitution of State government, which is republican," and that its legislature had duly ratified the Fourteenth Amendment. It then enacted, in terms similar to those in the statutes admitting new States: —

"That the State of Arkansas is entitled and admitted to representation in Congress, as one of the States of the Union, upon the following fundamental condition: That the Constitution of Arkansas shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the Constitution herein recognized, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted, under laws equally applicable to all the inhabitants of said State; Provided, That any alteration of said Constitution prospective in its effect may be made in regard to the time and place of residence of voters." [138]

On June 25th, 1868, an act, substantially similar to that for Arkansas, admitted to representation in Congress the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama and Florida. This provided that it should only take effect as to each State upon the ratification of the Fourteenth Amendment by its legislature. The admission of Georgia to representation was further conditioned upon the annullment of certain provisions in the State constitution which impaired the obligation of contracts, and the assent by the legislature to such condition.[139] The States affected by these acts promptly ratified the amendment.[140] On July 21st, 1868, a joint resolution was passed by Congress, declaring that the amendment had been ratified, and was a part of the Constitution of the United States.[141] On July 28th, military rule was withdrawn from all the States except Virginia, Mississippi and Texas.[142] Delegations from all who had thus ratified the Fourteenth Amendment, were promptly admitted to Congress.

On July 20th, Congress passed, over the veto of President John-

[138] 15 St. at L., p. 72.

[139] 15 St. at L., p. 73.

[140] Florida had so acted, June 9, 1868, before the passage of the bill. North Carolina ratified, July 1, Louisiana and South Carolina, July 9, Alabama, July 13, Georgia, July 21 (McPherson, History of the Reconstruction, pp. 353, 428, 429).

[141] Ibid., p. 380.

[142] Grant's General Order of that date (McPherson, History of the Reconstruction, p. 422).

son, a joint resolution, which declared "that none of the States whose inhabitants were lately in rebellion shall be entitled to representation in the electoral college" until after compliance with the Reconstruction legislation.[143]

The platform upon which Grant was elected President contained the plank: —

"The guaranty by Congress of equal suffrage to all loyal men at the South was demanded by every consideration of public safety, of gratitude, and of justice, and must be maintained; while the question of suffrage in all the loyal States properly belongs to the people of those States." [144]

But Republicans as well as Democrats had protested against the injustice of forcing upon the South a rule which the North was unwilling to accept.[145] The blacks above Mason and Dixon's line were too few to be able to out-vote the rest. Experience has proved that the education of one or more generations of freedmen had fitted them to exercise the right of suffrage which some States had previously extended to them. At the session of Congress immediately after the presidential election, the Fifteenth Amendment was introduced. On February 25th, 1869, it was sent to the State legislatures for consideration in its final form: —

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. The Congress shall have power to enforce this article by appropriate legislation."

The ratification of this amendment was now made an additional condition to the rehabilitation of Virginia, Mississippi and Texas.[146] The task was not too burdensome, since they thus helped to fasten upon the other States that which Congress had previously compelled them to assume themselves. Upon compliance with this and the provisions of the previous reconstruction acts, they were admitted to representation, Virginia, on January 28th,[147] Mississippi, February 23d,[148] and Texas, March 30th, 1870.[149] Each of

[143] McPherson, History of the Reconstruction, p. 378.

[144] Republican National Platform, adopted at Chicago, in May, 1868.

[145] Blaine, Twenty Years in Congress, vol. II, p. 412.

[146] Act of April 10, 1869; 16 St. at L., p. 40.

[147] 16 St. at L., p. 63.

[148] 16 St. at L., p. 67.

[149] 16 St. at L., p. 80.

the acts concerning these States stated in its preamble that the people had framed and adopted a Constitution of State government which was republican, and the legislature had ratified the two new amendments, and that "the performance of these several acts in good faith is," in the case of Virginia "was," [150] a condition precedent to the representation of the State in Congress." [151]

The body of each act stated that the admission to representation was —

"upon the following fundamental conditions: First that the" State "Constitution shall never be so amended as to deprive any citizen or class of citizens of the United States of the right to vote, who are entitled to vote by the Constitution herein recognized, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said State: *Provided* that any alteration of said Constitution, prospective in its effects, may be made in regard to the time and place of residence of voters. Second, That it shall never be lawful for the said State to deprive any citizen of the United States, on account of his race, color, or previous condition of servitude, of the right to hold office under the Constitution and laws of said State, or upon any such ground to require of him any other qualifications for office than such as are required of all other citizens. Third, That the State Constitution shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the Constitution of said State." [152]

The last condition referred to the establishment of a system of free education for all children in the State.

A hitch in the proceedings, caused by the action of her legislature, made Georgia the last State to obtain rehabilitation. After her ratification of the Fourteenth Amendment and the admission of her representatives to the Thirty-ninth Congress, the legislature, believing the State secure, admitted members who were disqualified by the Fourteenth Amendment and ousted from their seats all colored men elected, upon the ground that although the State Constitution gave them the right to vote, they had acquired no right to hold office; and then rejected the Fifteenth Amend-

[150] 16 St. at L., p. 63.
[151] 16 St. at L., pp. 67, 80.
[152] 16 St. at L., pp. 63, 67, 80.

ment.[153] The Supreme Court of the State subsequently held that negroes had the constitutional right to hold office.[154] The Fortieth Congress, in December, 1869, refused to admit her delegation to either house, but referred their credentials to the Committees on Privileges and Elections.[155] On December 22d, Grant approved "An act to promote the reconstruction of the State of Georgia." The governor was required to reconvene the General Assembly to perfect its organization in conformity with the new statutory requirements. It "declared that the exclusion of any person or persons elected as aforesaid, and being otherwise qualified, from participation in the proceedings of said Senate and House of Representatives, upon the ground of race, color or previous condition of servitude, would be illegal and revolutionary, and is hereby prohibited." All members were required to take a test-oath, swearing that they were not disqualified by the Fourteenth Amendment, under the penalty of punishment by the Federal court for perjury. The ratification of the Fifteenth Amendment was made a further condition to the admission of the State to representation. And the President was directed, on the application of the governor, to employ the army and navy to execute the provisions of the act.[156] The State was coerced into submission. Her legislature restored the blacks, excluded the disfranchised whites, and ratified the new Amendment. On July 15th, 1870, an act was passed which finally restored to her representation in Congress.[157] For the first time since December 20th, 1860, Congress represented all the United States.

But military despotism in the South was not ended by the admission of the States to representation in Congress. The governments which had been set in operation by the army were too weak to maintain themselves after its support was removed. Composed of the proletariat, ignorant blacks, led by unscrupulous men of mixed race and the white carpet-baggers[158] from the North and

[153] Blaine, Twenty Years in Congress, vol. II, p. 464.

[154] White *v.* Clements, 39 Ga., 232.

[155] Blaine, Twenty Years in Congress, p. 464.

[156] 16 St. at L., p. 80.

[157] 16 St. at L., p. 363.

[158] So called because they were supposed to have taken all their property with them in a carpet-bag. The term was originally applied to the wild-cat bankers in the West, but has gained an enduring place in history by its application to the Northern ad-

"scallawags" in the South, who had deserted their own people in the hour of defeat, they looted the public treasuries, and took vengeance upon their former masters by oppressive taxation and illegal pledges of the credit of the States, to obtain money which they might steal. The tax-payers, Union men [159] as well as former Confederates, combined against them. Disfranchised as were many, and out-voted as were the rest, the owners of property resorted to violence and intimidation to protect their rights. The White-League and the Ku-Klux Klan spread terror among the negroes; and, upon the call of carpet-bag governors, President Grant sent soldiers to preserve order and supervise elections. The writ of habeas corpus was suspended,[160] and more than six hundred military arrests were made in a few counties of South Carolina during a single year.[161]

But the use of the army was not confined to the subjugation of the taxpayers. The thieves quarrelled over their plunder; rival Governors and rival legislatures claimed recognition and authority; and the decision as to the legitimacy of each was submitted to the Federal Attorney-General, whose awards were supported by the army. Even the judges of the Circuit and District Courts of the United States took sides in the disputes; granted injunctions to assist their partisans; and, it was charged, shared in the plunder thus obtained. Grant endeavored to persuade the Supreme Court of the United States to detail one of their members to pass upon

venturers who moved to the South during the period of Reconstruction, and took the leadership of the Republican party there. A few among them, however, were men of character as well as ability. Amongst these was Governor Daniel H. Chamberlain of South Carolina. His career is described by Allen, History of the Administration of Governor Chamberlain. The best account of the situation, from their point of view, is A Fool's Errand, by one of the Fools (Albion W. Tourgee).

[159] This is admitted by Blaine, Twenty Years in Congress, vol. ii, p. 473.

[160] St. at L., 13, 15.

[161] Appleton's Annual Encyclopædia for 1871. The Congressional report gives an account of the Ku-Klux Klan, House Reports, No. 22, Parts 1 to 13, 42d Cong., 2d sess., vol. ii, Feb. 19, 1872; Senate Reports, No. 41, Parts 1 to 13, ibid. House Mis. Doc., No. 23, 40th Cong., 3d sess., vol. i, Jan. 18, 1869. A good account of the organization of the society in North Carolina is in the testimony taken upon Governor Holden's impeachment trial, *infra*. The best history of the white outrages in the South is by Cox, Three Decades of Federal Legislation.

one such controversy; but with their usual wisdom they declined to interfere.[162]

So great were the disorder and corruption, that five Federal judges in the South, during Grant's administration, were forced to resign so as to escape impeachment by the national House of Representatives. Within five years after the Reconstruction legislation the Governors of four of the Southern States, besides a number of State judges and other administrative officers, had been impeached;[163] one of them convicted and removed from office;[164] a fifth had fled the State to avoid impeachment and a criminal prosecution;[165] and an attempt to impeach a sixth[166] had been almost successful. In Arkansas, before the service of process, the House began the proceedings by locking the Governor in the executive chamber and barricading the door.[167] In the same State, two years later, in 1874, two Republican governors and two Republican legislatures, both sides representing a minority of the people, claimed legitimacy. One governor was intrenched in the state-house with militia and cannon for his protection, while the other proclaimed martial law and marched with troops to attack him. The interference of the Federal army protected the man in possession.[168]

The greatest travesties of local self-government took place in Louisiana. There, on August 9th, 1871, the Republican State Convention was organized in the room of the Circuit Court of the United States, and Federal soldiers prevented the admission of any delegate without a pass from the marshal of the United States. During January, 1872, the marshal, supported by the army of the United States, arrested members of the State legislature in order to overturn a majority. Later in the same month, a

[162] Appleton's Annual Encyclopædia for 1872, p. 485.

[163] Governor William W. Holden of North Carolina, in 1871; Harrison Reed of Florida, Powell Clayton of Arkansas, and Henry C. Warmoth of Louisiana. The last three in 1872. These proceedings, which give an instructive picture of the times, will be described in a subsequent chapter on Impeachment.

[164] Holden of North Carolina.

[165] Bullock of Georgia.

[166] R. K. Scott of South Carolina, in 1872.

[167] Journal of Arkansas House of Representatives for 1871; The Brooks-Baxter War, by John M. Darrell; Atlantic Monthly, vol. xxix, p. 386.

[168] The Brooks-Baxter War, by John M. Darrell.

number of State senators were given refuge on an armed revenue cutter of the United States to avoid arrest by the sergeant-at-arms, and thus leave their house incapable of action for want of a quorum.[169] A few weeks before, Durell, the Circuit Judge of the United States in the same State, enjoined a claimant from acting as governor of Louisiana or asserting any claim to that office; and finally, when out of court, issued the famous "midnight order," in which he directed the marshal of the United States to take possession of the state-house during the meeting of the legislature, and to exclude all who in his opinion had not been lawfully elected; thus directing him to usurp the most important constitutional power of a legislative house, the determination of the qualifications of its members.[170] With this order as his banner the marshal led a troop of Federal soldiers to the state-house and by force prevented any from taking part in the organization of the legislature without such credentials as the Federal judge determined to be sufficient.[171] Finally, on January 4th, 1875, General de Trobriand imitated Charles I; and, more successful than the King, entered a house of the State legislature with a file of soldiers, arrested and ejected at the point of the bayonet five members with the clerk; and not only obtained immunity, but actually escaped censure from either Congress or his superior officers.[172]

[169] Appleton's Annual Encyclopædia, 1871, pp. 472, 473; ibid., for 1872, p. 47; Cox, Three Decades of Federal Legislation, pp. 555, 556.

[170] The Supreme Court, for want of jurisdiction, denied a writ of prohibition against this proceeding. *Ex parte* Warmoth, 17 Wall., 64. This order was condemned in a report of a congressional committee. House Mis. Doc., No. 211, 42d Cong., 2d sess., vol. iv. An abstract is reprinted in Appleton's Annual Encyclopædia for 1873, pp. 447, 448.

[171] Appleton's Annual Encyclopædia for 1872, p. 483.

[172] The reports of congressional committees and other persons on the subject, are printed in Appleton's Encyclopædia for 1876, pp. 494–498, 736–742. The white party were finally coerced into the acceptance of what was known as the Wheeler compromise. By this, the decision as to the contested elections was submitted to the arbitration of the congressional committee of investigation; and they agreed that after the award had been ratified by the legislative committees on elections and qualifications, and by the appropriate houses, a resolution should be adopted by the legislature recognizing as governor the Republican Kellogg, whose election was disputed, and declaring that he and the rest of his government would not be disturbed, and he would not be impeached for any past official

By such uses of the Federal army under General Grant, civil liberty was denied the South until the end of his two administrations, in 1877, when Tilden and Hayes each claimed to be elected President. After the decision of the Electoral Commission was clearly manifest, the Southern representatives, who, by filibustering, might have prevented the count of the votes, made a bargain with the representatives of Hayes, by which they agreed to withdraw their dilatory proceedings if he would leave their State governments alone. He carried out the contract, thus deserting the Southern candidates who had aided him in securing his position, and each of whom had obtained more votes for governor than he for President. With the withdrawal of the troops, the carpet-bag governments fell like houses built of cards. In one State only was there any friction: Louisiana, where there were two rival legislatures, and the lottery company owned enough blacks in one of them to give the other by their secession the quorum necessary for a valid organization. A contract was made with the corporation; and its legislators marched like cattle to the other house, which then organized, and established a valid, efficient and honest government. But as the price for this rescue of the State from the hands of its despoilers, the tax-payers were obliged to insert in the new Constitution provisions which legal-

acts. The text of this extraordinary document may be found in Appleton's Annual Encyclopædia for 1875, p. 457. The agreement was performed, and Kellogg thus secured the control of the Returning Board which was used to give the electoral vote to Hayes, the following year.

"The general condition of affairs in the State of Louisiana seems to be as follows: The conviction has been general among the whites, since 1872, that the Kellogg government was a usurpation. This conviction among them has been strengthened by the acts of the Kellogg legislature abolishing existing courts and judges, and substituting others presided over by judges appointed by Kellogg, having extraordinary jurisdiction over political questions. By changes in the law centralizing in the Governor every form of political control, including the supervision of elections; by continuing the Returning Board with absolute power over the returns of elections; by the extraordinary provisions enacted for the trial of titles and claims to office; by the conversion of the police-force, maintained at the expense of the city of New Orleans, into an armed brigade of State militia, subject to the command of the Governor; by the creation in some places, of monopolies in markets, gas-making, water-works and ferries, cleaning vaults, removing filth and doing work as wharfingers; by the abolition of courts with elected judges, and the substitution of other courts with judges appointed by Kellogg in

ized the lottery for a period of twenty years.[173] So closed this, the most disgraceful episode in the history of the United States.[174]

evasion of the Constitution of the State; by enactments punishing criminally all persons who attempted to fill official positions unless returned by the Returning Board; by unlimited appropriations for the payment of militia expenses, and for the payment of legislative warrants, vouchers, and checks issued during the years 1870 to 1872; by laws declaring that no person in arrears for taxes, after default published, shall bring any suit in any court of the State, or be allowed to be a witness in his own behalf; measures which, when coupled with the extraordinary burdens of taxation, have served to vest, in the language of Governor Kellogg's counsel, 'a degree of power in the governor of a State, scarcely exercised by any sovereign in the world.' With this conviction is a general want of confidence in the integrity of the existing State and local officials, a want of confidence equally in their persons and in their personnel, which is accompanied by the paralyzation of business and destruction of values." Report of Charles Foster, William Walter Phelps and Clarkson A. Potter, sub-committee of a Congressional committee, which was adopted by the full committee and presented to the house by George F. Hoar, Jan. 14th, 1875. A majority of the full committee and of the sub-committee were Republicans.

[173] The history of this transaction was told by the New York Sun, Nov. 20, 1891. That the account there given is correct the writer knows from information given him by a prominent citizen of New Orleans. The Wormley Conference, at which the bargain was made between Hayes' representatives and certain Southern members of the House, is described in the New York Herald, Jan. 5, 1885.

[174] "My own public life has been a very brief and insignificant one, extending little beyond the duration of a single term of senatorial office; but in that brief period I have seen five judges of a high court of the United States driven from office by threats of impeachment for corruption or maladministration. I have heard the taunt from friendliest lips, that when the United States presented herself in the East to take part with the civilized world in generous competition in the arts of life, the only product of her institutions in which she surpassed all others beyond question was her corruption. I have seen in the State in the Union foremost in power and wealth four judges of her courts impeached for corruption, and the political administration of her chief city become a disgrace and a by-word throughout the world. I have seen the chairman of the Committee on Military Affairs in the House, now a distinguished member of this court, rise in his place and demand the expulsion of four of his associates for making sale of their official privilege of selecting youths to be educated at our great military school. When the greatest railroad of the world, binding together the continent and uniting the two great seas which wash our shores, was finished, I have seen our national triumph and exultation turned to bitterness and shame by the unanimous reports of three committees of Congress, two of the House, and one here, that every step of that mighty enterprise had been taken in fraud. I have heard in highest places the shameless doctrine avowed by men grown old in public office, that the true way by

The constitutionality of the reconstruction legislation has never been decided by the Supreme Court of the United States, although several attempts were made to bring the point before it for decision.[175] Applications were made to file bills in the Supreme Court by the State of Mississippi against President Johnson, and the State of Georgia against General Grant, to enjoin the execution of the acts as an unlawful invasion of the rights of those respective States. The Supreme Court, however, refused to entertain these bills, upon the ground that they involved political rights and not the rights of property, and, consequently, were not within

which power should be gained in the Republic is to bribe the people with the offices created for their service, and the true end for which it should be used when gained is the promotion of selfish ambition and the gratification of personal revenge. I have heard that suspicion haunts the footsteps of the trusted companions of the President." (Senator George F. Hoar, of Massachusetts, when manager for the House of the impeachment of William W. Belknap, Trial, pp. 200, 201.)

[175] The new courts of the reconstructed States naturally held the Reconstruction Acts to be constitutional. Invin *v.* Mayor, 57 Ala., 6; Foster *v.* Daniels, 39 Ga., 39; Gormley *v.* Taylor, 44 Ga., 76, 90. In Georgia, a majority of the Supreme Court, by different processes of ratiocination, held that Georgia "in effect, seceded from the Federal Union, and was out, and was brought back as a conquered territory." (Nicholas *v.* Hovenor, 42 Ga., 514, 516. See also *Re* Kennedy, 2 Richardson (S. C.), 216, 220.) In Mississippi (State *v.* Williams, 49 Miss., 661); and Texas, Campbell *v.* Field, 35 Texas, 751; Peak *v.* Swindle, 68 Texas, 242, 250, 251); and the U. S. Circuit Court for Virginia (*In re* Decker, 2 Hughes, 183, 188, per Waite C. J.); it was held that the reconstructed constitutions of those States were in force within them as soon as they were ratified by the people, although their approval by Congress was some time afterwards. In Mississippi, it was held that the President had the power to appoint a provisional governor and to create provisional courts; that these courts were courts created by the United States in the nature of territorial courts; but that they could not try actions at common law without a jury. Scott *v.* Billgerry, 40 Miss., 119, 134-137, 143. The court said that the facts established a conquest of the State, although this was an unsound view of the Constitution. In North Carolina, it was held that the action of the convention called under the direction of the President was valid, although voters qualified by the previous State Constitution were not allowed to take part in the election. The court said that it would assume, for the purposes of the argument, that the State was a conquered nation, since that relieved those who were disfranchised from liability for treason. In the matter of Egan, 8 Fed. Cas., 367; s. c., 5 Blatch., 319; Mr. Justice Nelson held, before the reconstruction legislation, that after the recognition of the State government by Johnson, military commissions had no jurisdiction in South Carolina.

the jurisdiction of courts of equity.[176] In the famous case of McCardle, an appeal was taken to the Supreme Court from the decision of the Circuit Court of the United States upon a writ of habeas corpus obtained by a prisoner held for trial by a military commission in Mississippi upon the charge of publishing articles in a newspaper which impeded the reconstruction of the State and incited a breach of the peace; and the question of the constitutionality of the reconstruction acts was argued in 1868 by the most distinguished lawyers in the country.[177] The majority of the Supreme Court were of the opinion that at least so much of the act was unconstitutional as deprived citizens of the United States of the right to trial by jury. They hesitated, however, to engage in a conflict with a co-ordinate department of the government upon a question of so great political importance; and, consequently, against the protest of two of their members,[178] postponed their decision until the succeeding term in order to afford Congress an opportunity to repeal the statute which gave them jurisdiction. This was promptly done, so that the appeal fell with the law.[179] McCardle was, however, discharged.[180] In the case of Texas against White,[181] the validity of the acts of the government of Texas, which was recognized by the President and subsequently set aside under the Reconstruction acts, was brought before the Supreme Court for decision. The court held that neither the ordinance of secession, nor anything which had subsequently occurred, had put Texas out of the Union.[182] That the government of Texas, during the war, had been revolutionary and illegal, and its acts could have no more effect than those of a *de facto* government, which, in so far as they related to the maintenance of peace and good order among the citizens of the State, would be respected; but that all acts in aid of the rebellion, "or in-

[176] Mississippi *v.* Johnson, 4 Wall., 475; Georgia *v.* Stanton, 6 Wall., 50; Georgia *v.* Grant, 6 Wall., 241. The subject will be discussed subsequently in the chapter on the Judiciary.

[177] Ex-parte McCardle, 6 Wall., 318; s. c., 7 Wall., 506; Cox, Three Decades of Federal Legislation, p. 548.

For Field's argument, see his Works, vol. I, p. 518.

[178] Justices Field and Grier. Their protest is printed subsequently in the chapter on the Judiciary. It may also be found in Field's Works, vol. I, p. 518.

[179] *Ex parte* McCardle, 7 Wall., 506.

[180] Field's Works, vol. I, p. 518.

[181] 7 Wall., 700.

[182] Ibid., p. 726.

tended to defeat the just rights of citizens, were void." [183] That the action of the President was only provisional. That the acts of the government which he recognized were valid before Congress interfered,[184] and that Congress had the exclusive right to determine whether any government there existing was a republican government which should be recognized by the United States.[185] The court evaded a decision upon the constitutionality of the Reconstruction acts, saying: —

"Nothing in the case before us requires the court to pass judgment upon the constitutionality of any particular provision of those acts." [186] "We do not inquire here into the constitutionality of this legislation so far as it relates to military authority, or to the paramount authority of Congress." [186]

There are, however, two dicta by Mr. Justice Swayne in other cases to the effect that —

"The National Constitution gives to Congress the power, among others, to declare war and suppress insurrection. The latter power is

[183] 7 Wall., 733.

[184] Ibid., 730.

[185] "The new freemen necessarily became part of the people, and the people still constituted the State, for States, like individuals, retain their identity, though changed to some extent in their constituent elements. And it was the State thus constituted which was now entitled to the constitutional guaranty of a republican form of government." "There being then no government in Texas in constitutional relations with the Union, it became the duty of the United States to provide for the restoration of such a government. But the restoration of the government which existed before the rebellion, without a new election of officers, was obviously impossible; and before any such election could properly be held, it was necessary that the new Constitution should receive such amendments as would conform its provisions to the new conditions created by emancipation, and afford adequate security to the people of the State. In the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means must be necessary and proper for carrying into execution the power conferred, through the restoration of the State to its constitutional relations, under a republican form of government, and that no acts be done and no authority exerted which is either prohibited or unsanctioned by the Constitution." Chief-Justice Chase in Texas v. White, 7 Wall., 700, 728, 729.

[186] Ibid., p. 731. In a subsequent case where the validity of an order by a district commander, setting aside the decree of a State court, came in question, the Supreme Court held the order void as not authorized by the act, without passing upon the power of Congress. Raymond v. Thomas, 91 U. S., 712.

not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently rightful authority to guard against an immediate renewal of the conflict, and to remedy the evils growing out of its rise and progress." [187]

And speaking of a constitution adopted under the coercion of the reconstruction legislation: —

"Congress authorized the State to frame a constitution, and she elected to proceed within the scope of the authority conferred. The result was submitted to Congress as a voluntary and valid offering, and was so received and so recognized in the subsequent action of that body. The State is estopped to assail it upon such an assumption. Upon the same grounds she might deny the validity of her ratification of the constitutional amendments. The action of Congress upon the subject cannot be inquired into. The case is clearly one in which the judicial is bound to follow the action of the political department of the government and is concluded by it." [188]

The validity of the acts of Congress is, therefore, open to investigation; and now that more than a quarter of a century has since elapsed, and what they accomplished cannot be disturbed, it would seem as if the question were capable of a dispassionate consideration. In view of the language of the Constitution, the decisions of the courts on cognate questions and the action of Congress in other respects towards the States which were the seat of the insurrection, it seems impossible to find any justification for them in law, precedent, or consistency. The war was instituted against the South upon the theory announced by the President [189] and both houses of Congress,[190] that it was not the States, but a portion of their inhabitants, who had rebelled. The remanence of the States in the Union was asserted in both the statutes during the war imposing upon them a direct tax,[191] and those since the

[187] Raymond *v.* Thomas, 91 U.S., 712, 714, 715. And to the same effect in Stewart *v.* Kahn, 11 Wall., 493, 507. See also Gunn *v.* Barry, 15 Wall., 610, 623. In Marsh *v.* Burroughs, 1 Woods, 463, 470-472, Mr. Justice Bradley held at circuit, that the validity of the reconstructed Constitution of Georgia was a political question as to which the courts must follow Congress, and that "some sort of rehabilitation was necessary."

[188] White *v.* Hart, 13 Wall., 646, 649.

[189] See Lincoln's proclamation calling for troops, *supra*, note 1.

[190] *Supra*, over note 14. See The Amy Warwick, 2 Sprague, 123, 143, 150, 160; s. c., 1 Fed. Cas., pp. 719, 817.

[191] 12 St. at L., 295, 422. See also

peace and before the reconstruction legislation, dividing them into districts and circuits for the courts of the United States,[192] which can only sit in States, not Territories,[193] and providing for the expenses of the courts, held there with the consent of Congress after they had been divided into military districts. The Senate confirmed the appointments of judges, district attorneys, and marshals in those States for that purpose.[194] The Chief-Justice of the United States sat in North Carolina in June, 1867,[195] at a time when the State was in charge of a district commander. The existence of the disfranchised States in the Union was consequently recognized by all three of the departments into which the Federal government is divided. "Martial rule can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction." "If this government is continued after the courts are reinstated it is a gross abuse of power."[196] The guaranties of liberty in the Constitution were intended for war as well as peace, for times of rebellion as well as of general acquiescence in the authority of the government, and are only suspended when military necessity suspends all law and the courts are closed.[197]

The legality of the ratification of the Thirteenth and Fourteenth Amendments depended upon the legal existence of the State governments which ratified them, and which were not till after that ratification admitted to representation in Congress and relieved from military despotism.[198] The power of the national government to suppress insurrection undoubtedly carries with it the power to prevent a subsequent outbreak by the maintenance of military government until all danger has passed away.[199] The maxim *bello*

the act which recites the consent of Virginia to the formation of West Virgina, 12 St. at L., 633.

[192] Act of July 23, 1866, 14 St. at L.

[193] See American Insurance Co. *v.* Carter, 1 Peters, 511; McAllister *v.* U. S., 141 U. S., 174.

[194] See Johnson's veto of the second supplement to the Reconstruction Act, July 19, 1867.

[195] Chase's Decisions, p. 132.

[196] Mr. Justice Davis, with the concurrence of a majority of the Supreme Court, in *Ex-parte* Milligan, 4 Wall., 3. 127. This subject is discussed subsequently under the War-Power.

[197] Ibid.

[198] See *supra*, over note 63; Johnson's message on the admission of Tennessee to representation in Congress, quoted *supra*, over note 84; and his veto of the second supplement to the Reconstruction Act, July 19, 1867.

[199] Stewart *v.* Kahn, 11 Wall., 493,

non flagrante sed nondum cessante is well recognized by international law.[200] But no rule of law or logic can sustain the theory which allows self-government to relinquish constitutional rights while it denies it in all other respects, either within the State or by representation in the national legislature.[201] The Reconstruction Acts must consequently be condemned as unconstitutional, founded on force, not law, and so tyrannical as to imperil the liberty of the entire nation should they be recognized as binding precedents.

There is much more support for the conduct of both houses of Congress in refusing admission to the delegations from the Southern States till after the ratification of the new amendments and the re-making of their constitutions. In action of that character neither house is bound by rules and limitations such as hedge them in when enacting laws. The jurisdiction is expressly vested in their uncontrolled discretion. And few legislative or administrative, not many judicial officers, feel that, in determining upon a discretionary act, they are bound to follow rules of law which conflict with their views of public policy.

There remains, however, another and broader view of the entire question. The experience of eighty years had proved that there was need of an alteration of our Federal system to create citizenship of the United States, and give to those who possessed it rights which the States could not destroy, and which should be under the protection of the Supreme Court of the United States. Few live who would now revoke from its jurisdiction the power to

507; Raymond *v.* Thomas, 91 U. S., 712, 714, 715; quoted, *supra* over note 187.

[200] Elphinstone *v.* Bedreechund, 1 Knapp P. C., 316, 360, 361; where this maxim was applied to relieve a military officer from liability for an act in a conquered foreign country not protected from him by any provision of a constitution, although open hostilities had ceased in the vicinity, and the native courts were open at the time. William Lawrence of Ohio claimed authority for the Reconstruction legislation under this maxim (Congressional Globe, 2d sess., 39th Cong., p. 1083). See also the speech of Shellabarger, quoted by Dunning, The Constitution in Reconstruction, Pol. Sc. Quart., vol. ii, p. 598; and the opinion of Attorney-General E. R. Hoar in the Weaver Case, 13 Op. A. G. 59.

[201] According to The Republic of Republics, 4th ed., p. 426: "Thaddeus Stevens said there were only two men in all Congress who agreed that these matters were constitutional. 'In all this business,' said he, 'we act outside of the Constitution.'"

annul the act of a State as well as the National government, which takes life, liberty, or property without due process of law, or which establishes inequality by statute.

The condition, too, of the slaves among their former masters demanded some interposition for their protection; and history has taught that no class with the exclusive right of government can refrain from legislation unfair to those who are disfranchised.

That a period of probation, or a gradual admission of the freedmen to the right to vote, would have been better, few can doubt; but, after Lincoln's death, it seemed to the most careful students of the subject, that the choice was peremptory between immediate enfranchisement for all or permanent disfranchisement, without hope of a future right for any. The unwisdom of the disfranchisement of the leaders of the South is most apparent. But when we consider that, after five years of civil strife, in which so much blood and treasure was wasted, the victors did not demand, as an atonement, the sacrifice of a single life not destroyed in battle, or for a violation of the laws of war; and remember, not only the decimations in Rome and the guillotine in France, but the explosion of the Sepoys by the English in India less than ten years before, and the military executions in South and Central America to-day; their magnanimity seems, indeed, without a parallel. The South failed in an attempt to accomplish a revolution for the security of slavery. Their failure was followed by a successful revolution effected by the North,[202] which destroyed the institution that had been the canker in the body politic, and so cemented the Union as to make it stronger and more beneficial than before. At the start of secession, the Southern statesmen announced that they would never return without a reconstruction of the Union.[203] On their return, they found that a reconstruction had been brought to pass. And their children now admit that what they obtained was better than what they sought.[204]

[202] See Maine, Popular Government, p. 245.

[203] *Supra*, § 36, note 24.

[204] The only histories of Reconstruction are by Blaine, in Twenty Years in Congress, vol. ii, which contains the best defence of the action of Congress that could be made, and by Cox, in Three Decades of Federal Legislation. The latter book shows more appreciation of the extraordinary influence of Thaddeus Stevens upon the action taken. A bitter account of some of the events, written from the Con-

§ 39. Seat of Sovereignty in the United States.

According to the doctrines of jurisprudence which are usually accepted, there is a sovereign power in every form of government, incapable of control by law, every act of which has legal efficacy.[1] The soundness of this position has in later years been impugned,[2] and the writer has expressed his opinion on the subject in another place.[3] The question, however, which is more abstract than practical, seems to belong rather to the domain of jurisprudence than to that of constitutional law, and it will not be discussed in the present work. Under its influence, before the Civil War, the disciples of the school of extreme State rights argued that because the several States were termed sovereign their powers were illimitable, and included the rights of nullification and secession.[4] Similarly influenced since the restoration of peace, later writers have seemed to contend that there are now no limits to the powers of the United States, except the express prohibitions in the Constitution.[5] Each of these dogmas is without support in precedent.

There are certain powers which are the usual attributes of sovereignty and these are apportioned between the United States and

federate point of view, is by Davis, Rise and Fall of the Confederate Government, vol. ii, pp. 718–763. McPherson's History of the Reconstruction is in no sense a history, but a very valuable compilation of the documents and important facts. The student should also consult the debates in Congress as well as the newspapers of the time, and the testimony taken before the Joint Committee on Reconstruction, as well as that taken before a number of subsequent committees of Congress. There are several valuable monographs; amongst them Allen's History of the Administration of Governor Chamberlain in South Carolina; and The Brooks-Baxter War in Arkansas, by John M. Darrell. A full and impartial history of the period remains to be written.

§ 39. [1] Grotius, Jus Belli et Pacis, Liber I, c. 3, c. 7; Hobbes, Works, vol. ii, p. 69; Austin, Lectures on Jurisprudence, vol. i, p. 171; Holland, Jurisprudence, chap. iv, 2d ed., pp. 39–43.

[2] Maine, Early History of Institutions, Lecture xiii.

[3] The Subjection of the State to Law, American Law Review for 1886, p. 519.

[4] See the Republic of Republics, by B. J. Sage; Stephens, Constitutional View of the War between the States; Calhoun's Works; Davis, Rise and Fall of the Confederate Government, vol. i, and other authorities cited in this chapter, *supra*.

[5] See John C. Hurd, The Theory of our National Existence; and a pamphlet by the same author. Pomeroy, Constitutional Law; Tiedeman on Constitutional Law.

their component members.[6] But the limits of each are prescribed by the Federal Constitution; and there are certain powers which that instrument withdraws from both.[7] The ultimate right of sovereignty, which can remove all barriers to accomplish legally its wishes, if it exists at all in the United States, rests in the people of three-fourths of the several States acting through their legislatures or conventions with the previous consent of two-thirds of both houses of Congress, who may amend the Federal Constitution.[8] But even they are forbidden to deprive any State, without its consent, of its equal suffrage in the Senate.[9]

§ 40. Sovereign Powers of the United States in General.

The powers of the United States are divided into two classes — those exercised beyond their borders and those exercised within their territorial jurisdiction; and these again are subdivided into two, those within the Territories and the District of Columbia and those within the several States. In all external relations and transactions with foreign nations, the sovereignty of the United States is absolute except in so far as it is limited by the express language and implied restrictions of the Constitution. That instrument expressly grants to Congress the powers to regulate commerce with foreign nations, to regulate the value of foreign coin, to define and punish piracies and felonies committed on the high seas and offenses against the law of nations, to declare war, grant letters of marque and reprisal, and to make rules concerning captures on land and water;[1] to the President the power to receive ambassadors and other public ministers;[2] to the President and

[6] McCulloch *v.* Maryland, 4 Wheaton, 316, 402-405; Cohen *v.* Virginia, 6 Wheaton, 264, 380-382; Tennessee *v.* Davis, 100 U. S., 257, 272; Pollock *v.* Farmers' Loan and Trust Co., 157 U. S., 429, 556.

[7] Constitution, Article I, Sections 9 and 10.

[8] Constitution, Article V; Calhoun, Works, vol. v, p. 36; Mr. Justice Bradley, in Hans *v.* Louisiana, 134 U. S., 1, 11; Chief Justice Fuller in Pollock *v.* Farmer's Loan and Trust Co., 158 U. S. 601, 635; Maine, The Conception of Sovereignty and its Importance in International Law, Juridical Society Papers, 1855-1858, pp. 26, 44; Dicey, Law of the Constitution, pp. 137-140; Foster, The Subjection of the State to Law, Am. Law Review for 1886, p. 519.

[9] Constitution, Article V.

§ 40. [1] Constitution, Article I, Section 8.

[2] Constitution, Article II, Section 3.

Senate the power to appoint ambassadors, other public ministers and consuls; and to the President and two-thirds of the Senators present the power to make treaties.[3] It expressly forbids the several States to enter into any treaty, alliance or confederation, to grant letters of marque and reprisal, and without the consent of Congress to lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing their inspection laws, 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.[4] It has been said that in their transactions with foreign nations and action without their own territorial limits the United States have all the powers usually exercised by sovereigns which the Constitution does not expressly withold.[5] Except in so far as they are expressly inhibited by the Constitution, the United States have absolute and exclusive sovereignty over the District of Columbia[6] and the Territories.[7] Their full jurisdiction over the Territories, although formerly denied,[8] is now firmly established.[9]

The extent of the jurisdiction of the United States within the States has been a question of more dispute and difficulty, but is now settled by repeated adjudications. The two governments, State and National, each exercise their functions side by side, with a far more extensive range of action in the former than in the latter; but when they do come into conflict the former has to yield. It is still true in substance, as said by Jefferson, that they constitute "co-ordinate departments of one single and integral whole;" the former having the power of legislation and administration in affairs which concern their own citizens alone, the latter over whatever concerns foreigners or citizens of other States. And the

[3] Constitution, Article II, Section 2.

[4] Constitution, Article I, Section 10.

[5] See *In re* Neagle, 135 U. S., 1, 84, 85; Jones *v.* U. S., 137 U. S., 202, 212; Chae Chan Ting *v.* U. S., 130 U. S., 581, 605, 606; Fong Yue Ting *v.* U. S., 149 U. S., 698, 705, 706, 711, 712, 713, quoted *infra*; Ekiu *v.* U. S., 142 U. S., 651, 659.

[6] Constitution, Article I, Section 8.

[7] Constitution, Article IV, Section 3.

[8] Dred Scott *v.* Sandford, 19 How. 393, 432–442. See *infra*.

[9] Reynolds *v.* U. S., 98 U. S., 145; Murphy *v.* Ramsey, 114 U. S., 15; Cannon *v.* U. S., 116 U. S., 55; Davis *v.* Beason, 133 U. S., 333; Mormon Church *v.* U. S., 136 U. S., 1; s. c. 140 U. S., 665; s. c. as U. S. *v.* Mormon Church, 150 U. S., 145. See *infra*.

usual simile is that of the solar system, with a comparison of the United States to the sun and of the States to the planets, each moving in its respective orbit, a deviation from which by any, if unchecked, would bring destruction upon the whole.[10]

Within the sphere of the powers vested in them, the United States are supreme.[11] Every State law or official action in conflict with an act passed in execution of a power of the United States is void.[12] And there are no limits upon the action of the United States in the immediate execution of such a power [13] except the express inhibitions of the Federal Constitution and the implied condition that the United States can do nothing which prevents or materially hinders the discharge of those functions which are essential to the existence of one of their component States.[14] Even a State police power which it has exercised as it deemed necessary for the protection of the health or morals of its citizens must yield when it conflicts with a power vested by the constitution in the United States.[15]

The United States are a government, and consequently a corporation capable of contracting to the extent of their powers of action [16] and of suing to enforce their rights [17] in the absence of

[10] The earliest use of this simile known to the writer was by John Dickinson in the Federal Convention: "He compared the proposed national system to the solar system, in which the States were the planets and ought to be left to move freely in their proper orbits" (Madison Papers, Elliot's Debates, 2d ed., vol. v, p. 168).

[11] McCulloch *v.* Maryland, 4 Wheaton, 316; Logan *v.* U. S., 144 U. S., 263; In the matter of Quarles 158 U. S., 532; In the matter of Debs, 158 U. S., 564.

[12] Constitution, Article VI; Tarble's Case, 13 Wall., 397, 407; Tennessee *v.* Davis, 100 U. S., 257, 263; *Ex parte* Siebold, 100 U. S., 371, 386; Gulf C. & S. Ry. Co. *v.* Hefley, 158 U. S., 98, 104.

[13] McCulloch *v.* Maryland, 4 Wheaton, 316; In the matter of Debs, 158 U. S., 564.

[14] Lane County *v.* Oregon, 7 Wall., 71; Day *v.* The Collector, 11 Wall., 113; U. S. *v.* Railroad Company, 17 Wall., 322; Pollock *v.* Farmers' Loan and Trust Co., 157 U. S., 429; *infra*, § 41 and later.

[15] Morgan's Steamship Co. *v.* Louisiana Board of Health, 118 U. S., 455, 464; New Orleans Gas Light Co. *v.* Louisiana Light and Heat Producing Co., 115 U. S., 650, 661; Leisy *v.* Hardin, 135 U. S., 100; Gulf C. & S. F. Ry. Co. *v.* Hefley, 158 U. S., 98, 104.

[16] Constitution, Article I, Section 8, concluding clause; Chief Justice Marshall in U. S. *v.* Maurice, 2 Marshall, 96, 109; U. S. *v.* Tingey, 5 Peters, 115; U. S. *v.* Bradley, 10 Peters, 343.

[17] *In re* Debs, 158 U. S., 564; U. S. *v.* Hughes, 11 How., 552; U. S. *v.* San Jacinto Tin Company, 125 U. S., 273, 279.

any statutory prohibition, although without express statutory authority.[18] There is a peace of the United States as well as a peace of each individual State.[19] The United States have the power to provide by law for the punishment of every attempt to impede the exercise of any of their functions [20] or to deprive any of their citizens of any right [21] which is guaranteed by the Federal Constitution.

"The government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent." [22]

"The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights intrusted by the Constitution to its care." [23] The United States have the right of self-protection, which includes the right of self-defense.

§ 41. State Sovereignty and State Rights.

The several States are still called sovereign in some opinions of the courts [1] as well as common parlance; but, as has been shown, they are not sovereign within the definition given to the term by the jurisprudents.[2] They have none of the rights of sovereignty in transactions with foreign nations.[3] They possess but a single power, the right of equal suffrage in the Senate, of which they cannot be deprived by three-fourths of the members of the Union.[4]

[18] Ibid.

[19] *Ex parte* Siebold, 100 U. S., 371, 395; *In re* Neagle, 135 U. S., 1, 69; Logan *v.* U. S., 144 U. S., 263, 295; *In re* Quarles, 158 U. S., 532, 535.

[20] McCulloch *v.* Maryland, 4 Wheat., 316, 417, 418; U. S. *v.* Marigold, 9 How., 560; *Ex parte* Siebold, 100 U. S., 371; *Ex parte* Yarbrough, 110 U. S., 651, 658. See the subsequent chapter upon the Implied Powers of Congress.

[21] U. S. *v.* Cruikshank, 92 U. S., 542, 552; U. S. *v.* Coombs, 12 Peters, 72, 78; *Ex parte* Yarbrough, 110 U. S., 651; U. S. *v.* Waddell, 112 U. S. 76; Logan *v.* U. S., 144 U. S., 263. See the subsequent chapter upon the Implied Powers of Congress.

[22] *Ex parte* Siebold, 100 U. S., 371, 395, per Mr. Justice Bradley.

[23] Mr. Justice Brewer, *In re* Debs, 158 U. S., 564, 582.

§ 41. [1] Mr. Justice Bradley in Hans *v.* Louisiana, 124 U. S., 1, 21. Compare the language of Chief Justice Marshall in Cohens *v.* Virginia, 6 Wheaton, 264, 414.

[2] *Supra*, § 39.

[3] Constitution, Article I, Section 10: New Hampshire *v.* Louisiana, 108 U. S., 76, 90; *supra*, § 40.

[4] Constitution, Article V.

And they can use no powers which clash with the exercise of any vested by the Constitution in the United States.[5] Their jurisdiction is, moreover, limited in other respects by the same instrument. They are forbidden to interfere with the foreign relations of the Union;[6] and to coin money, and emit bills of credit.[7] They cannot grant titles of nobility,[8] or establish a form of government which is not republican,[9] or assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave,[10] or pass a bill of attainder or *ex post facto* law,[11] or deny or abridge the right of citizens of the United States to vote on account of race, color or previous condition of servitude,[12] or abridge the privileges or immunities of citizens of the United States,[13] or deny to the citizens of the other States the privileges and immunities which they allow to their own citizens,[14] or authorize slavery or involuntary servitude except as a punishment for a crime after conviction,[15] or deny to any person within their jurisdiction the equal protection of their laws.[16] They are compelled to respect contractual rights [17] and all other rights to property.[18] They cannot make anything but gold and silver coin a tender in payment of debts, or pass any law impairing the obligation of contracts,[19] or deprive any person of life, liberty or property without due process of law.[20] They are directed to deliver fugitives from the justice of another State to the executive thereof upon his demand.[21] Their courts are obliged to respect the public acts, records and judicial proceedings of the other States.[22] And they are amenable to the jurisdiction of the Supreme Court of the United States in suits by other States of the Union, foreign States and the United States.[23]

In other respects each State has full and complete jurisdiction

[5] *Supra*, § 40.
[6] Constitution, Article I, Section 10.
[7] Ibid.
[8] Ibid.
[9] Ibid., Article IV, Section 4.
[10] Ibid., Fourteenth Amendment.
[11] Ibid., Article I, Section 10.
[12] Ibid., Fifteenth Amendment.
[13] Ibid., Fourteenth Amendment.
[14] Ibid., Article IV, Section 2.
[15] Ibid., Thirteenth Amendment.
[16] Ibid., Fourteenth Amendment.
[17] Ibid., Article I, Section 10.
[18] Ibid., Fourteenth Amendment.
[19] Ibid., Article I, Section 10.
[20] Ibid., Fourteenth Amendment.
[21] Ibid., Article IV, Section 2.
[22] Ibid., Article IV, Section 1.
[23] Ibid., Article III, Eleventh Amendment.

and all the attributes of sovereignty over every thing and person within its borders. "The powers not delegated to the States by the Constitution nor prohibited by it to the States are reserved to the States respectively, or to the people."[24] The domain of a State includes the regulation of the domestic relations of its citizens, including marriage, divorce, and other sexual relations,[25] adoption and the rights of parents over their children,[26] education,[27] inheritance and the acquisition of property within its borders, by bequest or devise, including the right to forbid a devise of land therein to the United States;[28] the title to real and personal property within its jurisdiction;[29] all its internal commerce and manufactures, including the prohibition of the manufacture of an article intended for export,[30] and full control over monopolies of manufacture, commerce and other business which are confined within its limits;[31] and those numerous necessary regulations for the preservation of health,[32] property,[33] and morals,[34] the maintenance of order,[35] and the adjustment of rights to property held in common,[36] which are usually classified under the police powers. Each State has absolute control over the structure of its internal government and the right to local self-government without interference by the United States, provided that it preserves the

[24] Ibid., Tenth Amendment.

[25] Hunt *v.* Hunt, 131 U. S., Appendix clxv.; Maynard *v.* Hill, 125 U. S., 190; Pace *v.* Alabama, 106 U. S., 583; Green *v.* State, 58 Ala., 190; S. C., 69 Ala., 231; *Ex parte* Kinney, 3 Hughes, 1; *Ex parte* François, 3 Woods, 367; François *v.* State, 9 Tex. App., 144.

[26] *In re* Burrus, 136 U. S., 586.

[27] Bertonneau *v.* City Directors, 3 Woods, 177; People *ex rel.* Kling *v.* Gallagher, 93 N. Y., 438; Commonwealth *v.* Denis, 10 Weekly Notes (Pa.), 156; Lehew *v.* Brummell, 103 Mo., 546; State *ex rel.* Garner *v.* McCann, 21 Ohio St., 198; Cary *v.* Carter, 48 Ind., 328; Ward *v.* Flood, 48 Cal., 36; Chrisman *v.* Brookhaven, 70 Miss., 477. See, however, Claybrook *v.* City of Owensboro, 16 Fed. R., 297.

[28] U. S. *v.* Fox, 94 U. S., 315.

[29] U. S. *v.* Fox, 94 U. S., 315, 320.

[30] Kidd *v.* Pearson, 128 U. S., 1, 20, 21, 22. Cf. Patterson *v.* Kentucky, 97 U. S., 501.

[31] Veazie *v.* Moor, 14 How., 568, 574; The Slaughter House Cases, 16 Wall., 36; U. S. *v.* E. C. Knight Co., 156 U. S., 1.

[32] Smith *v.* Alabama, 124 U. S., 465; Powell *v.* Pennsylvannia, 127 U. S., 678; Plumley *v.* Commonwealth of Massachusetts, 155 U. S., 461.

[33] U. S. *v.* Dewitt, 9 Wall., 41; Patterson *v.* Kentucky, 97 U. S., 501.

[34] Stone *v.* Mississippi, 101 U. S., 814.

[35] The James Gray *v.* The John Fraser, 21 How., 184; Vanderbilt *v.* Adams, 7 Cowen (N. Y.), 349.

[36] Wurts *v.* Hoagland, 114 U. S., 606.

republican form and does not infringe the express provisions of the Constitution.[37]

The Constitution, by implication, guarantees to each State its existence and the discharge of its governmental functions, without interference by the United States, except to the extent necessary for the enforcement of the powers granted to Congress. Even in the exercise of such a power the United States cannot impede any of the operations of a State which are essential to its corporate existence.[38] Thus they cannot tax the property of a State,[39] or the salary of a State officer,[40] or the principal or income of State indebtedness;[41] nor make bills of credit issued by the United States a legal tender in payment of State taxes.[42] The Constitution also contains express guaranties of State rights, namely, the right of each State to two senators[43] and at least one representative,[44] and at least three presidential electors[45]; the right to have representation in the House of Representatives[46] otherwise apportioned in accordance with population, unless a State for any reason except crime denies the right of suffrage to any of its male inhabitants who are twenty-one years of age, and citizens of the United States, except for crime[47]; the right to an apportionment of direct taxation in accordance with population[48]; the right to appoint the officers of its militia,[49] and to train them according to the discipline prescribed by Congress;[50] the right to recover fugitives from justice who have escaped to other States;[51] the right to have its public acts, records and judicial proceedings respected in other States;[52] the right of its citizens to enjoy the privileges and im-

[37] Minor *v.* Happersett, 21 Wall., 162; Murphy *v.* Ramsey, 114 U. S., 15, 44.

[38] The Collector *v.* Day, 11 Wall., 113; Lane County *v.* Oregon, 7 Wall., 71; U. S. *v.* Railroad Company, 17 Wall., 322; Pollock *v.* Farmer's Loan and Trust Co., 157 U. S., 429.

[39] U. S. *v.* Railroad Company, 17 Wall., 322.

[40] The Collector *v.* Day, 11 Wall., 113.

[41] Pollock *v.* Farmer's Loan and Trust Co., 157 U. S. 429.

[42] Lane County *v.* Oregon, 7 Wall., 71.

[43] Constitution, Article V.

[44] Ibid., Article I, Section 2.

[45] Ibid., Article II, Section 1.

[46] Ibid., Article I, Section 2.

[47] Ibid., Fourteenth Amendment.

[48] Ibid., Article I, Section 2; Pollock *v.* Farmer's Loan and Trust Co., 158 U. S., 601.

[49] Ibid., Article I, Section 8.

[50] Ibid.

[51] Ibid., Article IV, Section 2. This has been held to be a right of imperfect obligation. Commonwealth of Kentucky *v.* Dennison, 24 How., 66.

[52] Ibid., Article IV, Section 1.

munities of the citizens of the other States where they sojourn;[53] the right of territorial integrity, at least to the extent of protection from division into two or more States without its consent,[54] and, according to some authorities, to protection against consolidation with other States[55] or the cession of part of its territory to foreign States without its consent;[56] the right to freedom from commercial preferences to the ports of other States, and taxation of its exports imposed by the United States or the States from which they are shipped;[57] the right to a republican form of government, protected by the United States;[58] the right to exemption from suits by citizens of other States or foreign States;[59] and, finally, the right to take part in framing, and to vote upon, amendments to the Federal Constitution.[60]

The term State sovereignty was a misnomer. It is associated with slavery and secession; and little good can be gained by its use in the controversies of the present or the future. It is otherwise with the doctrine of State rights when correctly understood and properly applied. That had its origin in the rescue by Jefferson of the whole people from the attacks on the liberty of the press which were perpetrated by the Federalists, and aided in freeing the Southern tax-payers from the rapacity of illiterate blacks supported by the bayonets of Grant's army. Now that the whole world is the subject of a struggle for a readjustment of the relations between the employers and employed, in which each calls for the aid of the organized power of society; that the rights of land-owners are overhauled and attempts made to reconstruct them; that even personal property is not exempt from attack; that the change in the condition of women is accompanied by changes in the institution of marriage; and that the State's aid is invoked to assist in solving other social problems; while the preponderance of political power in the

[53] Ibid., Article IV, Section 2.

[54] Ibid., Article IV, Section 3.

[55] Synopsis of lectures on the Constitution of the United States before the School of Law of Cornell University by Ex-Governor Daniel H. Chamberlain, p. 32; a very valuable collection of notes.

[56] See the discussion of this subject under the Treaty Power.

[57] Constitution, Article I, Sections 9 and 10.

[58] Ibid., Article IV, Section 4.

[59] Ibid., Eleventh Amendment.

[60] Ibid., Article V.

United States has passed to the inhabitants of a portion of the country with different and less varied occupations, different habits and less wealth than those of the section which is in the minority; it is of the utmost importance that all experiments in legislation should be confined as far as possible to the communities who wish to try them, and not forced upon distant and reluctant States who are opposed to any change in the existing order. At no time in the history of the United States have the maintenance and preservation of State rights been more needed. And the most important decision of the Supreme Court since the period of reconstruction[61] shows that that tribunal, as at present constituted, is resolved to uphold them.[62]

[61] Pollock *v.* Farmers' Loan and Trust Co., 158 U. S., 601.

[62] "There are, moreover, two considerations particularly applicable to the federal system of America, which place that system in a very interesting point of view.

"First: In a single republic all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound Republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

"Second. It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil; the one by creating a will in the community independent of the majority — that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable if not impracticable. The first method prevails in all governments possessing an hereditary or self-appointed authority. This at best is but a precarious security; because a power independent of the society may as well espouse the unjust views of the major as the rightful interests of the minor party, and may possibly be turned against both parties. The second method will be exemplified in the federal republic of the United States. Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority." (The Federalist, No. li.

APPENDIX TO CHAPTER II.

AN ACT CONCERNING ALIENS.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That it shall be lawful for the President of the United States at any time during the continuance of this act to *order* all such *aliens* as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof, to depart out of the territory of the United States, within such time as shall be expressed in such order, which order shall be served on such alien by delivering him a copy thereof, or leaving the same at his usual abode, and returned to the office of the Secretary of State, by the marshal or other person to whom the same shall be directed. And in case any alien, so ordered to depart, shall be found at large within the United States after the time limited in such order for his departure, and not having obtained a *licence* from the President to reside therein, or having obtained such *licence* shall not have conformed thereto, every such alien shall, on conviction thereof, be imprisoned for a term not exceeding three years, and shall never after be admitted to become a citizen of the United States. *Provided always, and be it further enacted*, that if any alien so ordered to depart shall prove to the satisfaction of the President, by evidence to be taken before such person or persons as the President shall direct, who are for that purpose hereby authorized to administer oaths, that no injury or danger to the United States will arise from suffering such alien to reside therein, the President of the United States may grant a *licence* to such alien to remain within the United States for such time as he shall judge proper, and at such place as he may designate. And the President may also require of such alien to enter into a bond to the United States, in such penal sum as he may direct, with one or more sufficient sureties to the satisfaction of the person authorized by the President to take the same, conditioned for the good behavior of such alien during his residence in the United

States, and not violating his licence, which licence the President may revoke whenever he shall think proper.

SEC. 2. *And be it further enacted*, That it shall be lawful for the President of the United States, whenever he may deem it necessary for the public safety, to order to be removed out of the territory thereof, any alien, who may or shall be in prison in pursuance of this act; and to cause to be arrested and sent out of the United States such of those aliens as shall have been ordered to depart therefrom and shall not have obtained a licence as aforesaid, in all cases where, in the opinion of the President, the public safety requires a speedy removal. And if any alien so removed or sent out of the United States by the President, shall voluntarily return thereto, unless by permission of the President of the United States, such alien on conviction thereof, shall be imprisoned so long as, in the opinion of the President, the public safety may require.

SEC. 3. *And be it further enacted*, That every master or commander of any ship or vessel which shall come into any port of the United States after the first day of July next, shall immediately on his arrival make report in writing to the collector or other chief officer of the customs of such port, of all aliens, if any, on board his vessel, specifying their names, age, the place of nativity, the country from which they shall have come, the nation to which they belong and owe allegiance, their occupation and a description of their persons, as far as he shall be informed thereof, and on failure, every such master and commander shall forfeit and pay three hundred dollars, for the payment whereof on default of such master or commander, such vessel shall also be holden, and may by such collector or other officer of the customs be detained. And it shall be the duty of such collector or other officer of the customs, forthwith to transmit to the office of the Department of State true copies of all such returns.

SEC. 4. *And be it further enacted*, That the circuit and district courts of the United States, shall respectively have cognizance of all crimes and offences against this act. And all marshals and other officers of the United States are required to execute all precepts and orders of the President of the United States issued in pursuance or by virtue of this act.

SEC. 5. *And be it further enacted*, That it shall be lawful for any alien who may be ordered to be removed from the United States, by virtue of this act, to take with him such part of his goods, chattels, or other property as he may find convenient; and all property left in the United States by any alien, who may be removed, as aforesaid,

shall be, and remain subject to his order and disposal, in the same manner as if this act had not been passed.

SEC. 6. *And be it further enacted*, That this act shall continue and be in force for and during the term of two years from the passing thereof.

Approved June 25, 1798.[1]

THE SEDITION LAW.

AN ACT IN ADDITION TO THE ACT ENTITLED "AN ACT FOR THE PUNISHMENT OF CERTAIN CRIMES AGAINST THE UNITED STATES."

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America assembled*, That if any persons shall unlawfully combine or conspire together, with intent to oppose any measure or measures of the government of the United States, which are or shall be directed by proper authority, or to impede the operation of any law of the United States, or to intimidate or prevent any person holding a place or office in or under the government of the United States, from undertaking, performing, or executing his trust or duty; and if any person or persons, with intent as aforesaid, shall counsel, advise or attempt to procure any insurrection, riot, unlawful assembly, or combination, whether such conspiracy, threatening, counsel, advice, or attempt shall have the proposed effect or not, he or they shall be deemed guilty of a high misdemeanor, and on conviction, before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding five thousand dollars and by imprisonment during a term not less than six months nor exceeding five years; and further at the discretion of the court may be holden to find sureties for his good behavior in such sum, and for such times, as the said court may direct.

SEC. 2. *And be it further enacted*, That if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to

[1] Preston's Documents illustrative of American History, 2d ed., pp. 278–280.

bring them or either of them, into contempt or disrepute; or to excite against them, or either, or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States, and one in pursuance of any such law, or of the powers in him vested by the constitution of the United States, or to resist, oppose, or defeat any such law or act, or to aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government, then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.

SEC. 3. *And be it further enacted, and declared*, That if any person shall be prosecuted under this act, for the writing or publishing any libel aforesaid, it shall be lawful for the defendant, upon the trial of the cause, to give in evidence in his defence, the truth of the matter contained in the publication charged as a libel. And the jury who shall try the cause, shall have a right to determine the law and the fact, under the direction of the court, as in other cases.

SEC. 4. *And be it further enacted*, That this act shall continue and be in force until the third day of March, one thousand eight hundred and one, and no longer: *Provided*, that the expiration of the act shall not prevent or defeat a prosecution and punishment of any offence against the law, during the time it shall be in force.

Approved, July 14, 1798.[2]

VIRGINIA RESOLUTIONS OF 1798.

VIRGINIA *to wit.*

IN THE HOUSE OF DELEGATES,

Friday, December 21st, 1798.

Resolved, that the General Assembly of Virginia doth unequivocally express a firm resolution to maintain and defend the constitution of the United States, and the constitution of this state, against every aggression, either foreign or domestic, and that they will support the government of the United States in all measures, warranted by the former.

That this Assembly most solemnly declares a warm attachment to the union of the states, to maintain which, it pledges its powers; and that

[2] Preston's Documents illustrative of American History, 2d ed., pp. 280-282.

for this end, it is their duty, to watch over and oppose every infraction of those principles, which constitute the only basis of that union, because a faithful observance of them, can alone secure its existence, and the public happiness.

That this Assembly doth explicitly and peremptorily declare, that it views the powers of the Federal Government, as resulting from the compact, to which the states are parties; as limited by the plain sense and intention of the instrument constituting that compact; as no farther valid than they are authorized by the grants enumerated in that compact, and that in case of a deliberate, palpable and dangerous exercise of other powers not granted by the said compact, the states who are parties thereto have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights, and liberties appertaining to them.

That the General Assembly doth also express its deep regret, that a spirit has, in sundry instances, been manifested by the Federal Government, to enlarge its powers by forced constructions of the constitutional charter which defines them; and that indications have appeared of a design to expound certain general phrases (which having been copied from the very limited grant of powers in the former articles of confederation were the less liable to be misconstrued) so as to destroy the meaning and effect of the particular enumeration, which necessarily explains and limits the general phrases; and so as to consolidate the states by degrees into one sovereignty, the obvious tendency and inevitable consequence of which would be, to transform the present republican system of the United States, into an absolute, or at best a mixed monarchy.

That the General Assembly doth particularly protest against the palpable and alarming infractions of the constitution, in the two late cases of the "Alien and Sedition acts," passed at the last session of Congress; the first of which exercises a power nowhere delegated to the Federal Government; and which by uniting legislative and judicial powers, to those of executive, subverts the general principles of free government, as well as the particular organization and positive provisions of the federal constitution: and the other of which acts, exercises in like manner a power not delegated by the constitution, but on the contrary expressly and positively forbidden by one of the amendments thereto; a power which more than any other ought to produce universal alarm, because it is levelled against that right of freely examining public characters and measures, and of free communication among the

people thereon, which has ever been justly deemed, the only effectual guardian of every other right.

That this state having by its convention which ratified the federal constitution, expressly declared, "that among other essential rights, the liberty of conscience and the press cannot be cancelled, abridged, restrained or modified by any authority of the United States," and from its extreme anxiety to guard these rights from every possible attack of sophistry and ambition, having with other states recommended an amendment for that purpose, which amendment was in due time annexed to the constitution, it would mark a reproachful inconsistency and criminal degeneracy, if an indifference were now shewn to the most palpable violation of one of the rights thus declared and secured, and to the establishment of a precedent which may be fatal to the other.

That the good people of this Commonwealth having ever felt and continuing to feel the most sincere affection for their brethren of the other states, the truest anxiety for establishing and perpetuating the union of all, and the most scrupulous fidelity to that constitution which is the pledge of mutual friendship, and the instrument of mutual happiness: the General Assembly doth solemnly appeal to the like dispositions of the other states, in confidence that they will concur with this commonwealth in declaring, as it does hereby declare, that the acts aforesaid are unconstitutional, and that the necessary and proper measures will be taken by each for co-operating with this state, in maintaining unimpaired the authorities, rights, and liberties, reserved to the states respectively, or to the people.

That the Governor be desired to transmit a copy of the foregoing resolutions to the executive authority of each of the other states, with a request, that the same may be communicated to the legislature thereof.

And that a copy be furnished to each of the Senators and Representatives representing this state in the Congress of the United States.

Attest, JOHN STEWART, C. H. D.

1798, December the 24th.
Agreed to by the Senate.

H. BROOKE, C. S.[3]

[3] Preston's Documents illustrative of American History, 2d ed., pp. 284-287.

KENTUCKY RESOLUTIONS OF 1798.

I. *Resolved*, that the several states composing the United States of America, are not united on the principle of unlimited submission to their General Government; but that by compact under the style and title of a Constitution for the United States and of amendments thereto, they constituted a General Government for special purposes, delegated to that Government, certain definite powers, reserving each state to itself, the residuary mass of right to their own self-Government; and that whensoever the General Government assumes undelegated powers, its acts are unauthoritative, void, and of no force: That to this compact each state acceded as a state, and is an integral party, its co-states forming as to itself, the other party: That the Government created by this compact was not made the exclusive or final *judge* of the extent of the powers delegated to itself; since that would have made its discretion, and not the Constitution, the measure of its powers; but that as in all other cases of compact among parties having no common Judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress.

II. *Resolved*, that the Constitution of the United States having delegated to Congress a power to punish treason, counterfeiting the securities and current coin of the United States, piracies and felonies committed on the High Seas, and offences against the laws of nations, and no other crimes whatever, and it being true as a general principle, and one of the amendments to the Constitution having also 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," therefore also the same act of Congress passed on the 14th day of July, 1798, and entitled "An act in addition to the act entitled an act for the punishment of certain crimes against the United States;" as also the act passed by them on the 27th day of June, 1798, entitled "An act to punish frauds committed on the Bank of the United States" (and all other their acts which assume to create, define, or punish crimes other than those enumerated in the constitution) are altogether void and of no force, and that the power to create, define, and punish such other crimes is reserved, and of right appertains solely and exclusively to the respective states, each within its own Territory.

III. *Resolved*, that it is true as a general principle, and is also expressly declared by one 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;" and that no power over the freedom of religion, freedom of speech, or freedom of the press being delegated to the United States by the Constitution, nor prohibited by it to the states, all lawful powers respecting the same did of right remain, and were reserved to the states, or to the people: That thus was manifested their determination to retain to themselves the right of judging how far the licentiousness of speech and of the press may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use, should be tolerated rather than the use be destroyed; and thus also they guarded against all abridgement by the United States of the freedom of religious opinions and exercises, and retained to themselves the right of protecting the same, as this state, by a Law passed on the general demand of its Citizens, had already protected them from all human restraint or interference: And that in addition to this general principle and express declaration, another and more especial provision has been made by one of the amendments to the Constitution which expressly declares, that "Congress shall make no laws respecting an Establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press," thereby guarding in the same sentence, and under the same words, the freedom of religion, of speech, and of the press, insomuch, that whatever violates either, throws down the sanctuary which covers the others, and that libels, falsehoods, defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals. That therefore the act of the Congress of the United States passed on the 14th day of July, 1798, entitled "An act in addition to the act for the punishment of certain crimes against the United States," which does abridge the freedom of the press, is not law, but is altogether void and of no effect.

IV. *Resolved*, that alien friends are under the jurisdiction and protection of the laws of the state wherein they are; that no power over them has been delegated to the United States, nor prohibited to the individual states distinct from their power over citizens; and it being true as a general principle, and one of the amendments to the Constitution having also declared, that "the powers not delegated to the United States by the Constitution, nor prohibited to the states are reserved to the states respectively or to the people," the act of the Congress of the United States passed on the 22d day of June, 1798, entitled "An act concerning aliens," which assumes power over alien friends not delegated by the Constitution, is not law, but is altogether void and of no force.

V. *Resolved*, that in addition to the general principle as well as the express declaration, that powers not delegated are reserved, another and more special provision inserted in the Constitution from abundant caution has declared, "that the *migration* or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808." That this Commonwealth does admit the migration of alien friends described as the subject of the said act concerning aliens; that a provision against prohibiting their migration, is a provision against all acts equivalent thereto, or it would be nugatory; that to remove them when migrated is equivalent to a prohibition of their migration, and is, therefore contrary to the said provision of the Constitution, and void.

VI. *Resolved*, that the imprisonment of a person under the protection of the Laws of this Commonwealth on his failure to obey the simple *order* of the President to depart out of the United States, as is undertaken by the said act entitled "An act concerning Aliens," is contrary to the Constitution, one amendment to which has provided, that "no person shall be deprived of liberty without due process of law," and that another having provided, 'that in all criminal prosecutions, the accused shall enjoy the right to a public trial by an impartial jury, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence," the same act undertaking to authorize the President to remove a person out of the United States who is under the protection of the Law, on his own suspicion, without accusation, without jury, without public trial, without confrontation of the witnesses against him, without having witnesses in his favour, without defence, without counsel, is contrary to these provisions also of the Constitution, is therefore not law but utterly void and of no force.

That transferring the power of judging any person who is under the protection of the laws, from the Courts to the President of the United States, as is undertaken by the same act concerning Aliens, is against the article of the Constitution which provides, that "the judicial power of the United States shall be vested in the Courts, the Judges of which shall hold their offices during good behaviour," and that the said act is void for that reason also; and it is further to be noted, that this transfer of Judiciary power is to that magistrate of the General Government who already possesses all the Executive, and a qualified negative in all the Legislative powers.

VII. *Resolved*, that the construction applied by the General Govern-

ment (as is evidenced by sundry of their proceedings) to those parts of the Constitution of the United States which delegate to Congress a power to lay and collect taxes, duties, imposts, and excises; to pay the debts, and provide for the common defence, and general welfare of the United States, and to make all laws which shall be necessary and proper for carrying into execution the powers vested by the Constitution in the Government of the United States, or any department thereof, goes to the destruction of all the limits prescribed to their power by the Constitution — That words meant by that instrument to be subsidiary only to the execution of the limited powers, ought not to be so construed as themselves to give unlimited powers, nor a part so to be taken, as to destroy the whole residue of the instrument: That the proceedings of the General Government under colour of these articles, will be a fit and necessary subject for revisal and correction at a time of greater tranquillity, while those specified in the preceding resolutions call for immediate redress.

VIII. *Resolved*, that the preceding Resolutions be transmitted to the Senators and Representatives in Congress from this Commonwealth, who are hereby enjoined to present the same to their respective Houses, and to use their best endeavours to procure at the next session of Congress, a repeal of the aforesaid unconstitutional and obnoxious acts.

IX. *Resolved lastly*, that the Governor of this Commonwealth be, and is hereby authorized and requested to communicate the preceding Resolutions to the Legislatures of the several States, to assure them that this Commonwealth considers Union for specified National purposes, and particularly for those specified in their late Federal Compact, to be friendly to the peace, happiness, and prosperity of all the states: that faithful to that compact according to the plain intent and meaning in which it was understood and acceded to by the several parties, it is sincerely anxious for its preservation: that it does also believe, that to take from the states all the powers of self government, and transfer them to a general and consolidated Government, without regard to the special delegations and reservations solemnly agreed to in that compact, is not for the peace, happiness, or prosperity of these states: And that therefore, this Commonwealth is determined, as it doubts not its Co-states are, to submit to undelegated & consequently unlimited powers in no man or body of men on earth: that if the acts before specified should stand, these conclusions would flow from them; that the General Government may place any act they think proper on the list of crimes & punish it themselves, whether enumerated or not enumerated by the

Constitution as cognizable by them: that they may transfer its cognizance to the President or any other person, who may himself be the accuser, counsel, judge, and jury, whose *suspicions* may be the evidence, his order the sentence, his officer the executioner, and his breast the sole record of the transaction: that a very numerous and valuable description of the inhabitants of these states, being by this precedent reduced as outlaws, to the absolute dominion of one man and the barrier of the Constitution thus swept away from us all, no rampart now remains against the passions and the powers of a majority of Congress, to protect from a like exportation or other grievous punishment the minority of the same body, the Legislature, Judges, Governors, the Counsellors of the states, nor their other peaceable inhabitants who may venture to reclaim the constitutional rights and liberties of the state and the people, or who for other causes, good or bad, may be obnoxious to the views or marked by the suspicions of the President, or be thought dangerous to his or their elections or other interests public or personal: that the friendless alien has indeed been selected as the safest subject of a first experiment: but the citizen will soon follow, or rather has already followed; for already has a Sedition Act marked him as its prey: that these and successive acts of the same character, unless arrested on the threshold, may tend to drive these states into revolution and blood, and will furnish new calumnies against Republican Governments, and new pretexts for those who wish it to be believed, that man cannot be governed but by a rod of iron:[3] that it would be a dangerous delusion were a confidence in the men of our choice to silence our fears for the safety of our rights: that confidence is everywhere the parent of despotism: free government is founded in jealousy and not in confidence; it is jealousy and not confidence which prescribes limited Constitutions to bind down those whom we are obliged to trust with power: that our Constitution has accordingly fixed the limits to which and no further our confidence may go; and let the honest advocate of confidence read the Alien and Sedition Acts, and say if the Constitution has not been wise in fixing limits to the Government it created, and whether we should be wise in destroying those limits? Let him say what the Government is if it be not a tyranny, which the men of our choice have conferred on the President, and the President of our choice has assented to and accepted over the friendly strangers, to whom the mild spirit of our country and its laws had pledged hospi-

[3] This language will seem less absurd to those who recollect that the reign of terror in France had closed less than four years before, and that the French Republic fell within the following year.

tality and protection: that the men of our choice have more respected the bare suspicions of the President than the solid rights of innocence, the claims of justification, the sacred forces of truth, and the forms the substance of law and justice. In questions of power then let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution. That this Commonwealth does therefore call on its co-States for an expression of their sentiments on the acts concerning Aliens, and for the punishment of certain crimes herein before specified, plainly declaring whether these acts are or are not authorized by the Federal Compact? And it doubts not that their sense will be so announced as to prove their attachment unaltered to limited Government, whether general or particular, and that the rights and liberties of their Co-states will be exposed to no dangers by remaining embarked on a common bottom with their own: That they will concur with this Commonwealth in considering the said acts as so palpably against the Constitution as to amount to an undisguised declaration, that the Compact is not meant to be the measure of the powers of the General Government, but that it will proceed in the exercise over these states of all powers whatsoever: That they will view this as seizing the rights of the states and consolidating them in the hands of the general government with a power assumed to bind the states (not merely in cases made federal) but in all cases whatsoever, by laws made, not with their consent, but by others against their consent: That this would be to surrender the form of Government we have chosen, and live under one deriving its powers from its own will, and not from our authority; and that the Co-states, recurring to their natural right in cases not made federal, will concur in declaring these acts void and of no force, and will each unite with this Commonwealth in requesting their repeal at the next session of Congress.

EDMUND BULLOCK, S. H. R.
JOHN CAMPBELL, S. S. P. T.

Passed the House of Representatives, Nov. 10th, 1798.
Attest, THOMAS TODD, C. H. R.

In Senate, November 13th, 1798, unanimously concurred in.
Attest, B. THURSTON, Clk. Sen.

Approved November 16th, 1798.
JAMES GARRARD, G. K.

By the Governor.
HARRY TOULMIN, Secretary of State.[4]

[4] Preston's Documents illustrative of American History, 2d ed., pp. 287-295.

THE KENTUCKY RESOLUTIONS OF 1799.

HOUSE OF REPRESENTATIVES,

Thursday, Nov. 14, 1799.

The house, according to the standing order of the day, resolved itself into a committee, of the whole house, on the state of the commonwealth, (Mr. Desha in the chair,) and, after some time spent therein, the speaker resumed the chair, and Mr. Desha reported that the committee had taken under consideration sundry resolutions passed by several state legislatures, on the subject of the Alien and Sedition Laws, and had come to a resolution thereupon, which he delivered in at the clerk's table, where it was read and *unanimously* agreed to by the House as follows: —

The representatives of the good people of this commonwealth, in General Assembly convened, having maturely considered the answers of sundry states in the Union to their resolutions, passed the last session, respecting certain unconstitutional laws of Congress, commonly called the Alien and Sedition Laws, would be faithless indeed to themselves, and to those they represent, were they silently to acquiesce in the principles and doctrines attempted to be maintained in all those answers, that of Virginia only excepted. To again enter the field of argument, and attempt more fully or forcibly to expose the unconstitutionality of those obnoxious laws, would, it is apprehended, be as unnecessary as unavailing. We cannot, however, but lament that, in the discussion of those interesting subjects by sundry of the legislatures of our sister states, unfounded suggestions and uncandid insinuations, derogatory to the true character and principles of this commonwealth, have been substituted in place of fair reasoning and sound argument. Our opinions of these alarming measures of the general government, together with our reasons for those opinions, were detailed with decency and with temper, and submitted to the discussion and judgment of our fellow-citizens throughout the Union. Whether the like decency and temper have been observed in the answers of most of those States who have denied or attempted to obviate the great truths contained in those resolutions, we have now only to submit to a candid world. *Faithful to the true principles of the federal Union, unconscious of any designs to disturb the harmony of that Union* and anxious only to escape the fangs of despotism, the good people of this commonwealth are regardless of censure or calumniation. Lest, however, the silence of this

commonwealth should be construed into an acquiescence in the doctrines and principles advanced, and attempted to be maintained by the said answers or, at least those of our fellow-citizens, throughout the Union, who so widely differ from us on those important subjects, should be deluded by the expectation that we shall be deterred from what we conceive our duty, or shrink from the principles contained in those resolutions, — therefore,

Resolved, That this Commonwealth considers the Federal Union upon the terms and for the purposes specified in the late compact, conducive to the liberty and happiness of the several States: That it does now unequivocally declare its attachment to the Union, and to that compact, agreeably to its obvious and real intention, and will be among the last to seek its dissolution: That, if those who administer the general government be permitted to transgress the limits fixed by that compact, by a total disregard to the special delegations of power therein contained, an annihilation of the State governments, and the creation, upon their ruins of a general consolidated government, will be the inevitable consequence: That the principle and construction, contended for by sundry of the state legislatures, that the general government is the exclusive judge of the extent of the powers delegated to it, stop not short of *despotism* — since the discretion of those who administer the government, and not the *Constitution*, would be the measure of their powers: That the several States who formed that instrument, being sovereign and independent, have the unquestionable right to judge of the infraction; and, *That a nullification, by those sovereignties of all unauthorized acts done under color of that instrument, is the rightful remedy:* That this Commonwealth does, under the most deliberate reconsideration, declare, that the said Alien and Sedition Laws are, in their opinion, palpable violations of the said Constitution; and, however cheerfully it may be disposed to surrender its opinion to a majority of its sister States, in matters of ordinary or doubtful policy, yet, in momentous regulations like the present, which so vitally wound the best rights of the citizen, it would consider a silent acquiescence as highly criminal: That, although this Commonwealth, as a party to the Federal compact, *will bow to the laws of the Union*, yet it does, at the same time, declare, that it will not now, or ever hereafter, cease to oppose, in a constitutional manner, every attempt, at what quarter so ever offered, to violate that compact: And finally, in order that no pretexts or arguments may be drawn from a supposed acquiescence, on the part of this Commonwealth, in the constitutionality of those laws, and be thereby used as precedents for similar future violations of the federal com-

pact, this Commonwealth does now enter against them its solemn PROTEST.

Extract, etc. Attest, THOMAS TODD, C. H. R.

In Senate, Nov. 22, 1799. — Read and concurred in.

Attest, B. THURSTON, C. S.[5]

AN ORDINANCE TO NULLIFY CERTAIN ACTS OF THE CONGRESS OF THE UNITED STATES, PURPORTING TO BE LAWS LAYING DUTIES AND IMPOSTS ON THE IMPORTATION OF FOREIGN COMMODITIES.

Whereas the Congress of the United States by various acts, purporting to be acts laying duties and imposts on foreign imports, but in reality intended for the protection of domestic manufacturers, and the giving of bounties to classes and individuals engaged in particular employments, at the expense and to the injury and oppression of other classes and individuals, and by wholly exempting from taxation certain foreign commodities, such as are not produced or manufactured in the United States, to afford a pretext for imposing higher and excessive duties on articles similar to those intended to be protected, hath exceeded its just powers under the constitution, which confers on it no authority to afford such protection, and hath violated the true meaning and intent of the constitution, which provides for equality in imposing the burdens of taxation upon the several States and portions of the confederacy: and whereas the said Congress, exceeding its just power to impose taxes and collect revenue for the purpose of effecting and accomplishing the specific objects and purposes which the constitution of the United States authorizes it to effect and accomplish, hath raised and collected unnecessary revenue for objects unauthorized by the constitution;

We, therefore, the people of the State of South Carolina, in convention assembled, do declare and ordain, and it is hereby declared and ordained, that the several acts and parts of acts of the Congress of the United States, purporting to be laws for the imposing of duties and imposts on the importation of foreign commodities, and now having actual operation and effect within the United States, and, more especially, an act entitled "An act in alteration of the several acts imposing duties on imports," approved on the nineteenth day of May, one thousand eight hundred and twenty-eight, and also an act entitled "An act to alter and amend the several acts imposing duties on imports," approved on the fourteenth day of July, one thousand eight

[5] Preston's Documents Illustrative of American History, 2d ed., pp. 295–298.

hundred and thirty-two, are unauthorized by the Constitution of the United States, and violate the true meaning and intent thereof and are null, void, and no law, nor binding upon this State, its officers and citizens; and all promises, contracts, and obligations, made or entered into, or to be made or entered into, with purpose to secure the duties imposed by said acts, and all judicial proceedings which shall be hereafter had in affirmance thereof, are and shall be held utterly null and void.

And it is further ordained, that it shall not be lawful for any of the constituted authorities, whether of this State or of the United States, to enforce the payment of duties imposed by the said acts within the limits of this State; but it shall be the duty of the legislature to adopt such measures and pass such acts as may be necessary to give full effect to this ordinance, and to prevent the enforcement and arrest the operation of the said acts and parts of acts of the Congress of the United States within the limits of this State, from and after the 1st day of February next, and the duty of all other constituted authorities, and of all persons residing or being within the limits of this State, and they are hereby required and enjoined to obey and give effect to this ordinance, and such acts and measures of the legislature as may be passed or adopted in obedience thereto.

And it is further ordained, that in no case of law or equity, decided in the courts of this State, wherein shall be drawn in question the authority of this ordinance, or the validity of such act or acts of the legislature as may be passed for the purpose of giving effect thereto, or the validity of the aforesaid acts of Congress, imposing duties, shall any appeal be taken or allowed to the Supreme Court of the United States, nor shall any copy of the record be permitted or allowed for that purpose; and if any such appeal shall be attempted to be taken, the courts of this State shall proceed to execute and enforce their judgments according to the laws and usages of the State, without reference to such attempted appeal, and the person or persons attempting to take such appeal may be dealt with as for a contempt of the court.

And it is further ordained, that all persons now holding any office of honor, profit, or trust, civil or military, under this State (members of the legislature excepted), shall, within such time, and in such manner as the legislature shall prescribe, take an oath well and truly to obey, execute, and enforce this ordinance, and such act or acts of the legislature as may be passed in pursuance thereof, according to the true intent and meaning of the same; and on the neglect or omission of any such person or persons so to do, his or their office or offices shall be

forthwith vacated, and shall be filled up as if such person or persons were dead or had resigned; and no person hereafter elected to any office of honor, profit, or trust, civil or military (members of the legislature excepted), shall, until the legislature shall otherwise provide and direct, enter on the execution of his office, or be in any respect competent to discharge the duties thereof until he shall, in like manner, have taken a similar oath; and no jurors shall be empanelled in any of the courts of this State, in any cause in which shall be in question this ordinance, or any act of the legislature passed in pursuance thereof, unless he shall first, in addition to the usual oath, have taken an oath that he will well and truly obey, execute, and enforce this ordinance, and such act or acts of the legislature as may be passed to carry the same into operation and effect, according to the true intent and meaning thereof.

And we, the people of South Carolina, to the end that it may be fully understood by the government of the United States, and the people of the co-States, that we are determined to maintain this our ordinance and declaration, at every hazard, do further declare that we will not submit to the application of force on the part of the federal government, to reduce this State to obedience; but that we will consider the passage, by Congress, of any act authorizing the employment of a military or naval force against the State of South Carolina, her constitutional authorities or citizens; or any act abolishing or closing the ports of this State, or any of them, or otherwise obstructing the free ingress and egress of vessels to and from the said ports, or any other act on the part of the federal government, to coerce the State, shut up her ports, destroy or harass her commerce, or to enforce the acts hereby declared to be null and void, otherwise than through the civil tribunals of the country, as inconsistent with the longer continuance of South Carolina in the Union; and that the people of this State will henceforth hold themselves absolved from all further obligation to maintain or preserve their political connection with the people of the other States; and will forthwith proceed to organize a separate government, and do all other acts and things which sovereign and independent States may of right do.

Done in convention at Columbia, the twenty-fourth day of November, in the year of our Lord one thousand eight hundred and thirty-two, and in the fifty-seventh year of the declaration of the independence of the United States of America.[6]

[6] Preston's Documents illustrative of American History, pp. 300–303.

AN ORDINANCE TO NULLIFY AN ACT OF THE CONGRESS OF THE UNITED STATES, ENTITLED "AN ACT FURTHER TO PROVIDE FOR THE COLLECTION OF DUTIES ON IMPORTS," COMMONLY CALLED THE FORCE BILL.

We, the people of the State of South Carolina in convention assembled, do declare and ordain that the act of the Congress of the United States, entitled, "an act further to provide for the collection of duties on imports, approved the 2nd day of March, 1833, is unauthorized by the Constitution of the United States, subversive of that Constitution, and destructive of public liberty, and that the same is, and shall be deemed null and void within the limits of this State; and it shall be the duty of the Legislature, at such time as they may deem expedient, to adopt such measures and pass such acts as may be necessary to prevent the enforcement thereof, and to inflict proper penalties on any person who shall do any act in execution or enforcement of the same within the limits of this State. We do further ordain and declare, that the allegiance of the citizens of this State, while they continue such, is due to the said State; and that obedience only, and not allegiance, is due by them to any other power or authority, to whom a control over them has been, or may be delegated by the State; and the General Assembly of the said State is hereby empowered, from time to time, when they may deem it proper, to provide for the administration of the citizens and officers of the State, or such of the said officers as they may think fit, of suitable oaths or affirmations, binding them to the observance of such allegiance, and abjuring all other allegiance, and also to define what shall amount to a violation of their allegiance, and to provide the proper punishment for such violation.

Done at Columbia, the eighteenth day of March, in the year of our Lord one thousand eight hundred and thirty-three, and in the fifty-seventh year of the Sovereignty and Independence of the United States of America.

ROBERT Y. HAYNE,

Delegate from the parishes of St. Phillips and St. Michaels — President of the Convention.

ISAAC W. HAYNE, Clerk.

CHAPTER III.

THE THREE DEPARTMENTS.

§ 42. The Three Departments of the Government of the United States.

THE government of the United States is divided into three great departments, — the legislative, the executive and the judiciary.[1] The first makes the laws; the second carries them into effect; and the third decides all disputes to which they give occasion. These departments are not, however, absolutely independent. The executive has the power to interfere in legislation by his veto, which can only be overcome by the vote of two-thirds of each legislative house. The upper chamber of the legislature discharges executive functions in connection with the President

§ 42. [1] "It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to the government, whether State or national, are divided into three grand departments, the executive, the legislative and the judicial. That the function appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other. To these general propositions there are in the Constitution of the United States certain important exceptions." These are then stated substantially as set forth in the text. (Mr. Justice Miller in Kilbourn *v.* Thompson, 103 U.S., 168, 190, 191.)

"One branch of the government cannot encroach on the domain of another without danger." (Chief Justice Waite in the Sinking Fund Cases, 99 U.S., 700, 718, quoted with approval by Mr. Justice Harlan in Clough *v.* Curtis 134 U.S., 361, 371.)

"The maintenance of the system of checks and balances characteristic of republican constitutions requires the co-ordinate departments of government, whether federal or State, to refrain from any infringement of the independence of each other, and the possession of property by the judicial department cannot be arbitrarily encroached upon, save in violation of this fundamental principle." (Chief Justice Fuller, *In re* Tyler, 149 U. S., 164, 182-183; to the same effect *In re* Swan, 150 U.S., 637, 652.) The decisions as to which head particular powers belong will be discussed later.

upon the ratification of treaties and the confirmation of appointments to office; and also judicial functions in the trial of impeachments. The judiciary has been constitutionally vested with the power to appoint to certain offices [2] which many consider to be executive.[3]

In the main, however, these departments are distinct and independent. Each of them is vested with powers to protect itself against encroachment upon its jurisdiction by the other. The legislative may be checked by the executive, through his veto power and his power to refuse to execute a law which he considers to be unconstitutional. It may be checked by the judiciary, through their power to refuse to enforce unconstitutional laws and to give relief to those injured or threatened by action founded upon them.

The checks upon the executive by the legislature are the power of two-thirds of the Senate and a majority of the lower House to remove him by impeachment, the power of a majority of either house to withhold the payment of the funds needed to discharge his functions, and perhaps the power of two-thirds of both to prescribe, over his veto, the manner in which he shall discharge his duties.[4] The checks upon him by the judiciary are their power to order the punishment of any of his subordinates, if not of himself, for illegal action in pursuance of his orders; to forbid such acts when threatened, and in certain cases to command them, or perhaps even him, to obey the law.

The checks upon the judiciary are the power of the legislature to remove their members in the same manner as the executive, by impeachment; the power of either house to refuse the appropriations necessary to carry on their business; the power of the legislature and executive, or two-thirds of both houses without the executive, to limit their jurisdiction and prescribe the manner in which it shall be exercised, except in so far as it is protected by the Constitution; and the power of the executive to refuse to enforce a judgment which he considers unconstitutional, and to pardon all whom he thinks were improperly convicted.[5]

There thus exists a system of checks and balances, each of

[2] Constitution, Article II, Section 3; *Ex parte* Siebold, 100 U. S., 371.

[3] The Federalist, No. xlvii. See the discussion of this question, *infra*.

[4] See *supra*, § 38, over notes 94 and 95, and *infra*, ch. XIII.

[5] Judge Frazier was removed upon impeachment by the Legislature of

which has been used or threatened, designed to preserve the original form of the Constitution unchanged.[6]

This system is the peculiar characteristic of the United States, and has established there a presidential form of government as distinguished from the cabinet governments which usually prevail. In these, the legislative and executive functions are both exercised by the same body which has usually absolute control over the judiciary by the power to remove them and appoint their successors; and the nominal head, whether called king or president, has his power reduced to a shadow, while the judges are powerless against the assaults of the legislature.

The importance of the maintenance of this principle is recognized in the Constitution of the United States, both by the manner in which it distributes the powers granted by it, and by the language which it uses. In most of the State constitutions, from their earliest foundation, the principle is expressly declared. Thus the present Constitution of Virginia ordains: —

"The legislative, executive and judicial departments shall be kept separate and distinct, so that neither exercise the powers properly belonging to either of the others; nor shall any person exercise the power of more than one of them, except as hereinafter provided."[7]

And the present, which is also the first, Constitution of Massachusetts: —

"In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that this may be a government of laws and not of men."[8]

§ 43. History of the Classification of Governmental Powers.

The classification of governmental powers into three is as old as Aristotle, but the importance of their separation was first ex-

Tennessee, for his interference by the writ of habeas corpus with the action of the lower house. (See *infra*, § 94, and Appendix to this volume.) Cases of the refusal by the executive to enforce decisions which he considered unconstitutional, were the conduct of Jackson in regard to the Cherokee cases (*infra*, § 45), and the recent action of Comptroller Bowler in refusing to audit the warrant for the payment of the sugar bounty.

[6] Compare Cooley, Constitutional Limitations, 6th ed., pp. 45–47.

[7] Article II.

[8] Part First, Article XXX.

plained by Montesquieu.[1] His great work was accepted as infallible by the leaders of the American people throughout the Revolution and at the time of the Federal Convention.[2] More than half the first State constitutions contained declarations of the importance of the distinction. The rest recognized it in their structure. The first constitution proposed for Massachusetts was rejected partly for the reason that the powers were not kept sufficiently apart.[3]

The first resolution of the Federal Convention was, "that a national government ought to be established, consisting of a supreme legislative, executive, and judiciary."[4] This was adopted by a considerable majority.[5] The only contest was over the question whether they should create a new and national government, or should merely amend the Articles of Confederation. There was no dispute as to the tripartite division of the government if that were to be national in its character.[6]

The Constitution was opposed upon the ground that these powers

§ 43. [1] *Supra*, § 6, note 10.

[2] *Supra*, § 6, note 9.

[3] The reasons assigned by the County of Essex are contained in a pamphlet called The Essex Result, published in 1778. It contains the following language: "The legislative power must not be trusted with one assembly. A single assembly is frequently influenced by the vices, follies, passions, and prejudices of an individual. It is liable to be avaricious, and to exempt itself from the burdens it lays on its constituents. It is subject to ambition; and after a series of years will be prompted to vote itself perpetual. The *Long Parliament* in England voted itself perpetual, and thereby for a time destroyed the political liberty of the subject. Holland was governed by one representative assembly, annually elected. They afterwards voted themselves from annual to septennial, then for life; and finally exerted the power of filling up all vacancies, without application to their constituents. The government of Holland is now a tyranny *though a republic*. The result of a single assembly will be hasty and indigested, and their judgments frequently absurd and inconsistent. There must be a second body to revise with coolness and wisdom and to control with firmness, independent upon the first, either for their creation or existence. Yet the first must retain a right to a similar revision and control over the second." See the New England Magazine for March, 1832, p. 9. See also the statement of the reasons for the rejection of this Constitution in the pamphlet cited *supra*, § 8, note 7.

[4] *Supra*, § 17.

[5] Six to one on the first vote in the committee of the whole. New York being divided and the other States absent. Seven to three on the reconsideration, Maryland being divided. *Supra*, § 17, over notes 5 and 18.

[6] "An independence of the three great departments of each other, as far as possible, and the responsibility of all to the will of the community, seemed to be generally admitted as

were not sufficiently distinct on account of the executive functions given to the Senate and the veto power lodged in the President. These objections were answered in the Federalist by the statement that the doctrine only meant "that where the whole power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted;"[7] that this was shown by the practice in Great Britian and the several States; and that a certain mixture of the powers was essential in order that each might be able to guard itself against the encroachments of the others.[8]

"The British Constitution was to Montesquieu what Homer has been to the didactic writers on epic poetry. As the latter have considered the work of the immortal bard as the perfect model from which the principles and rules of the epic art were to be drawn, and by which all similar works were to be judged, so this great political critic appears to have viewed the Constitution of England as the standard, or, to use his own expression, as the mirror of political liberty, and to have delivered, in the form of elementary truths, the several characteristic principles of that particular system.[9]" In the century which has since elapsed, by the firm establishment of a system of cabinet government in Great Britain, the legislative and executive powers have become blended. "We have thus an extraordinary result. The nation whose constitutional practice suggested to Montesquieu his memorable maxim concerning the executive, legislative and judicial powers, has in the course of a century falsified it. The formal executive is the true source of legislation, the formal legislature is incessantly concerned with executive government."[10] And this practice has gradually spread into all countries where civil liberty is enjoyed, except a few like Germany, in which there is still a conflict between the crown and the people, and perhaps two or three countries in Central and South America besides the United States, where the presidential form of government prevails.

A few of the later writers on political science are now disposed to question the soundness of the doctrine of Montesquieu.[11] Here,

the true basis of a well-constructed government." (Madison Papers, Elliot's Debates, 2d ed., vol. v, p. 327.)

[7] The Federalist, No. xlvii.

[8] Ibid., No. xlviii.

[9] Madison in The Federalist, No. xlvii.

[10] Maine, Popular Government, p. 239.

[11] "The separation of the executive

however, there are no signs of its abandonment by the people; and the wisdom of the changes elsewhere it remains for the future to determine.

§ 44. Reasons for the Separation of the Three Powers.

The reasons assigned for the separation of the legislative, executive, and judiciary, are that they cannot be combined without the creation of an arbitrary government. That the authority to make an act a crime, to condemn for its commission, and to execute the sentence, when united in a single man, make him a despot, and that human passions are too strong to keep him from an abusive use of such strength, are universally admitted, without the need of any reference to history. That when these powers are vested in one body of men, that body usually degenerates into a mob, unrestrained by any considerations of justice or moderation, is less generally recognized, because the instances are rarer; but it is usually conceded, not only by students of the histories of the democracies of Greece, but by those who have any knowledge of the proceedings of the Long Parliament and the National Convention. Their excesses are the things which have brought discredit upon government by the people. They caused the reactions which set up innumerable tyrannies among the ancients; which restored the Stuarts, and, when they were again expelled, made the English nation import foreign kings; which, twice within the century, have made the French people voluntarily submit to an emperor; and which make many of the most intelligent of our own day still believe that no republic can endure.

These dangers were observed and described by Montesquieu before the history of his own country reinforced his illustrations. And the continual encroachments which those vested with one power seek to make upon the others are even more apparent now than then.

In earlier times, the executive was the strongest. He in most countries succeeded in destroying the legislature, and made the

power from the legislative is a dream, though Montesquieu has established the belief that it is one of the great securities of liberty." (Goldwin Smith in The Bystander, Toronto, May, 1880, p. 64, quoted by Doutre, Constitution of Canada, p. 68.) See also Wilson, Congressional Government, pp. 285, 306, 311; Stevens, Sources of the Constitution of the U. S., 1st ed., p. 47.

judiciary subservient to his will. In Europe, during the nineteenth century, the legislatures have been the invaders. Through their power to refuse supplies to carry on the government they have nearly everywhere destroyed the authority of the executive; and in those countries where they have the power to remove the judiciary, they must inevitably prevent its imposing any obstruction to the immediate accomplishment of their arbitrary will. In the United States, the three departments still remain, each in full force, as checks and balances upon each other; and equilibrium, with a few variations, seems to have been maintained.[1]

§ 45. Equilibrium of the Three Departments in the United States.

Of the three departments, the strongest is the legislative, and the weakest the judiciary. The legislature has the control of the purse, and can starve the other two by refusing them the supplies with which to carry on the government, or even to support themselves. The executive has the power of the sword. He can command the army to compel obedience to his will. By this means, in former centuries in Europe, and in parts of South and Central America to-day, that department has absorbed most of the functions of the other two. The judiciary has merely the power to register its decrees, with a declaration of the reasons for its action. It can only enforce them by the aid of an executive officer.[1]

Congress is chosen by the people at biennial elections, so that a majority of the lower house nearly always represents the people's wishes. The President is elected every four years by what is in effect a direct popular vote, and consequently nearly always represents the wishes of at least a large minority. The judges are appointed by the President and Senate, and hold office, unless impeached, for life. So they may represent the opinions of a party which has passed out of existence, and have no sympathy with the prevailing doctrines. Yet they have had many conflicts with the other departments of the government, and in all but four have triumphed. Three of these were with the executive with whom

§ 44. [1] See, however, § 45, note 11.

§ 45. [1] The marshal, who is appointed by the President and Senate. Judgments of the State courts are usually executed by the sheriff, who is an elective county officer.

the legislature was in sympathy: the Cherokees' cases, where the President sided with the State of Georgia, and refused to enforce the Federal process;[2] Merryman's case,[3] where the army refused to obey the writ of habeas corpus issued by Chief-Justice Taney, in which, however, there was no expressed concurrence by his judicial brethren; and the Legal Tender cases, where, by the appointment of two new justices, he obtained the overruling of a decision that a former act was unconstitutional.[4] The fourth was with the legislative alone, then in conflict with the President, but with a majority of the legislature so large that it had the power of impeachment; when a decision in the McCardle case against the constitutionality of the Reconstruction acts was prevented by a repeal of the statute which gave the court jurisdiction.[5] All of these cases but the first, however, were in times of war, or immediately after the close of war, during what was practically a time of revolution.[6] The judiciary has since regained its strength and courage, and now the jurisdiction exercised by the State as well as the Federal courts without question is greater than that previously reposed in any tribunal in the world. The last volume of the reports of the Supreme Court of the United States contains the record of their successful assertions of greater power to interfere with the civil administration of the States,[7] and with the taxing power of Congress,[8] than was ever exercised before.

So elsewhere, the executive, wherever civil liberty has prevailed, has been unable to resist the assaults of the legislature, and the threat to withhold the supplies has in the present century been efficacious to compel acquiescence in the wishes of the people's representatives.[9] President Johnson was similarly coerced in his conflict with Congress, and compelled to assent to an appropriation bill with sections which infringed the constitutional powers of

[2] Worcester *v.* Georgia, 6 Peters, 515. This will be explained later under the Judicial Power.

[3] *Ex parte* Merryman, Taney, 246.

[4] Legal Tender Cases, Knox *v.* Lee, 12 Wall., 457. See *infra*.

[5] *Ex parte* McCardle, 6 Wall., 318; s. c. 7 Wall., 506; *supra*, § 38, over note 179.

[6] *Supra*, § 38, over note 202.

[7] *In re* Debs, 158 U. S., 564.

[8] Pollock *v.* Farmers' Loan and Trust Co., 158 U. S., 601.

[9] There are two apparent exceptions: Prussia in 1866 and Denmark at the present time; but it can hardly be said that civil liberty then existed in either.

his office, and the reserved rights of the States.[10] He, however, was never chosen by the people to be president, but was a vice-president elevated by the pistol of an assassin; and consequently had not the public confidence reposed in an officer who discharges duties which the people have elected him to perform. When a similar attempt was made to force one of his successors, Hayes, to sign appropriation bills with clauses containing legislation of which he disapproved, the President, although the previous Congress had refused to vote the needed supplies, returned bill after bill with veto messages; threatened successive extra sessions until the government received the funds necessary for its maintenance; and after a protracted struggle, public opinion compelled the legislature to yield. The President of the United States now exercises, with the approval of the people, more power than any constitutional king in the world. No President has paid less respect to the wishes of Congress than Grover Cleveland during both his administrations; and the people, when they chose him President for his second term, signified their satisfaction with such conduct. Yet at the same time, in matters which appertained to their province, he has more than once been obliged to yield his opinions to the legislative will. Thus at the end of the century we find that the three departments still retain their balance, each with its prerogatives unimpaired.[11]

[10] 14 St. at L., p. 486; *supra*, § 38, over note 94.

[11] Some writers maintain that Congress has encroached permanently upon the other departments. See Lodge's Webster, p. 230; Centennial Address of Mr. Justice Miller. Professor Woodrow Wilson, also, in his interesting work on Congressional Government, claims that the doctrine of the independence of the three departments is, borrowing the words of Bagehot, "the literary theory of the Constitution"; and that, in fact, Congress is supreme (pp. 10–12, 36–40 and *passim*). He cites, however, no proof of this, except the legal-tender cases. He admits that the power of Congress over cabinet officers is less now than at the institution of the government (p. 257). He says, concerning its control over the administration (p. 271): "Congress stands almost helplessly outside of the departments;" and (p. 297): "There is no similar legislature in existence which is so shut up to the one business of law-making as is our Congress" (see also pp. 302 and 311). And his whole work seems to be a vigorous argument in favor of giving to Congress power to break down the executive rather than a demonstration of the position that that power has been already obtained.

CHAPTER IV.

CONGRESS IN GENERAL.

§ 46. Limited Powers of Congress.

THE legislative is the most powerful and the most important of the three departments of the government of the United States. Accordingly a description of this is contained in the first Article of the Constitution, which follows the Preamble. The first section reads: —

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

The first words of the article creating Congress show that the powers therein granted are limited and not general. "The term 'all legislative Powers herein granted,' reminds both the Congress and the people of the existence of some limitation. The introduction displays the general objects. The Constitution itself enumerates some of the powers of Congress, and excludes others which might perhaps fall within the general expressions of the introductory part. These prohibitions are in some degree auxiliary to a due construction of the Constitution. When a general power over certain objects is granted, accompanied with certain exceptions, it may be considered as leaving that general power undiminished in all those respects which are not thus excepted."[1]

It is well settled that the Constitution of the United States is a grant of powers;[2] whereas the State constitutions are, so far as the State legislatures are concerned, limitations of powers previously existing.[3]

§ 46. [1] Rawle on the Constitution, p. 29. For the discussion of a similar question under the Federal Constitution of 1795, see Mémoires de Barras, vol. ii, pp. 20–23. In the Confederate Constitution, the powers of Congress were "delegated" instead of "granted" (*supra*, § 37).

[2] U. S. *v.* Cruikshank, 92 U. S., 542, 551; Trade-mark Cases, 100 U. S., 82, 93.

[3] Ohio Life Insurance and Trust

§ 47. Origin of Congress.

The name of Congress was taken from that of the body which preceded and continued under the Articles of Confederation; but there is no analogy between their functions, and the source of the present institution is far different as well as distinct from that of its predecessor. The Continental Congress and that which sat under the Articles of Confederation were, in theory at least, what their name denotes, gatherings of ambassadors,[1] although in fact they exercised considerable legislative power, which they usually disguised by the terms, recommendations and ordinances.[2] The present Congress of the United States is a national legislature, and its source may be traced through the British Parliament to the meetings in the woods of Germany described by Tacitus.[3]

The form of government which prevails usually in primitive communities comprises a king or chief, a senate or gathering of elders or selectmen with whom he consults, and a public assembly of all freemen with the right of suffrage, who decide questions of importance, whether legislative, executive or judicial, which are submitted to them. This naturally arose from the councils of war, where the general, after consulting the more experienced, took the sense of the whole body of warriors before an important enterprise. Such a legislative assemblage of the whole people may still be seen once a year on the Tynwald in the Isle of Man, in the Swiss cantons of Uri, Unterwalden, Glarus and Appenzell; and more frequently in the town-meetings in New England and the Western States. In Switzerland the voters still follow the early custom of attending armed.[4] Of such a character were the federal assemblies of the Achaian, Aetolian and Lycian Leagues, which

Co. *v.* Debolt, 16 How., 416, 438; Pratt *v.* Allen, 13 Conn., 119, 125; People *ex rel.* McDonald *v.* Keeler, 99 N.Y., 463, 479.

§ 47. [1] Chief Justice Marshall in Gibbons *v.* Ogden, 9 Wheaton, 1, 187, quoted *supra*, § 12, over note 22; John Adams also expressed this opinion, but Jefferson disagreed to it. (See Works of John Adams, vol. viii, p. 433; Jefferson's letter to John Adams, Feb. 23, 1787, Jefferson's Works, vol. ii, p. 128, quoted in Bigelow's note to Story on the Constitution, 5th ed., § 271.

[2] *Supra*, § 26. See also § 12, note 3.

[3] "Ce beau système a été trouvé dans les bois." (Montesquieu, L'Esprit des Lois, tome xi, ch. vi.

[4] Spencer, Political Institutions, § 491; Freeman, Growth of the English Constitution, ch. i.

each citizen had a right to attend, although they voted by cities.[5] They were manifestly impracticable when a government was spread over an extensive territory, and to the lack of representative institutions has been ascribed the loss of liberty in Greece and Rome. The senates of these confederations seem to have been composed of the present and former magistrates of the different cities, who acted rather as ambassadors than legislators, and voted by cities, each having an equal voice regardless of differences in wealth and population.[6]

Such gatherings of all freemen to decide questions submitted to them by their kings and a select body of his advisers were customary among the German tribes whose descendants conquered England and North America. Their kings seem to have had certain hereditary rights; but their local magistrates were elected, and with these were joined certain companions or assistants.[7] The companions were the prototypes of the assistants in the colonies and of our present members of Congress.

The wars during the subjugation of England and the consolidation of the different tribes into a single monarchy strengthened the powers of the king and the class of nobles who arose, so that the powers of the latter became in law, and that of the former in

[5] Freeman, History of Federal Government.

[6] Ibid.

[7] "Reges ex nobilitate, duces ex virtute sumunt. Nec regibus infinita aut libera potestas; et duces exemplo potius quam imperio, si prompti, si conspicui, si ante aciem agunt, admiratione praesunt." (Tacitus, Germania, c. 7.) "De minoribus rebus principes consultant, de majoribus omnes, ita tamen ut ea quoque quorum penes plebem arbitrium est apud principes pertractentur. Credunt, nisi quid fortuitum et subitum inciderit, certis diebus, cum aut inchoatur luna aut impletur; nam agendis rebus hoc auspicatissimum initium credunt. Nec dierum numerum, ut nos, sed noctium computant. Sic constituunt, sic condicunt. Nox ducere diem videtur. Illud ex libertate vitium, quod non simul nec ut jussi conveniunt, sed et alter et tertius dies constatione coeuntium absumitur. Ut turba placuit, considunt armati. Silentium per sacerdotes, quibus tum et coercendi jus est, imperatur. Mox rex vel princeps, prout aetas cuique, prout nobilitas, prout decus bellorum, prout facundia est, audiuntur, auctoritate suadendi magis quam jubendi potestate. Si displicuit sententia, fremitu aspernantur; sin placuit, frameas concutiunt. Honoratissimum assensus genus est armis laudare." (Ibid., c. 11.) "Eliguntur in iisdem conciliis et principes, qui jura per pagos vicosque reddunt. Centeni singulis ex plebe comites consilium simul et auctoritas adsunt." (Ibid., c. 12.)

practice, hereditary, while the gathering of all the freemen of the nation became impossible, although the form of an appeal to them for their consent to the coronation of the king was preserved.[8]

The national legislature was the Witenagemote, in which sat the chief vassals of the crown, the ealdormen or county leaders, and the bishops, whom they appointed.[9] Its exact composition is obscure, but some writers believe that all freemen had the right to attend.[10]

The people certainly preserved certain powers of local self-government. All freemen still had the right to take part in the shiremote of the county where they lived; and as late as the reign of Athelstan laws were submitted to the shiremotes for approval before they took effect.[11] They also kept the right to elect certain local officers, including four companions of the reeve from each township, who took part in the shiremote, and represented such of the people as did not attend in person.[12] These were evidently the same officers that were found by Tacitus in ancient Germany.[13] The Norman conquest extended the feudal system, and made local government more despotic in its character. In England, however, as on the Continent, the kings gained strength against the nobles by the grant of chartered privileges, including the power of electing their own magistrates, to boroughs as well as cities. And the assemblies of the tenants in chief included not only bishops, but also abbots, who were, in theory at least, elected by the ecclesiastics over whom they presided, and whom they represented when voting aids to the crown. In the apportionment of the taxes levied, and in the selection of juries, it became customary to allow each English shire to elect four knights to represent it. King John, who had a doubtful title and an empty treasury, in 1213 followed this analogy when he directed the sheriffs to summon four discreet men from each county to his council at Ox-

[8] *Supra*, § 7, note 3, p. 30.

[9] Stubbs, Select Charters, pp. 10, 11, 288.

[10] Freeman, Growth of the English Constitution, ch. ii; Norman Conquest, vol. i, p. 591, Appendix; Taylor, Origin and Growth of the English Constitution, p. 184.

[11] Stevens, Sources of the Constitution, 1st ed., p. 65, quoting Kemble, Saxons in England, vol. ii, pp. 236, 237.

[12] Stubbs, Select Charters, pp. 9, 287.

[13] *Supra*, note 7.

ford.[14] This was a development of the representation of the township in the shiremote by the reeve and his four elected companions.[15] On the Continent, the towns had formed leagues for mutual protection against the magnates in their vicinity, at which at first the representatives of each town were the magistrates whom it had elected for general purposes. Out of these grew the representation of the towns in the third estates of Spain and France.[16] Simon de Montfort perhaps took the idea from Spain, when, to strengthen himself in his contest with Henry III. he summoned to Parliament, in 1265, two representatives from each city and borough, as well as the knights of the shire. In thirty more years, under Edward I, the right of both towns and shires to representation was fully established.[17]

At the institution of popular representation in Parliament there were three estates as finally established in France and Spain; but the clergy, fortunately for civil liberty, had the folly to cast aside their opportunity, and chose at first to grant their aids in convocation, a privilege which they afterwards relinquished; and they became subject to Parliament without any different representation than the other commoners, except through their bishops in the House of Lords.[18]

In the northern countries of continental Europe the burghers and the peasants were separately represented; and in Finland the four estates still assemble. Whether the representatives of the three estates ever conducted their deliberations in the same assembly in England is a matter as to which historians disagree.[19] Cer-

[14] A copy of the writ is printed in Stubbs' Select Charters, 287.

[15] Ibid., p. 287.

[16] Ibid., pp. 43–44; Spencer, Political Institutions, § 498. In Florence, in 1250, the citizens divided into groups, of which each chose a captain, and the captains in council ruled the city (Ibid., § 487).

[17] Stubbs, Select Charters, pp. 40–44.

[18] Stubbs, Select Charters, pp. 38, 39. The right of Parliament to tax the clergy and the surrender of the jurisdiction of the convocations over the subject was arranged in a verbal agreement between Archbishop Sheldon and Lord Chancellor Clarendon in 1664, under Charles I, just after the restoration. Bishop Gibson pronounced it to be "the greatest alteration of the Constitution ever made without an express law." (Speaker Onslow's note to Burnet's History of My own Times, Oxford ed. of 1853, vol. iv, pp. 520–521.)

[19] Prynne, 1st Register, p. 233, denies this. Coke, 4 Institutes, p. 4, says that they did. (Taylor, Origin and Growth of the English Constitution, p. 478.)

tainly the knights of the shires and the representatives of the boroughs soon withdrew to a separate body called the Commons, which, after a series of battles, fought usually in the chambers of legislation and the courts of justice, but sometimes in the field, obtained the exclusive right of taxation, and by its use has reduced the power of the Crown to a ceremony, and the House of Lords to a temporary obstruction.

The early colonies in North America were corporations created by the king, subject to his visitorial power, exercised through the Privy Council and through the power of the courts to dissolve them for a breach of the conditions of their charters.[20] The thirteen are divided by the historians into three classes: charter, crown, and proprietary colonies;[21] but in substance, at the outbreak of the Revolution, their form of government was substantially the same. At the head was a governor appointed by the king or proprietors, except in Connecticut and Rhode Island, where he was chosen by the people. Next came a council appointed by the king or governor, or in Connecticut and Rhode Island, as formerly in Massachusetts, a body of assistants chosen by popular election. In the early settlements there was no authority by law for popular representative assemblies. Such assemblies "were not formally instituted, but grew up by themselves, because it was in the nature of Englishmen to assemble."[22] The first met at the call of the governor of Virginia, in 1619; and two years later was sanctioned by an ordinance of the council of the company in England.[23] Massachusetts followed this example in 1634 without any legal authority,[24] and in the same year a representative assembly met in Maryland; where, under the charters, originally all the freemen had the right to take part in legislation.[25] These examples were followed in the other colonies.[26] The early assem-

[20] The Charter of Massachusetts was cancelled in 1684, under Charles II, in a proceeding in the Court of King's Bench, begun by *scire facias*. (Howell's State Trials, vol. viii, p. 1071.)

[21] Blackstone's Commentaries, vol. i, p. 108; Story on the Constitution (5th ed.), § 159.

[22] Seeley, Expansion of England, p. 67.

[23] Henning's Stat., III; Story on the Constitution (5th ed.), § 46.

[24] Story on the Constitution (5th ed.), § 69.

[25] Stevens, Sources of the Constitution, pp. 17–18.

[26] Ibid., pp. 18–25.

blies sat together with the assistants or councils;[27] but soon they separated. The subsequent history of the relations between England and the North American colonies shows a constant struggle, on the part of the popular assemblies, to assert the powers and privileges of the House of Commons, and to reduce that of the governor and council over legislation to what was allowed in England to the king and House of Lords. By the outbreak of the Revolution, the people believed in the legality and justice of these claims; and they were exercised against the protest of the officers of the crown, but with only sporadic opposition.[28]

Most of the State constitutions organized during the Revolution contained two legislative houses, of which the lower, in some, had the exclusive power of originating money bills, and the latter, usually called a senate, was more aristocratic in its composition. But three of the first State constitutions, — those of Pennsylvania, Delaware and Georgia, — and at the close of the Revolution but two, — Georgia and Pennsylvania, — had a single chamber, although the legislature of Vermont, which was then seeking admission, was similarly composed. Since the adoption of the Federal Constitution these also have adopted the bicameral form.[29]

Almost every step in the growth of the English Constitution, — even the origin of chancery jurisdiction from the extraordinary powers of the executive and his council, — may be found reproduced in the history of one of the American colonies.

§ 48. Proceedings in the Convention as to the Composition of Congress.

This brings us to a consideration of the first of the three great compromises of the Constitution. The main obstacle to a more perfect union arose from the conflicting interests of two groups of States — the larger and the smaller — and of two other cross-sec-

[27] This was the case in Massachusetts until 1644; in Maryland till 1647 or 1650 (Taylor, Origin and Growth of the English Constitution, p. 24; Moran, Rise and Development of the Bicameral System in America, Johns Hopkins Studies, vol. xii, pp. 211, 216, 249, 250); and in Rhode Island until 1696 (Rhode Island Colony Laws, ed. of 1744 p. 24; Story on the Constitution, 5th ed., § 99).

[28] Chalmers, Introduction to the Revolt of the American Colonies, *passim*.

[29] Georgia in 1789; Pennsylvania in 1790; Vermont not till 1836.

tions into which they were also divided,— the free and the slave States. The first conflict was settled then, and it is to be hoped forever. The latter was smothered for a while; but the embers smouldered for nearly three-quarters of a century, until they broke into a flame which was not quenched till it had destroyed the kindling.

The larger States wished the political power to be based on numbers. The smaller insisted that they should have an equal right of suffrage, as under the Confederation.[1] The North desired that the basis of representation, if related to numbers, should be confined to free men. The South demanded that property in slaves should also be represented. The Continental Congress and the Congress under the Confederation each consisted of a single chamber in which the delegates voted by States.[2] Before the opening of the Convention some of the delegates from Pennsylvania were disposed to abolish this injustice at the outset by insisting that votes in that body should be proportioned to population; but the moderation of Virginia checked their rashness, which would have brought the proceedings to an early and fruitless termination.[3] The earliest division arose upon the question as to the character of the new government.[4] There was little opposition to the determination that if it were to be national the legislature should consist of two houses. The only hostile vote was that of Pennsylvania, which was thus cast as a compliment to Franklin.[5]

Upon the day after the introduction by Randolph of the resolution proposed by the delegation of Virginia, the consideration of the first was postponed, and instead thereof the Convention, in the committee of the whole, adopted, by a vote of six States to one, New York being divided, the following resolution: —

"That a *National* government ought to be established, consisting of a *supreme* legislative, executive, and judiciary."

In the course of the debate, —

"Mr. Gouverneur Morris explained the distinction between a *federal*

§ 48. [1] *Supra*, § 4, over note 17; § 9, note 3.

[2] Articles of Confederation, V.

[3] *Supra*, § 9, note 3.

[4] *Supra*, § 17.

[5] Madison Papers, Elliot's Debates, 2d ed., vol. v, p. 135; *infra*, § 75.

and a *national supreme* government; the former being a mere compact resting on the good faith of the parties."

When referred to the Committee of Detail, the first resolution was: —

"That the government of the United States ought to consist of a supreme legislature, judiciary and executive."[6]

The small States, however, refused to concede that their defeat on the question of the character of the new government should carry with it the control of the national legislature by the majority. They were aided by the support of some delegates from the larger States, who feared lest the consolidation should eventually cause a destruction of the State governments and a complete centralization that would result in the destruction of liberty.[7] They rallied in support of the Connecticut compromise, first proposed by Roger Sherman, which allowed the lower house to be filled by popular election and its membership proportioned to population; but preserved the equality of the States in the upper house, which was to be chosen by their legislatures.[8] A debate ensued of the utmost bitterness, in which the small States threatened to dissolve the Union and seek the support of some foreign power, while the large replied that disruption would be prevented by an appeal to arms.[9] The convention came to a deadlock upon the question, and Franklin was driven to the expedient of suggesting the aid of prayer to promote conciliation.[10] At last the subject was referred to a committee of one member from each State, who recommended the measure finally adopted,[11] except that they proposed to give the lower house exclusive power to inaugurate appropriation bills and bills fixing salaries, without power in the Senate to alter or amend them.[12] The concession in the commit-

[6] Madison Papers, Elliot's Debates, 2d ed., vol. v, pp. 133, 375.

[7] Ibid., p. 240, note.

[8] Ibid., pp. 138 and 178. See, however, the remarks of Dickinson, ibid., pp. 148–149; and of Spaight, ibid., p. 137. Sherman had suggested an analogous scheme in the Continental Congress, Aug. 1, 1776. John Adams' Works, vol. ii, p. 499.

[9] See the speeches of Gunning Bedford of New Jersey (ibid., p. 268), of Gouverneur Morris (ibid., p. 276), and of Gorham of Massachusetts (ibid., p. 255).

[10] His suggestion was not adopted. Ibid., pp. 253–255.

[11] Ibid., p. 273.

[12] Ibid., p. 274. See *infra*, § 64, over note 26.

tee was obtained by the influence of Franklin,[13] who represented Pennsylvania, the second State in population. It was carried against the vote of Pennsylvania in the Convention by five States to four, Massachusetts being divided; New York, New Hampshire and Rhode Island, who would have voted with the majority, being absent; and North Carolina, which had formerly acted with the larger States, with one dissentient delegate, giving the casting vote.[14] A motion for a reconsideration, made by Gouverneur Morris in the Convention immediately after this conference, was not even seconded.[15] Thus the structure of Congress was finally determined by the votes of less than a majority of the States present in the Convention, and of less than one-third of the represented population.[16]

[13] Ibid., p. 274, note.

[14] Connecticut, New Jersey, Delaware, Maryland, North Carolina (Mr. Spaight, no), ay, 5. Pennsylvania, Virginia, South Carolina, Georgia, no, 4. Massachusetts, divided: Mr. Gerry, Mr. Strong, ay; Mr. King, Mr. Gorham, no (ibid., p. 316).

[15] Ibid., p. 319.

[16] Towle, History and Analysis of the Constitution, 3d ed., p. 69.

CHAPTER V.

TERM OF MEMBERS OF THE HOUSE OF REPRESENTATIVES.

§ 49. Term of Members of the House of Representatives.

THE Constitution provides that "The House of Representatives shall be composed of members chosen every second year."[1] The history of the English Parliament and of the extension of its term from two to seven years by the Septennial Act under George I, in order to defeat the will of the people,[2] had taught the framers of the Constitution the importance of limiting the duration of the term of members of Congress. The necessity of the adjudication that a statute was void which extended a legislative term beyond the limits of the Constitution, seemed to the men of that time the strongest argument in support of the power of the courts to declare an act of the legislature unconstitutional.[3]

Their caution was proved wise by the action of the French National Convention in continuing the greater part of themselves in the legislative assembly which they established in their constitution of 1795. Had no such safeguard been inserted in the Constitution of the United States, there can be little doubt but that at least the Federal Congress at the close of the administration of Adams, and perhaps later ones would have continued themselves in office, under the conviction that this was indispensable to the public welfare. The terms of the colonial assemblies were fixed by law, and varied from six months to seven years.[4] When the first State constitutions were adopted, Rhode Island and Connec-

§ 49. [1] Constitution, Article I, Section 2.

[2] A. D. 1717, Hallam's Constitutional History, Widdleton's American Ed., vol. iii, p. 228.

[3] Den d. Bayard and wife v. Singleton, 1 Martin (N. C.), 42.

[4] The Federalist, No. 11.

ticut continued under their old charters and former practice of semi-annual elections. The other States, except South Carolina, where they were biennial, had annual elections.[5] Delegates to the Congress under the Confederation were annually appointed as the State legislature directed, subject to recall at any time, and ineligible for more than three years out of six.[6]

The term of two years was chosen by the Federal Convention as a compromise between the advocates of annual elections and those who wished the old English practice of a triennial term.[7] This feature of the Constitution was perhaps that most attacked when it was before the people for ratification. The Federalist found it necessary to devote an entire number to the consideration of the phrase of the day, "that where annual elections end, tyranny begins."[8] The dangers feared from a long term were ignorance of the wants of the constituents, and attempts at a perpetuation of power. The advantages anticipated were the wisdom to be derived from experience, and the opportunity to mature measures which might require a considerable period of time for their perfection. In practice, the term has been found to be subject to more criticism for its brevity than its length; and the pres-

[5] The Federalist, No. lii.

[6] Articles of Confederation, V.

[7] The first vote was in favor of a triennial term. New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, and Georgia, 7; Massachusetts (Mr. King, ay, Mr. Gorham wavering); Connecticut, North Carolina, and South Carolina, no, 4. Mr. Madison seconded the motion for three years. "Instability is one of the great vices of our Republic to be remedied. Three years will be necessary in a government so extensive, for members to form any knowledge of the various interests of the States to which they do not belong, and of which they can know but little from the situation and affairs of their own. One year will be almost consumed in preparing for, and travelling to and from, the seat of national office." Mr. Gerry: "The people of New England will never give up the point of annual elections. They know of the transition made in England from triennial to septennial elections, and will consider such an innovation here as the prelude to a like usurpation. He considered annual elections as the only defense of the people against tyranny. He was as much against a triennial house as against an hereditary executive." (Madison Papers, Elliot's Debates, 2d ed., pp. 183-184.) Nine days later the term of three years was stricken out. Massachusetts, Connecticut, Pennsylvania, Virginia, North Carolina, South Carolina, Georgia, ay, 7; New York, Delaware, Maryland, no, 3; New Jersey, divided. The term of two years was then inserted, nem. con. (Ibid., pp. 224-226.

[8] No. liii.

ent tendency of State constitutions is to lengthen the terms of both legislative houses. In a majority of the State legislatures, assemblymen are elected for two years, and State senators for four. In Louisiana, the terms of members of both houses are four years.[9] It is the practice in many congressional districts, where one party is in a large majority, to give to each satisfactory member an election to a second term, and then to elect another from a different part of the constituency. Thus rotation in office is the rule.

[9] In Belgium, representatives are elected for four years, one-half of the house being renewed every two years, and senators for eight years, one-half the senate being renewed every four years; and both houses being entirely renewed upon a dissolution (Articles 51, 55). In France, deputies for four and senators for nine years, the latter body being renewed by thirds; and the terms of both are determined by a dissolution (Law of Nov. 30, 1875, Article 15; Law of Dec. 9, 1884, Article 7). Members of the German Diet are elected for three years, unless sooner dissolved (Constitution of Germany, Article 24). In Prussia, members of the Second Chamber for five years, unless sooner dissolved; members of the First Chamber are appointed by the crown for life, or with the power of hereditary transmission (Articles 65, 69, 73). In Switzerland, members of the National Council are elected for three years (Article 76). In the Republic of Colombia, representatives are chosen for four years and senators for six, the senate being renewed by thirds (Articles 95, 101). In Ecuador, representatives for two years and senators for four, one-half of the senate being renewed every two years (Articles 58, 59). In Honduras, deputies for four years, one-half every second year (Article 39). In Mexico, deputies for two years and senators for four years, one-half of the senate every second year (Articles 52, 58). In Venezuela, deputies and senators for four years (Article 21). In the Argentine Republic, deputies for four years, one-half every second year, senators for nine years, one-third every third year (Articles 42 and 48). In Brazil, deputies for three years with a guaranty of minority representation, senators as in the Argentine (Articles 17, 31). In Japan, membership in the House of Peers is hereditary or for life on appointment by the Mikado. The diet seems to be chosen every year and also upon a dissolution (Articles 34, 35). The Hawaiian constitution is similar to that of the United States in this respect (Articles 39, 54).

CHAPTER VI.

THE RIGHT OF SUFFRAGE.

§ 50. Provisions in the Federal Constitution concerning the Right of Suffrage.

THE regulation of the right of suffrage in a republic corresponds to that of the succession in a monarchy; for it determines the rulers of the country. It was the intention of the framers of the Federal Constitution to leave to the States the unrestricted power over the right of suffrage within their respective borders, provided that the form of government remained republican. The only provision upon the subject which they inserted was the section following that which has been last considered: —

"The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." [1]

This remained unchanged till after the close of the Civil War, when, by the Fifteenth and last Amendment, it was ordained: —

"SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.

"SECTION 2. The Congress shall have power to enforce this article by appropriate legislation."

§ 51. History of Constitutional Provisions as to the Right of Suffrage.

The qualifications for the right of suffrage were different in the different colonies. In some, the ownership of a freehold, and in others that of a small amount of personal property was required. In others again the right depended upon the payment of taxes. At

§ 50. [1] Constitution, Article I, Section 2.

one time, in New Haven and Massachusetts, only church members had the right of suffrage. In Rhode Island, only freeholders elected freemen of the towns, and their eldest sons.[1] In all the franchise was confined to freemen, and in most to whites; but in a few it seems that those with the other necessary qualifications were not excluded on account of color.[2] Similar diversities existed in the State constitutions at the time of the Federal Convention. All religious qualifications had been then abolished except in South Carolina, and the franchise more liberally extended; in five States to freemen of the African race,[3] and in one to women [4] who possessed the other qualifications; but nowhere to all free males. Except perhaps in Rhode Island, the right could only be exercised by freeholders, taxpayers, or the owners of a small amount of personal property;[5] but no approach to uniformity could be found;

§ 51. [1] Poore's Charters and Constitutions, and the colonial statutes of Rhode Island, collected in a note to 12 R. I., Appendix, p. 594.

[2] See the dissenting opinion of Mr. Justice Curtis in Dred Scott *v.* Sandford, 19 How., 393, 573, 574.

[3] New Hampshire, Massachusetts, New York, New Jersey, and North Carolina. State *v.* Manuel, 4 Dev. & Bat. (N. C.), 20; Commonwealth *v.* Aves, 18 Pick. (Mass.), 210; dissenting opinion of Judge Curtis in Dred Scott *v.* Sandford, 19 How., 393, 572–574 and citations.

[4] "Lucy Stone and H. B. Blackwell, citizens of New Jersey, have made an investigation, the result of which is remarkable, and proves that previously to 1776 only men voted, but that in 1776 the original State constitution conferred on *all inhabitants* (men or women, white or black), possessing the prescribed qualifications of £50 clear estate and twelve months' residence, and this constitution remained in force until 1814. In 1790, the Legislature, in an act regulating elections, used the words, 'he or she,' in reference to voters. In 1797, another act relative to electors repeatedly designates the voters as 'he or she.' In the same year, 1797, seventy-five women voted in Elizabethtown for the Federal candidate. In 1800, women generally voted throughout the State in the presidential contest between Jefferson and Adams. In 1802, a member of the legislature from Hunterdon County was actually elected, in a closely contested election, by the votes of two or three women of color. In 1807, at a local election in Essex County, for the location of the county seat, men and women generally participated and were jointly implicated in very extensive frauds. In the winter of 1807–8, the legislature, in violation of the terms of the constitution, passed an act restricting suffrage to free white male adult citizens, and, in reference to these, virtually abolished the property qualification of £50, thus extending it to all white male tax-payers, while excluding all women and negroes. In 1820, the same provisions were repeated and remained unchanged until the adoption of the present Constitution in 1844." (New York Tribune, quoted by McPherson, History of the Reconstruction, p. 258.)

[5] The early regulations upon the

and any attempt to create it would have caused great opposition to the Constitution in any State where a change was attempted in

subject in the different States are well summarized by Chief-Justice Chase in Minor *v.* Happersett, 21 Wall., 162, 172, 173: "When the Federal Constitution was adopted, all the States, with the exception of Rhode Island and Connecticut, had constitutions of their own. These two continued to act under their charters from the Crown. Upon an examination of those constitutions we find that in no State were all citizens permitted to vote. Each State determined for itself who should have that power. Thus, in New Hampshire, 'every male inhabitant of each town and parish with town privileges, and places unincorporated in the State, of twenty-one years of age and upwards, excepting paupers and persons excused from paying taxes at their own request,' were its voters; in Massachusetts, 'every male inhabitant of twenty-one years of age and upwards, having a freehold estate within the commonwealth of the annual income of three pounds, or any estate of the value of sixty pounds'; in Rhode Island 'such as are admitted free of the company and society' of the colony; in Connecticut such persons as had 'maturity in years, quiet and peaceable behavior, a civil conversation, and forty shillings freehold or forty pounds personal estate,' if so certified by the selectmen; in New York, 'every male inhabitant of full age who shall have personally resided within one of the counties of the State for six months immediately preceding the day of election . . . if during the time aforesaid he shall have been a freeholder, possessing a freehold of the value of twenty pounds within the county, or have rented a tenement therein of the yearly value of forty shillings, and been rated and actually paid taxes to the State'; in New Jersey, 'all inhabitants . . . of full age who are worth fifty pounds, proclamation-money, clear estate in the same, and have resided in the county in which they claim a vote for twelve months immediately preceding the election'; in Pennsylvania, 'every freeman of the age of twenty-one years, having resided in the State two years next before the election, and within that time paid a State or county tax which shall have been assessed at least six months before the election'; in Delaware and Virginia, 'as exercised by law at present'; in Maryland, 'all freemen above twenty-one years of age having a freehold of fifty acres of land in the county in which they offer to vote and residing therein, and all freemen having property in the State above the value of thirty pounds current money, and having resided in the county in which they offer to vote one whole year next preceding the election'; in North Carolina, for senators, 'all freemen of the age of twenty-one years who have been inhabitants of any one county within the State twelve months immediately preceding the day of election, and possessed of a freehold within the same county of fifty acres of land for six months next before and at the day of the election,' and for members of the House of Commons 'all freemen of the age of twenty-one years who have been inhabitants in any one county within the State twelve months immediately preceding the day of any election, and shall have paid public taxes'; in South Carolina, 'every free white man of the age of twenty-one years, being a citizen of the State and having resided therein two years previous to the day of election, and who hath a freehold of fifty

the existing order.[6] Danger was anticipated lest, should the power to restrict the right be granted to Congress, the liberty of all or the rights of property in some might be endangered. It was believed that to have submitted the right to vote for members of Congress to the legislative discretion of the States, "would have rendered too dependent on the State governments that branch of the federal government that ought to be dependent on the people alone."[7] For these reasons, the provision in the Constitution was adopted, and it excited little discussion in the Federal or State Conventions.

The Articles of Confederation directed that —

"for the more convenient management of the general interests of the United States, delegates shall be annually appointed, in such manner as the legislature of each State shall direct, to meet in Congress on the first Monday in November in every year, with a power reserved to each State to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year."[8]

In all of the States but two, delegates to the Continental Congress were appointed by the State legislatures. In Connecticut and Rhode Island, they were elected by the people.[9] Upon the first vote in the convention on the proposition —

"that the members of the first branch of the national legislature ought to be elected by the people of the several States,"

six States voted ay; two, no; and two were divided.[10]

Six days later, a resolution "that the first branch of the national legislature be elected by the State legislatures, and not by the

acres of land, or a town lot of which he hath been legally seized and possessed at least six months before such election, or (not having such freehold or town lot), hath been a resident within the election district in which he offers to give his vote six months before said election, and hath paid a tax the preceding year of three shillings sterling towards the support of the government;' and in Georgia such 'citizens and inhabitants of the State as shall have attained the age of twenty-one years, and shall have paid tax for the year next preceding the election, and shall have resided six months within the county.'"

[6] See the debate reported in Madison Papers, Elliot's Debates, 2d ed., vol. v, pp. 385–388.

[7] The Federalist, No. lii.

[8] Articles of Confederation, V.

[9] The Federalist, No. xl.

[10] Yeas: Massachusetts, New York, Pennsylvania, Virginia, North Carolina and Georgia. Nays: New Jersey and South Carolina. Divided: Connecticut and Delaware (Madison Papers, Elliot's Debates, 2d ed., vol. v, p. 137).

people," was made by General Charles C. Pinckney of South Carolina, and negatived by eight States against three.[11] Two weeks afterwards a resolution that representatives "ought to be appointed in such manner as the legislature of each State shall direct" was rejected by a vote of six States to four in its favor; one being divided.[12] An attempt by Gouverneur Morris to confine the franchise to freeholders obtained the support of no State but Delaware.[13] In the end unanimity prevailed.[14]

From the beginning of representation in England, the members of the House of Commons were chosen by a direct popular vote; while in France representatives of the third estate in the States General, and until the middle of the present century, members of the Assembly, were usually chosen by electoral colleges, so that the people voted only for electors. The advantages of this system were supposed to be that the selected wisdom of

[11] June 6th, 1787; Connecticut, New Jersey, South Carolina, ay; Massachusetts, New York, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, Georgia, no (Ibid. pp. 160–164).

[12] This resolution was moved by Gen. Charles C. Pinckney of South Carolina. Yeas: Connecticut, New Jersey, Delaware and South Carolina. Nays: Massachusetts, New York, Pennsylvania, Virginia, North Carolina, Georgia. (Ibid., pp. 223–224.) Maryland was divided (Ibid, p. 388).

[13] Gouverneur Morris said: "He had long learned not to be the dupe of words. The sound of aristocracy, therefore, had no effect upon him. It was the thing, not the name, to which he was opposed; and one of his principal objections to the Constitution, as it was now before us, is, that it threatens the country with an aristocracy. The aristocracy will grow out of the House of Representatives. Give the votes to people who have no property, and they will sell them to the rich, who will be able to buy them. We should not confine our attention to the present moment. The time is not far distant when this country will abound with mechanics and manufacturers, who will receive their bread from their employers. Will such men be the secure and faithful guardians of liberty? Will they be the impregnable barrier against aristocracy? He was as little duped by the association of the words 'taxation and representation.' The man who does not give his vote freely is not represented. It is the man who dictates the vote. Children do not vote. Why? Because they have no will of their own. The ignorant and dependent can be as little trusted with the public interest. He did not conceive the difficulty of defining 'freeholders' to be insuperable; still less that the restriction would be unpopular. Nine-tenths of the people are at present freeholders, and these will certainly be pleased with it. As to merchants, &c., if they have wealth and value the right, they can acquire it. If not, they don't deserve." (Ibid., pp. 386, 387.)

[14] Ibid., p. 389.

the college was greater than the aggregate wisdom of the people. In practice it has been found that such a course on the one hand tends to lower the character of the representative, since it facilitates intrigue if not bribery, and on the other lessens his care for his constituents, to whom he is not directly responsible. The experience of France has taught that country as well as others the unwisdom of such a method of election.[15]

The natural imitation of the practice in the mother country had made the colonial legislatures elected directly by the people, and the same practice had prevailed in the early State constitutions, except in Maryland, where the senate was chosen through an intermediate body of electors. In the debates over this provision, the advocates of a choice of the lower house of Congress by the State legislatures rested upon the argument of Sherman. "The people," he said, "immediately should have as little to do as may be about the government. They want information, and are constantly liable to be misled."[16] Those who prevailed, referred to the practice in England and the States as proving the safety and advantages of a direct popular election, and pointed out the danger of placing the existence of the national government at the mercy of the State legislatures. They applauded the remark of Wilson: "On examination, it would be found that the opposition of the States to federal measures had proceeded much more from the officers of the States than from the people at large."[17]

The subject remained within the exclusive jurisdiction of the States until the close of the Civil War. They gradually extended the franchise, except as regards negroes and women, till the right of suffrage in State and Federal elections was possessed by every free white male inhabitant, a citizen of the United States, of sound mind and not a pauper, with no other qualification; except in a few States the payment of a poll-tax or capacity to read and write, and in Rhode Island a discrimination against citizens of foreign birth, upon whom a property qualification was imposed, besides a property qualification for all voters at municipal elections, which authorized the imposition of a tax or the expenditure of money.

[15] See Burke's Observations on the French Revolution.

[16] Madison Papers, Elliot's Debates, 2d ed., vol. v, p. 136.

[17] Ibid., pp. 136, 137.

§ 52. The Fifteenth Amendment.

The condition of the emancipated blacks in the insurrectionary States at the close of the Civil War, seemed to demand some interposition for their relief; but even then the serious consequences of a sudden push into the franchise of a horde of men unaccustomed to control their own persons and property, much less fitted to aid in the government of States, in three of which they were in a majority, made both the Presidents and Congress pause. Lincoln in his attempts at reconstruction went no further than a tentative suggestion that one State should grant the right of suffrage to colored men who had fought in the Union army.[1] Johnson tried by his influence to induce the Southern States to grant the ballot to those who could read and write or who paid taxes on real estate assessed at two hundred and fifty dollars.[2] But neither recommendation was adopted; and the invariable result of an oligarchy followed, namely, legislation oppressive to the disfranchised class.[3] Congress at first had proposed no further remedy than that contained in the Fourteenth Amendment, which reduced the representation of any State that denied the right of suffrage to any part of its male adult population. When that clause of the amendment was first before the Senate, on March 9th, 1866, Henderson of Missouri moved as a substitute: "No State, prescribing the qualifications requisite for electors therein, shall discriminate against any person on account of color or race;" and said of his proposition: "I am aware that the Senate will vote it down now. Let them vote it down. It will not be five years from to-day before this body will vote for it. You cannot get along without it."[4] Only nine other Senators voted for his motion. It was not until after the former slave States had rejected the Fourteenth Amendment, that Congress interposed to establish negro suffrage. By the Reconstruction acts, of which the first was passed over Johnson's veto, March 2d, 1867,[5] the States formerly the seat of the insurrection were compelled by military force to adopt constitutions extending the right of suffrage to all

§ 52. [1] *Supra*, § 38, note 40.
[2] *Supra*, § 38, over note 65.
[3] *Supra*, § 38, over note 66.
[4] Blaine, Twenty Years in Congress, vol. ii, p. 203.
[5] *Supra*, § 38, over note 103.

adult colored men within their jurisdiction.[6] At the same time no step was taken toward compelling similar action in the loyal States, although a number of them voluntarily adopted it. The platform of the Republican party, upon which Grant was elected in 1868, contained the plank: —

"The guaranty by Congress of equal suffrage to all loyal men at the South was demanded by every consideration of public safety, of gratitude, and of justice, and must be maintained; while the question of suffrage in all the loyal States properly belongs to the people of those States."[7]

"There was something so obviously unfair and unmanly in the proposition to impose negro suffrage on the Southern States by national power, and at the same time to leave the Northern States free to decide the question for themselves, that the Republicans became heartily ashamed of it long before the political canvass had closed."[8]

At the opening of the third session of the Fortieth Congress, in December of that year, various propositions were offered in both houses for an amendment to the Constitution which would extend negro suffrage throughout the country.[9] On January 30th, 1869, the House of Representatives, by a vote of one hundred and fifty to forty-two, thirty-one not voting, passed the Fifteenth Amendment in the following form, which differed in only a few immaterial words from that finally adopted: —

"SEC. 1. The right of any citizen of the United States to vote shall not be denied or abridged by the United States or by any State *by reason* of race, color, or previous condition of *slavery of any citizen or class of citizens of the United States.*

"SEC. 2. The Congress shall have power to enforce by appropriate legislation *the provisions* of this article."[10]

The Senate desired a more radical remedy, which would prevent discrimination by the States through religious, educational, or property qualifications, as well as those forbidden by the amend-

[6] *Supra*, § 38.

[7] McPherson, History of the Reconstruction, p. 364.

[8] Blaine, Twenty Years in Congress, vol. iii, p. 412.

[9] Ibid., p. 413.

[10] McPherson, History of the Reconstruction, p. 399. The italics denote words not used in the final form.

ment which the House proposed; and which would extend the protection to the right to hold office as well as the right to vote.[11] Upon the motion of Henry Wilson of Massachusetts, that body adopted an amendment which would have altered the constitutions of more than half the States in the Union: —[12]

"No discrimination shall be made in any State among the citizens of the United States in the exercise of the elective franchise, *or in the right to hold office* in any State, on account of race, color, *nativity*, property, education or creed."[13]

A further amendment was added to alter the second article of the Constitution so as to prevent the appointment of presidential electors by a State legislature; and the measure returned to the House, which refused to concur in either. The Senate refused a conference which the House requested; and passed a new amendment in the form finally adopted, except that the words "to hold office" were added after "the right to vote." In their debates the Democrats made a strong point that the question should not be submitted to the legislatures then in session, who had not been chosen with a view to such action, which the national platform of the Republican party had expressly disclaimed.[14] Propositions to submit it to the legislatures next chosen and to State conventions were, however, voted down.[15]

The House refused to accept the senatorial proposition, and passed an amendment substantially like that first adopted by the Senate, prohibiting disqualification from office as well as suffrage "on account of race, color, nativity, property, creed, or previous condition of servitude." The Senate refused to accept this then. A conference was held, which resulted in a recommendation of the form which had originally passed the House, with a few verbal changes. On February 25th, 1869, the Amendment finally passed the House, and on the 26th the Senate, by a majority of more than two-thirds in each; and was sent to the State legislatures in its final form: —

[11] Ibid., p. 402.

[12] Blaine, Twenty Years in Congress, vol. ii, p. 416.

[13] Ibid., pp. 416, 417; McPherson, History of the Reconstruction, pp. 400–404.

[14] Blaine, who voted for the Amendment, afterwards admitted that the point was well taken (Twenty Years in Congress, vol. ii, pp. 413, 414).

[15] Ibid., p. 413. McPherson, History of the Reconstruction, p. 405.

"ARTICLE XV.

"SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

"SECTION 2. The Congress shall have power to enforce this article by appropriate legislation." [16]

The peculiar language used, which gives color to the claim that citizens of the United States previously possessed the right of suffrage, was chosen to conciliate those who claimed that the Fourteenth Amendment had already conferred the franchise upon all citizens of the United States; [17] a position which the Supreme Court has since said was untenable.[18]

On April 10th, 1869, Grant approved an act of Congress which made the ratification of this amendment a condition precedent to the admission of Virginia, Mississippi and Texas to representation; [19] and on December 22d, an act which took from Georgia the representation that had been restored to her, and made her adoption of the Amendment a condition precedent to her rehabilitation.[20]

During the following year, the Amendment was ratified by the legislatures of the following States: Alabama, Arkansas, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Mississippi, Nebraska, Nevada, New Hampshire, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, Virginia, West Virginia and Wisconsin, thirty in all, twenty-nine only being essential to its adoption. Of these, the New York legislature, subsequent to the ratification by some, but before three-fourths of all the States had ratified, repealed the ratification of New York. Since enough ratifications were obtained without counting that State, the question became immaterial. The legislatures of Ohio and Georgia, to which the question was first submitted, refused a ratification; but a subsequent Ohio leg-

[16] McPherson, History of the Rebellion, pp. 403-405.

[17] See the Speeches of Charles Sumner and George F. Edmunds in the Senate, Feb. 3, 1869; quoted by Judge Cooley in Story on the Constitution, 5th ed., § 1969, note 1.

[18] U. S. v. Reese, 92 U. S., 214, 217.

[19] 16 St. at L., p. 63. *Supra*, § 38.

[20] 16 St. at L., p. 80. *Supra*, § 38.

islature,[21] and the Georgia legislature after its reorganization under an act of Congress,[22] gave the ratifications of their respective States. The legislatures of California, Delaware, Kentucky, Maryland, unanimously, and New Jersey, voted against a ratification. In Tennessee, the Amendment failed to pass the House, and was never reported to the Senate by the Committee on Federal Relations, to whom it was referred. Oregon also failed to ratify.[23] On March 30th, 1870, the Secretary of State filed a certificate stating that the Fifteenth Amendment had been adopted.[24]

The Fifteenth Amendment was self-executing,[25] and immediately upon its adoption erased from all State constitutions and statutes the provisions obnoxious to its commands.[26] "It does not confer the right of suffrage on any one. It merely invests citizens of the United States with the constitutional right of exemption from discrimination in the enjoyment of the elective franchise on account of race, color, or previous condition of servitude."[27]

[21] McPherson, History of the Reconstruction, p. 562.

[22] *Supra*, § 38, over notes 156, 157.

[23] McPherson, History of the Reconstruction, pp. 488–498, 557–562.

[24] Ibid., p. 545. The struggle in the Indiana legislature over the question of ratification gave occasion to sharp parliamentary tactics. An attempt by the Democratic senators to prevent a quorum by their absence was prevented by locking the door and then counting those who refused to vote (see the N. Y. World, May 3, 1888). In the lower house, all but ten of the Democrats resigned, thus reducing the membership to less than two-thirds of the members elected. Those who remained called attention to the constitutional provision, that "two-thirds of each house shall constitute a quorum to do business," and insisted that the assembly consequently could not act upon the amendment. The speaker, however, ruled that this section cited did not apply to proceedings upon the ratification of an amendment to the Federal Constitution. His action was approved by a majority of the members present, some taking the position that the presence of two-thirds of the actual members of the house was sufficient in all cases. The amendment was ratified by two-thirds of the members and a majority of all originally elected, and then question as to its validity was raised in Congress. (McPherson, History of Reconstruction, pp. 490–491, note; Corbin *v.* Butler, Taft's Senate Election Cases, continued by Furber, pp. 541, 551; *infra*, Ch. XVIII.)

[25] Civil Rights Cases, 109 U. S., 3, 20.

[26] Neal *v.* Delaware, 103 U. S., 370, 383.

[27] U. S. *v.* Harris, 106 U. S., 629, 637; *infra*, § 53. In Mills *v.* Green, 67 Fed. R., 818, which was afterwards reserved upon another point, and is a case of very doubtful authority, Judge Goff held that this amendment invalidated a registration law of South Carolina,

§ 53. The Power of Congress over the Right of Suffrage.

The only express power of Congress to affect the right of suffrage within the States is contained in the second section of the Fifteenth Amendment, which provides —

"that the Congress shall have power to enforce this article by appropriate legislation."

Pursuant to this, Congress may pass a law to protect the right to vote, at least for representatives in the lower House, by making criminal a conspiracy to prevent, by force or intimidation, a person from exercising his right of suffrage at such an election on account of his race, color, or previous condition of servitude.[1] This amendment, however, gives Congress no power to legislate for the protection of any civil rights of colored men, or others, except the right to vote free from discrimination as aforesaid.[2] It was the opinion of the Supreme Court of Pennsylvania, that the act of Congress which provided that "all persons who have deserted the military or naval service of the United States, who shall not return to said service, or report themselves to the provost-marshal within sixty days after the proclamation hereinafter mentioned, shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship, and their right to become citizens, and such deserters shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any right of citizens thereof,"[3] was not a penalty for the original desertion previously committed, but for persistence in the crime, and consequently not an *ex post facto* law; and that the United States had the power, in the exercise of its right to punish the citizen of a State for a crime against the United States, to deprive him, by imprisonment or removal from the State, of his opportunity to vote, and, as incidental thereto, to deprive him of the right to vote.[4] Although Congress has no further powers to affect the right of

that discriminated against ignorant voters, white as well as black.

§ 53. [1] *Ex parte* Yarbrough, 110 U. S., 651. See also U. S. *v.* Reese, 92 U. S., 214, 218.

[2] Civil Rights Cases, 109 U. S., 3.

[3] Act of March 23, 1865, 13 St. at L., p. 490. See U. S. R. S., § 1996.

[4] Huber *v.* Reilly, 53 Pa. St., 112; s. c. Brightly's Election Cases, 69; McCrary on Elections (3d ed.), § 87.

suffrage within the States, it may regulate the exercise of that right in the election of members of Congress, under the clause of the Constitution which grants the express power to regulate the time, place and manner of such elections.[5] This will be discussed subsequently.

Under its power to admit States into the Union,[6] Congress may refuse to act until a State constitution has been adopted containing provisions as to the right of suffrage that meet its approval. Under color of this power, and that to guarantee to each State a republican form of government, Congress imposed as a condition of the rehabilitation of the reconstructed States, that each of their constitutions should be so amended as to grant the right of suffrage to all —

"male citizens of said State twenty-one years old and upward, of whatever race, color or previous condition, who have been residents of said State for one year previous to such election, except such as may be disfranchised for participation in rebellion or felony at common law."[7]

And in each of the acts readmitting them to representation Congress provided that the State constitution —

"shall never be so amended or changed as to deprive any citizens of the United States of the right to vote who are entitled to vote by the Constitution herein recognized, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said State; Provided that any alteration of said constitution prospective in its effect may be made in regard to the time and place of residence of voters."[8]

These statutes are inoperative upon the power of those States to amend their constitutions so as to restrict the right of suffrage within the limitations of the Fifteenth Amendment.[9]

Congress has the absolute power to regulate and restrict the suffrage in the Territories, and in the District of Columbia, al-

[5] Constitution, Article I, Section 4.

[6] Constitution, Article IV, Section 3.

[7] 14 St. at L., p. 429; *supra*, § 38, over note 103.

[8] *Supra*, § 37.

[9] Sproule *v.* Fredericks, 69 Miss., 898: s. c. 11 So. Rep., 472; Pollard's Lessee *v.* Hagan, 3 How., 212, 223, 228; Permoll *v.* First Municipality, 3 How., 589, 610; Strader *v.* Graham, 10 How., 82; Withers *v.* Buckley, 20 How., 84, 93.

though it abridges the rights of electors under previous laws;[10] provided that in so doing it does not enact a bill of attainder or an *ex post facto* law,[11] or a discrimination on account of race, color, or previous condition of servitude.[12] In the exercise of this power, Congress may prohibit a polygamist to vote, even though he does not actually cohabit with more than one wife, if, after having previously contracted a polygamous marriage, he continues to live with two or more women in the same family, treating them as his wives in all respects except actual sexual connection; and it may authorize a territorial legislature to disfranchise from the rights to vote and hold office all persons who themselves teach, advise, or encourage polygamy, or are members of any order or association which gives such teaching, advice, or encouragement.[13] In this manner the Constitution has been circumvented.

§ 54. Limitations of the Federal Constitution on the Power of the States over the Right of Suffrage.

The only limitations imposed by the Federal Constitution upon the power of the States to regulate the right of suffrage are the Fifteenth Amendment, the guaranty to each State of a republican form of government,[1] and the inhibitions against the enactment of bills of attainder and *ex post facto* laws.[2]

The Fifteenth Amendment has been previously considered.[3] Should a State so restrict the right of suffrage as to establish a narrow oligarchy, Congress under its power to guarantee to all the inhabitants of the State a republican form of government may perhaps abrogate so much of the State legislation or constitution as contains the restriction.[4]

Some authorities hold that disfranchisement, either directly or

[10] Murphy *v.* Ramsey, 114 U. S., 15, 45; Innis *v.* Bolton, 2 Idaho T., 407; s. c. 17 Pac. Rep., 264; Wooley *v.* Watkins, 2 Idaho T., 555.

[11] Constitution, Article I, Section 9.

[12] Fifteenth Amendment.

[13] Davis *v.* Beason, 133 U. S., 333, 347; but see State *v.* Findley, 20 Nevada, 198; s. c. 19 Pac. Rep., 241; where under a State constitution giving every male citizen except convicts and paupers the right to vote, it was held that Mormons could not be excluded by means of a test-oath or otherwise.

§ 54. [1] Constitution, Article IV, Section 4.

[2] Ibid., Article I, Section 10.

[3] *Supra*, § 52.

[4] Constitution, Article IV, Section 4; *supra*, § 38, and *infra*.

by the imposition of a test-oath, on account of a crime such as treason, which was not so punishable at the time of its commission, is a bill of attainder or *ex post facto* law, and consequently void.[5] Others support the position that the elective franchise is not a privilege, but rather a duty imposed for the benefit of the community, not the voter; that consequently it may be withdrawn in a State's discretion for any reason, and that such withdrawal from a class cannot be considered as in the nature of a punishment.[6] The subject became of importance at the close of the Civil War, when some of the loyal States, as well as those which had seceded, imposed test-oaths of past loyalty designed to withdraw the right of suffrage from those who had sympathized with the Confederacy. Congress imposed similar disabilities in its Reconstruction legislation;[7] and a few words in the Fourteenth Amendment gave some slight color to the contention that the validity of such disfranchisement was therein recognized.[8] In the opinion of the writer, those who contend that such a disfranchisement is unconstitutional have the better of the argument. During recent years the question has been considered in the legislation against the Mormons; but the constitutional objections were obviated by disfranchisement for membership in an association which continued to teach the morality of polygamy[9] and for continuing to treat as a member of the voter's family a polygamous wife, although sexual relations with her had been abandoned.[10] In New York the requirement from a voter of an oath that he has not previously committed a crime, has been attacked as an infringement of the provision of the State Constitution, which ordains that "no member of this State shall be disfranchised, or

[5] See the opinion of Miller, J., in Green *v.* Shumway, 39 N. Y., 418, 426; and the cases cited *infra*, note 12.

See also *Ex parte* Garland, 4 Wall., 333; Cummings *v.* Missouri, 4 Wall., 277; *supra*, § 53, and *infra* under Bills of Attainder and Ex post Facto Laws.

[6] Anderson *v.* Baker, 23 Md., 531; Blair *v.* Rigley, 41 Mo., 63; State *v.* Neal, 42 Mo., 119; Randolph *v.* Good, 3 West Va., 551; Burch *v.* Van Horn, 3 Bart. Election Cases, 405; Innis *v.* Bolton, 2 Idaho T., 407; Wooley *v.* Watkins, 2 Idaho T., 555. See also State *v.* Woolson, 41 Mo., 227.

[7] *Supra*, § 38.

[8] "When the right to vote . . . is deprived . . . or in any way abridged *except for participation in rebellion or other crime.*"

[9] Davis *v.* Beason, 133 U. S., 333, 347.

[10] Murphy *v.* Ramsey, 114 U. S., 15, 45.

deprived of any of the rights or privileges secured to any citizens thereof, unless by the law of the land, or the judgment of his peers." [11] In that and other States such test-oaths have been held invalid as adding to the qualifications for voting prescribed by their respective constitutions.[12]

Provided that no discrimination is made on account of race, color, or previous condition of servitude,[13] the right of suffrage is exclusively within the control of the individual States, and may be extended or abridged by any one of them to any extent not prohibited by the terms of its own constitution, without any infringement of the Constitution of the United States, unless the abridgment is so made as to constitute a bill of attainder, or *ex post facto* law, or to make the government no longer republican in form.[14] The right of suffrage is not conferred by the United States except in those cases where a discrimination by reason of race, color, or previous condition of servitude was abolished by the Fifteenth Amendment.[15] The right of suffrage is not a privilege or immunity of a citizen of the United States, which is protected by the Fourteenth Amendment;[16] and a State legislature, unless prohibited by the State constitution, can consequently deny the right of suffrage to minors, lunatics,[17] paupers,[18] women,[19] persons not possessing a certain property or educational qualification, or non-taxpayers.[20] Constitutional and statutory provisions for the exclusion from the right of suffrage of persons who have been guilty of specified crimes, have been so construed as to re-

[11] Green *v.* Shumway, 39 N. Y., 418, 426. See also the citations in note 12.

[12] Green *v.* Shumway, 39 N. Y., 418; Rison *v.* Fair, 24 Arkansas, 161; Davies *v.* McKerkey, 5 Nevada, 368; State *v.* Findlay, 20 Nevada, 198. But see Randolph *v.* Good, 3 W. Va., 551.

[13] See Fifteenth Amendment.

[14] Minor *v.* Happersett, 21 Wall., 162.

[15] Minor *v.* Happersett, 21 Wall., 162, 170; U. S. *v.* Rees, 92 U. S., 214; But see *Ex parte* Yarbrough, 110 U.S., 651, 664–665.

[16] Minor *v.* Happersett, 21 Wall., 162.

[17] Thompson *v.* Ewing, 1 Brewster (Pa.), 68, 69; Clark *v.* Robinson, 88 Illinois, 498; McCrary on Elections (3d ed.), § 80.

[18] Opinions of Justices, 124 Mass., 196.

[19] Minor *v.* Happersett, 21 Wall., 162; Van Valkenburg *v.* Brown, 43 California, 43; Rohrbacher *v.* Mayor of Jackson, 51 Miss., 735; Spencer *v.* Board of Registration, 1 MacArthur (D. C.), 169; Bloomer *v.* Todd, Washington Territory, 19 Pac. Rep., 135; Opinions of Justices, 62 Maine, 596.

[20] Buckner *v.* Gordon, 81 Ky., 665.

quire a conviction of such crime in a court of justice before the disqualification becomes operative, and not to allow the rejection by the election officer of a vote upon such a ground before conviction.[21] An express provision giving to the election officers such right of exclusion before conviction would be of very doubtful constitutionality, inasmuch as it might be claimed to amount to the imposition of a penalty or infliction of a punishment without due process of law.[22] Where the State constitution authorizes the legislature to exclude from the right of suffrage persons convicted of infamous crimes, the legislature cannot enact a disqualification for conviction of a crime such as duelling, which is not infamous.[23] In the absence of express language a constitutional[24] or statutory[25] disqualification by a State for the conviction of a felony or infamous crime does not apply to the conviction of a mere statutory offense against the United States. Where a State constitution provided that an elector should forfeit his right of suffrage by "a conviction of any crime which is punishable by imprisonment in the penitentiary," it was held that a person who had been convicted of a crime punishable by fine or such imprisonment, but who had been punished by a mere fine, did not forfeit his franchise.[26] A pardon, when not limited, restores the right of suffrage which has been lost by the commission of a disqualifying crime.[27]

[21] Huber *v.* Reilly, 53 Pa. St., 112; s. c. Brightly's Election Cases, 69; State *v.* Symonds, 57 Maine 148; Commonwealth *v.* Jones, 10 Bush (Ky.), 725; s. c. 14 American Law Register, N.S., 374; see also Burkett *v.* McCarty, 10 Bush (Ky.), 758; McCrary on Elections (3d ed.), §§ 87, 88, 89, 309, 310.

[22] Huber *v.* Reilly, 53 Pa. St., 112; State *v.* Symonds, 57 Maine, 148; Commonwealth *v.* Jones, 10 Bush (Ky.), 725; s. c. 14 American Law Register, N. S., 374. See also Burkett *v.* McCarty, 10 Bush (Ky.), 758; McCrary on Elections (3d ed.), §§ 87, 88, 89, 309, 310.

[23] Barker *v.* People, 20 Johnson (N. Y.), 457; McCrary on Elections (3d ed.), § 84.

[24] Gandy *v.* State, 10 Neb., 243.

[25] United States *v.* Barnabo, 14 Blatchford, 74.

[26] Gandy *v.* State, 10 Nebraska, 243; People *v.* Cornell, 16 California, 187; *contra*, U. S. *v.* Watkins, 7 Sawyer, 85. See McCrary on Elections (3d ed.), § 85.

[27] Wood *v.* Fitzgerald, 3 Oregon, 569; *Ex parte* Garland, 4 Wall., 333; *infra*.

§ 55. Usual Provisions of State Constitutions as to the Right of Suffrage.

Although the power of a State over the right of suffrage within its jurisdiction is very broad, that of a State legislature is not. All the State constitutions contain provisions which establish the qualifications of voters and restrictions upon the right of suffrage. In the absence of language which grants the power, either expressly or by clear implication, neither the State legislature nor any board of local government can add to the qualifications of voters at the election of a State officer, or member of the legislature, or any other election which affects the State at large.[1] The better opinion would seem to be that in such a case they have no power to add to the constitutional qualifications of voters at elections which are purely local, such as the choice of a county-seat;[2] but express power upon the subject of local elections is conferred by a few State constitutions, and less explicit language might be required to grant such authority over them than over general elections. It has been held in Kentucky that the legislature may restrict to tax-payers the right to vote for municipal officers.[3] Inasmuch as the Constitution directs that the State legislatures shall prescribe the time, place and manner of the election of representatives in Congress, subject to alteration by Congress,[4] and shall direct the manner of electing presidential electors,[5] it was the opinion of the Supreme Courts of two different States that the provisions of their constitutions which required voters to cast their

§ 55. [1] Rison *v.* Farr, 24 Ark., 161: State *ex rel.* Knowlton *v.* Williams, 5 Wis., 308; State *v.* Baker, 38 Wis., 71; Monroe *v.* Collins, 17 Ohio St., 665; State *v.* Symonds, 57 Me., 148; State *v.* Staten, 6 Cold. (Tenn.), 233; Davies *v.* McKeeby, 5 Nev., 369; Clayton *v.* Harris, 7 Nev., 64; McCafferty *v.* Guyer, 59 Pa. St., 109; Huber *v.* Reilly, 53 Pa. St., 112; Quinn *v.* State, 35 Ind., 485; Randolph *v.* Good, 3 W. Va., 551; Green *v.* Shumway, 39 N. Y., 418; Quinn *v.* State, 35 Ind., 485; People *v.* Canaday, 73 N.C., 198; State *v.* Tuttle, 53 Wis., 45. Cooley's Constitutional Limitations, 6th ed., pp. 79, 753; McCrary on Elections, 3d ed., §§ 14–18.

[2] State *v.* Williams, 5 Wis., 308; State *v.* Lean, 9 Wis., 279; Coffin *v.* Board of Election Commissioners of Detroit, 97 Mich., 188; s. c. 56 N. W. Rep., 567.

[3] Buckner *v.* Gordon, 81 Ky., 665. See State *v.* Dillon, 32 Florida, 545; s. c. 14 Southern Rep., 383; Mayor of Town of Valverde *v.* Shattuck, Colorado, 34 Pac. Rep., 947; *contra*, People *v.* Canaday, 73 N. C., 198.

[4] Constitution, Article I, Section 4.

[5] Ibid., Article II, Section 1.

ballots in the localities where they resided, could not prevent the legislatures from passing laws which allowed soldiers in active service to vote in their camps at the seat of war without the State.[6] Special constitutional provisions in several States authorize soldiers thus to vote in time of war.[7]

The State legislatures cannot, however, grant the right to vote at a Congressional election to any except the electors of the most numerous branch of the State legislature, or take from any of such electors the right to vote for members of the national House of Representatives.[8] The power to regulate the manner of an election does not include the power to impose qualifications upon voters different from those contained in a State Constitution.[9]

The State constitutions usually grant the right to vote to all male citizens of the United States, and residents of the State, who are of sound mind, have not been convicted of certain specified crimes, and are not inmates of poorhouses or similar asylums. Two States — Colorado and Wyoming — allow female suffrage at all elections;[10] Montana upon all questions submitted to taxpayers; Kansas at municipal elections; the last and a number of others at school elections. Where the State constitution is silent upon the subject, the legislature has the power to withhold the right of suffrage from women,[11] or to confer it upon them, either wholly or in part; as, for example, in local school elections, which are sometimes held to be impliedly excepted from the constitutional provisions as to the qualifications of voters.[12] Where female suffrage was authorized, it was held

[6] Opinions of Justices, 45 N. H., 595; Opinions of Judges, 37 Vt., 665.

[7] Cooley, Constitutional Limitations, 6th ed., p. 754. Soldiers may so vote in Ohio, ibid., citing Lehman *v.* McBride, 15 Ohio (N. S.), 573. The statutes authorizing them so to vote were held invalid under the former constitutions of California and Michigan. Day *v.* Jones, 31 Cal., 261; Twitchell *v.* Blodgett, 13 Mich., 127.

[8] Constitution, Article I, Section 2.

[9] Coffin *v.* Board of Elections Commissioners of Detroit, 97 Mich., 188.

[10] The proposed constitution of Utah does the same. See also the Constitution of North Dakota, § 122.

[11] Minor *v.* Happersett, 21 Wall., 162.

[12] Wheeler *v.* Brady, 15 Kansas, 26; Brown *v.* Phillips, 71 Wis., 239; State *v.* Cones, 15 Neb., 444; Belles *v.* Bur, 76 Mich., 1; State *v.* Crosby, 15 Neb., 444; Opinion of the Judges, 115 Mass., 602. But see Coffin *v.* Board of Election Commissioners, 97 Mich., 188; Matter of Gage, 141 N. Y., 112; Winans *v.* Williams, 5 Kansas, 227.

that the right of women to vote must depend upon the same terms and conditions as applied to men, and that therefore a condition that all male voters should be tax-payers was void because it did not apply to female voters.[13] Under the California Constitution, which provided that "no person shall on account of sex be disqualified from entering upon or pursuing any lawful business, vocation or profession," it was held that a board of supervisors could not prohibit the employment of women in drinking cellars and other places where liquors were kept for sale,[14] but that a higher license might be charged for drinking-places where women were employed.[15] In the absence of a State constitutional prohibition, women may be excluded from admission to the bar.[16]

Four States — Connecticut, Maine, Massachusetts and Mississippi — impose an educational qualification, which usually consists in capacity to read the Constitution of the United States in the English language.[17]

A few States confine the right of suffrage to tax-payers, with certain exceptions. In Texas, "in all elections to determine expenditures of money or assumption of debt, only those shall be qualified to vote who pay taxes on property in said city or incorporated town."[18] And in Rhode Island, at elections of the Providence city councils and for the expenditure of money in a town or city, only those can vote who have paid a tax assessed upon property therein valued at at least one hundred and thirty-four dollars.[19] There are no other property qualifications for the right of suffrage in the United States.

A large number of the States allow aliens to vote for members of Congress and presidential electors as well as State officers, as soon as they have declared their intention to become citizens, although they have not been naturalized. This was a practice of

[13] Lyman *v.* Martin, 2 Utah, 136.

[14] Matter of Maguire, 57 Cal., 604.

[15] *Ex parte* Felchin, 96 Cal., 360; s. c. 31 Pac. Rep., 224.

[16] Bradwell *v.* The State, 16 Wall., 130.

[17] In Mississippi the direction is that the voter must be able either to read or to understand the part of the Constitution shown or read to him, and thus the election officers are able to allow illiterate whites to vote while disfranchising illiterate blacks. The South Carolina Convention is now considering the propriety of adopting a similar provision.

[18] Texas Constitution, Art. VI, Sec. 3.

[19] Rhode Island Constitution, Art. VII, Sec. 2.

which South Carolina complained in her declaration of independence,[20] and which was forbidden by the Confederate Constitution.[21]

Where the constitution simply required that a person should have a residence in the locality where he offered to vote, without prescribing any period of residence, it was held that a statute which required a residence in such a locality for twenty days previous to the election was void.[22] Where the Pennsylvania Constitution provided that a voter must have resided in his election district "ten days immediately preceding the election," it was held that an act was void which attempted to authorize a voter who had changed his residence within ten days of the election to vote where he formerly resided.[23]

It has been said that persons of unsound mind are impliedly excepted from the class of electors specified in a constitution or statute, although not expressly named.[24] Drunkenness is considered as a temporary insanity.[25]

The crimes, a conviction of which operates as a disfranchisement, are usually all or a specified class of infamous crimes; ordinarily include treason and often duelling and bribery.

Most State constitutions contain a provision concerning the residence of voters in substance like that of New York: —

"For the purpose of voting, no person shall be deemed to have gained or lost a residence, by reason of his presence or absence, while employed in the service of the United States; nor while engaged in the navigation of the waters of this State, or of the United States, or of the high seas; nor while a student of any seminary of learning; nor while kept at any almshouse, or other asylum, wholly or partly supported at public expense, or by charity; nor while confined in any public prison."[26]

Under similar provisions it has been held in some States that where the persons therein described showed that they had actually acquired a permanent residence at their official post,[27] or place of

[20] *Supra*, § 36.

[21] *Supra*, § 37.

[22] Quinn *v.* State, 35 Ind., 485.

[23] Thompson *v.* Ewing, 1 Brewster (Pa.), 67, 103.

[24] See Clark *v.* Robinson, 88 Ill., 98; Cushing, Law and Practice of Legislative Assemblies, §§ 24, 27; Cooley, Constitutional Limitations, 6th ed., p. 753.

[25] Ibid.

[26] N. Y. Constitution, Article II, Section 3.

[27] People *ex rel.* Orman *v.* Riley, 51

education,[28] or asylum,[29] they might vote there. The New York courts construe the provision more strictly against the voter.[30]

§ 56. Constitutionality of Registration Laws.

Although a State legislature cannot add to the constitutional qualifications of electors, it may establish such reasonable regulations for the conduct of the elections and for the determination of the right to vote at the same as do not impair the constitutional right of suffrage.[1] It is the better opinion that where the constitution is silent upon the subject, a State legislature has still the power to make a reasonable law compelling the registration of all voters before an election.[2] A few State courts, however, have held registration laws unconstitutional unless expressly authorized.[3] In consequence, express provisions authorizing registration laws are now usually inserted in the modern State constitutions.[4]

Registration laws, and all other laws providing for the conduct of elections, must not unreasonably restrict the right of qualified

Cal., 48; People *ex rel.* Budd *v.* Holden, 28 Cal., 123; Wood *v.* Fitzgerald, 3 Oregon, 568; Darragh *v.* Bird, 3 Oregon, 229; Hunt *v.* Richards, 4 Kansas, 549.

[28] Putnam *v.* Johnson, 10 Mass., 488; Opinion of Justices, 5 Met. (Mass.), 587; Sanders *v.* Getchell, 76 Me., 158; Pedigo *v.* Grimes, 113 Ind., 148; Berry *v.* Wilcox, Nebraska, 62 N. W. Rep., 249.

[29] Stewart *v.* Kyser (California), 39 Pac. Rep., 19.

[30] Silvey *v.* Lindsay, 107 N. Y., 55; People *v.* Cady, 143 N. Y., 100; *Re* Goodman, 84 Hun., 53; s. c. 146 N. Y., 256. *Re* Garvey, 84 Hun., 611.

§ 56. [1] Cooley's Constitutional Limitations, 6th ed., pp. 756-760; McCrary on Elections, 3d ed., § 91.

[2] Capen *v.* Foster, 12 Pick. (Mass.), 485; s. c. 23 American Decisions, 632; Davis *v.* School District, 45 N. H., 398; People *v.* Kopplekom, 16 Mich., 342; State *v.* Bond, 38 Mo., 425; Ensworth *v.* Albin, 46 Mo., 450; State *v.* Hillmantel, 21 Wis., 566; State *v.* Baker, 38 Wis., 71; Byler *v.* Asher, 47 Ill., 101; People *v.* Hoffman, 116 Ill., 587; Monroe *v.* Collins, 17 Ohio St., 665; Edmonds *v.* Banbury, 28 Iowa, 267. See also *In re* Polling Lists, 13 R. I., 729; State *v.* Butts, 31 Kan., 537; Hawkins *v.* Carroll Co., 50 Miss., 735; McMahon *v.* Mayor, 66 Ga., 217. Patterson *v.* Barlow, 60 Pa. St., 54; Commonwealth *v.* McClelland, 83 Ky., 686. Cooley's Constitutional Limitations, 6th ed., p. 757, and McCrary on Elections, 3d ed., § 92. An excellent note on this subject in 29 Am. Law Rep., N. S., 872.

[3] Dell *v.* Kennedy, 49 Wis., 555; s. c. 35 Am. Rep., 786; White *v.* County of Multnomah, 13 Oregon, 317. See Daggett *v.* Hudson, 43 Ohio St., 548; State *v.* Corner, 22 Neb., 265; Page *v.* Allen, 58 Pa. St., 338; Cooley's Constitutional Limitations, 6th ed., 757.

[4] The Constitutions of Arkansas (Art. III, Sec. 2) and of West Virginia

electors to vote.[5] The only lawful object of a registration law is the prevention of frauds at an election. Consequently, when one is so drawn as to practically disqualify a class of citizens and residents of the State, authorized by the constitution to vote, who through their want of permanent homes or migratory habits do not remain in any locality a long period of time, it is void.[6]

It has been held that a law which closes the registration three weeks before the election, and allows no one not then registered to vote, is reasonable and constitutional.[7]

An act which provided that "no person hereafter naturalized in any court shall be entitled to be registered as a voter within thirty days of such naturalization," was held unconstitutional, as imposing a new qualification upon voters not authorized by the State constitution.[8] Where the Illinois Constitution provided that "all elections shall be free and equal," it was held that this did not require a uniformity of regulation in regard to elections in all portions of the State; and that a registration law which operated only in such cities, villages and towns as adopted it was not a local or a special law.[9] But in Indiana it was held, that the

(Art. VI, Sec. 43) expressly forbid a registration law. That of Missouri (Art. V, Sec. 5) only authorizes them in cities and counties with a population of over 100,000; and in cities with a population of over 25,000.

[5] Capen *v.* Foster, 12 Pick. (Mass.), 485; s. c. Brightly's Election Cases, 51; s. c. 23 Am. Decisions, 632; Daggett *v.* Hudson, 43 Ohio St., 548; State *v.* Corner, 22 Neb., 265; Kinneen *v.* Wells, 144 Mass., 497; Monroe *v.* Collins, 17 Ohio St., 765; Cooley's Constitutional Limitations, 6th ed., 758; Morris *v.* Powell, 125 Ind., 281; s. c. 25 N. E. Rep., 221; McCrary on Elections, 3d ed., § 91.

[6] Morris *v.* Powell, 125 Ind., 281; *In re* Appointment of Supervisors, 52 Fed. R., 254.

[7] People *v.* Hoffman, 116 Ill., 587. In Nebraska, it was held that a law closing the registration ten days before the election was invalid, and that an elector might subsequently claim the right to register and vote. State *v.* Corner, 22 Neb., 265. *Contra*, State *v.* Butts, 31 Kansas, 537; Weil *v.* Calhoun, 25 Fed. R., 865, 871. In Ohio, it was held that a law closing the registration five days before the election was similarly unconstitutional. Daggett *v.* Hudson, 43 Ohio St., 548. These cases are, however, contrary to the current of authority. The Mississippi Constitution (Art. XII, Sec. 249) compels a registration four months before an election. In Rhode Island (Art. VII, Sec. 1) a registration in the previous December is required.

[8] Kinneen *v.* Wells, 144 Mass., 497; See also Attorney-General *v.* City of Detroit (Mich.), 44 N. W. Rep., 388. In the New York Constitution of 1894 (Art. II, Sec. 1), a similar provision was inserted.

[9] People *v.* Hoffman, 116 Ill., 587.

provision in the State Constitution which required the general assembly to provide for the registration of all persons entitled to vote impliedly forbade a law for the registration of a special class of voters.[10]

See also McMahon *v.* Mayor of Savannah, 66 Ga., 217; Commonwealth *v.* McClelland, 83 Ky., 686; Patterson *v.* Barlow, 60 Pa. St., 54, 77.

[10] Morris *v.* Powell, 125 Ind., 281; s. c. 25 N. E. Rep., 221. Judge Speer of the District Court of the United States has said that the enactment of local registration-laws which differed in different parts of the State was a violation of a State constitutional requirement that "laws of a general nature shall have uniform operation throughout the State, and no special law shall be enacted in any case for which provision has been made by an existing general law." He said further: "But if this were not true, it would be none the less our duty to disregard them. They are plainly in conflict with section 2,005 of the Revised Statutes, which provides: 'When, under the authority of the constitution or laws of any State, any act is required to be done as a prerequisite or qualification for voting, and by such constitution or laws persons or officers are charged with the duty of furnishing to citizens an opportunity to perform such prerequisites, or to become qualified to vote, every such person and officer shall give to all citizens of the United States the same and equal opportunity to perform such prerequisite and to become qualified to vote.'

"Now, it is not enough that all the citizens of the same county shall have an equal opportunity, but all the electors of the State, voting, or desiring to vote, at the same general election, must have the equal opportunity to perform the prerequisites, and to become qualified to vote. And it is a necessary implication of the language of this statute of the United States, that the prerequisites for voting at the same general election must be equal to each elector. Indeed, it is true, if a State of the American Union prescribes for a portion of its citizens, otherwise entitled to vote, prerequisites for voting from which other citizens are relieved, to that extent the State ceases to maintain a republican form of government, and enactments with such effect are contrary to the Constitution of the common country. It will be easy to understand how, with such a system or want of system of registration laws, as hereinbefore described, the most injurious and unfair political results might be attained. If a congressional district be 'gerrymandered' with unequal registration laws, according to the political complexion of certain localities, the fundamental laws of the United States, guaranteeing equal political rights, could be set at naught. The power of Congress over national elections is no longer in question. This being a national election of general character, it will be well to remember that it is clearly within the scope of the national laws."

"It follows, therefore, that since the federal law requires uniformity in the prerequisites of the right to vote as affecting the citizen, otherwise entitled to vote, at the national election, and further requires that each citizen shall have an equal opportunity to do the act made a prerequisite to the right of voting, varying and inconsistent registration enactments mak-

Where under the Ohio Constitution, which gave the right of suffrage to "white male citizens," it was settled by a judicial interpretation that persons having a preponderance of white blood were "white" within the meaning of the Constitution; an act was held unconstitutional, which, while prescribing penalties against judges of election who rejected the ballot of any person, with knowledge that he had the qualifications of a voter, contained a proviso that the act and its penalties "shall not apply to clerks or judges of election for refusing to receive the votes of persons having a distinct and visible admixture of African blood, nor shall they be liable to damages by reason of such rejection." [11]

It was held that a statute was void which authorized the governor to set aside the registration in a county upon proof satisfactory to him of fraud or irregularity in its conduct.[12]

§ 57. Minority Representation.

A favorite remedy for misgovernment proposed by theoretical reformers consists of provisions for the representation of minorities, although in practice the result has usually been to give the control to the managers of the political machines in the two leading parties by means of a mutual arrangement. Under the Ohio Constitution, which provided that each elector should be entitled to vote at all elections, it was held that a statute, denying an elector the right to vote for more than two out of four members of the police board at the same election, was unconstitutional.[1] It was the opinion of Judge McCrary, that an act, permitting but not requiring a voter to concentrate more than one vote upon a less number of candidates than the whole number, would be similarly unconstitutional, unless expressly authorized.[2] It is safer, conse-

ing different prerequisites, and denying equal opportunities to perform them, are contrary to the federal statute, and nugatory." (*In re* appointment of Supervisors, 52 Fed. Rep., 254, 261, 262.) See Butler *v.* Ellerbe (S. C.), 22 S. E. Rep., 425.

[11] Monroe *v.* Collins, 17 Ohio St., 665.

[12] State *v.* Staten, 6 Cold. (Tenn.), 233; Sheafe *v.* Tillman, 2 Bart., 907; McCrary on Elections, 3d ed., § 22.

§ 57. [1] State *v.* Constantine, 42 Ohio St., 437; s. c. 9 American and English Corporation Cases, 39–42. Intimations to a similar effect are contained in the opinions in People *v.* Kenney, 96 N. Y., 294; People *v.* Crissey, 91 N. Y., 616, 624.

[2] McCrary on Elections, 3d ed.,

quently, for the advocates of such a reform, to procure a constitutional amendment authorizing its trial. The Constitution of Illinois provides that —

"in all elections of representatives aforesaid, each qualified voter may cast as many votes for one candidate as there are representatives to be elected, or may distribute the same, or equal numbers thereof, among the candidates as he shall see fit; and the candidates highest in votes shall be declared elected." [3]

§ 58. The Ballot.

The usual mode of voting at popular elections in the United States is by ballot; and this is expressly required by most State constitutions.[1] "A ballot may be defined to be a piece of paper or other suitable material, with the name written or printed upon it of the person to be voted for; and where the suffrages are given in this form each of the electors in person deposits such a vote in the box, or other receptacle provided for the purpose, and kept by the proper officers." [2] The object of the requirement of a vote by

§ 177, citing the note to the case of State *v.* Constantine, 9 American and English Corporation Cases, 39–42; People *v.* Perley, 80 N. Y., 624.

[3] Illinois Constitution, Art. IV, Secs. 7, 8.

§ 58. [1] Cooley's Constitutional Limitations, 6th ed., p. 760.

[2] Cushing's Law and Practice of Legislative Assemblies, § 103, quoted with approval by Judge Cooley in his Constitutional Limitations, 6th ed., p. 760: "In this country, and indeed in every country where officers are elective, different modes have been adopted for the electors to signify their choice. The most common modes have been either by voting *viva voce*, that is, by the elector openly naming the person he designates for the office, or by ballot, which is depositing in a box provided for the purpose a paper on which is the name of the person he intends for the office. The principal object of this last mode is to enable the elector to express his opinion secretly, without being subject to be overawed, or to any ill-will or persecution on account of his vote for either of the candidates who may be before the public. The method of voting by tablets in Rome was an example of this manner of voting. There certain officers appointed for that purpose, called Diribitores, delivered to each voter as many tablets as there were candidates, one of whose names was written upon every tablet. The voter put into a chest prepared for that purpose which of these tablets he pleased, and they were afterwards taken out and counted. Cicero defines tablets to be little *billets* in which the people brought their suffrages. The clause in the constitution directing the election of the several State officers was undoubtedly intended to provide that the election should be made by this mode of voting to the exclusion of any other. In this mode the freemen can individually express their choice

ballot is concealment of the choice of each particular elector.[3] "The ballot is dear to the people, for it uncovers men's faces, and conceals their thoughts. It gives them the opportunity of doing what they like, and of promising all that they are asked."[4] Any statutes which tend to impair the secrecy of the ballot are consequently unconstitutional and void.[5] Thus, an act was held void as preventing secrecy, which provided that each inspector on receiving the ballot should endorse the same with a number corresponding to the number of the name of the voter on the poll list.[6] Where the constitution declared that all ballots should be "fairly written," it was held that a printed ballot was sufficient.[7]

In late years a system of voting, originally adopted in Australia, has been introduced into several States as well as other countries. Its general features are that all votes must be cast by the use of an official ballot printed and furnished by the government. In some States, a separate ballot is printed for each party, or group of voters of the number fixed by the act, that has nominated candidates. In others, a blanket ballot must be used, upon which the names of all such candidates are printed in parallel columns, and the voter indicates by a mark his preference.[8] The constitutionality of these laws has been frequently attacked.[9] It has been held that the requirement that all votes be made by the use of an official ballot selected and prepared in secret is not an infringement

without being under the necessity of publicly declaring the object of their choice; their collective voice can be easily ascertained and the evidence of it transmitted to the place where their votes are to be counted, and the result declared with as little inconvenience as possible." Temple *v.* Mead, 4 Vt., 535, 541-542.

[3] People *v.* Pease, 27 N. Y., 45, 81; Commonwealth *v.* Woeper, 3 S. & R. (Pa.), 90; Williams *v.* Stein, 38 Ind., 90; Brisbin *v.* Cleary, 26 Minn., 107; Temple *v.* Mead, 4 Vt., 535; Cooley's Constitutional Limitations, 6th ed., pp. 760-763.

[4] Cicero in Defense of Plancius, Forsyth's Cicero, vol. i, p. 339; quoted by Cooley, Constitutional Limitations, 6th ed., p. 762, note.

[5] Williams *v.* Stein, 38 Ind., 90; Brisbin *v.* Cleary, 26 Minn., 107.

[6] Williams *v.* Stein, 38 Ind., 90; Brisbin *v.* Cleary, 26 Minn., 107: approved in McCrary on Elections, 3d ed., § 513. See, however, Hodge *v.* Lyman, 100 Ill., 397.

[7] Temple *v.* Mead, 4 Vt., 535, 541; Henshaw *v.* Foster, 9 Pick. (Mass.), 312.

[8] For a detailed account, see Wigmore's Australian Ballot System.

[9] For a collection of cases affecting the constitutionality of such laws, see Ballot Reform: its Constitutionality, by Wigmore, 23 Am. Law Review, 719.

of a constitutional provision that all elections shall be "free and open";[10] that the limitation of a voter to two and one-half minutes for the preparation of his ballot is not unreasonable nor invalid;[11] that a provision permitting the attendance of a sworn special constable to assist blind voters or those who were otherwise "physically or educationally" unable to mark their ballots does not deprive such voters of the equal protection of the laws, nor establish inequality of civil or political rights, nor establish new educational and physical qualifications for voters;[12] that the requirement that no names be printed on the ballot, except those of the candidates of political parties, is not an unreasonable restriction of the rights of an independent voter, provided he be allowed to write on the ballot the name of any other candidate;[13] that a prohibition against electioneering within a reasonable distance of the polls is not an infringement of any rights protected by either a State or the Federal Constitution;[14] that a statute may forbid the printing of a candidate's name in the column of more than one party, although he has been nominated by two or more;[15] but that one is void which forbids an elector to vote for a person whose name is not printed in the official ballot, unless expressly authorized by the constitution.[16]

Every ballot law, however, must contain due protection for the rights of all voters qualified by the State constitution. Consequently, in the absence of express authority, a law would be unconstitutional, which prevented from the expression of his choice a voter who, through a physical defect or lack of education, was unable intelligently to select or mark a ballot.[17] A recent case holds

[10] State *v.* McMillan, Missouri Supreme Court, 18 S. W. Rep., 784.

[11] Pearson *v.* Board of Supervisors of Brunswick County (Va.) Court of Appeals, 21 S. E. Rep., 483.

[12] Ibid.

[13] State *v.* Black, 54 N. J. Law, 446; s. c. 24 Atl. Rep., 489; De Walt *v.* Bartley (Pa. s. c.), 24 Atl. Rep., 185. See also Miner *v.* Olin, 159 Mass., 487; s. c. 34 N. E. Rep., 721.

[14] State *v.* Black, 54 N. J. Law, 446; s. c. 24 Atl. Rep., 489.

[15] Todd *v.* Board of Election Commissioners of Kalamazoo (Michigan Supreme Court), 62 N. W. Rep., 564: a case of doubtful authority.

[16] State *v.* Dillon, 32 Florida, 545; s. c. 14 Southern Rep., 383.

[17] This point has been the subject of much discussion in recent political contests in New York over the proposed change in the system of election by ballot. The following opinion, signed by some of the most eminent members at the New York

that a law which allowed a vote for all the nominations of a political party by stamping a cross opposite the name of such party at the head of the ballot was unconstitutional, as a discrimination against classes of voters who did not adhere to any party and had made nominations for only a part of the offices to be filled at the election.[18] The soundness of this decision may well be doubted.

§ 59. General Observations upon the Right of Suffrage.

A survey of the laws and constitutions established in the United States during the nineteenth century, shows a steady extension of the right of suffrage, with no reaction except recently in the South to reduce the negro vote by inconvenient regulations for registration as to previous residence, educational and tax-paying qualifications.[1] Universal manhood suffrage is now the rule in nearly all the States of the Union, and there is at least a temporary tendency toward the further extension of the right to women. Prophecies of resultant evil have been frequent, and opposition to

Bar, was furnished to Governor Flower and transmitted by him to the legislature in April, 1894: —

"First — Any duly qualified elector has a right to vote for any competent person to fill an office for which a person is to be elected at the election at which he desires to vote, whether or not such person for whom he desires to vote has been so nominated that his name is printed upon the official ballot. Any ballot act which does not afford all voters, whether illiterate or not, an opportunity and reasonable facilities for voting for such a person is unconstitutional.

"Second — If a secret ballot act prescribing an official ballot does not permit the voter to write upon the ballot the name of the person for whom he desires to vote, whose name is not borne upon the official ballot, or to vote for such person by a paster placed upon such ballot, or by some other method, the act is unconstitutional.

"Third — Such a ballot act must enable voters who, by reason of ignorance or physical disability, cannot write, to have the assistance of a competent person to write upon, or to affix to the official ballot the name of a person not borne upon it, but for whom they desire to vote, and that assistance must be allowed to such an extent, and in such a manner, that the illiterate or disabled person may be certain that the name of the person he desires to vote for has been placed upon the ballot, otherwise it is unconstitutional. James C. Carter, John F. Dillon, George Bliss, John E. Parsons, W. B. Hornblower, W. H. Peckham, Hugh L. Cole, Elihu Root, Francis L. Stetson, Joseph H. Choate."

In Cook *v.* State, 90 Tenn., 407; s. c. 16 S. W. Rep., 471, it was held that a law was constitutional which compelled each voter without assistance to mark the names of the candidates whom he selected. But see State *v.* Dillon, 32 Florida, 545; s. c. 14 Southern Rep., 383; *supra*.

[18] Easton *v.* Brown, 96 Cal., 371, 373.

§ 59. [1] See the Constitution of Mississippi.

each extension has been made from those of the community with the largest wealth and the deepest learning.[2] But they have not been justified. History proves that, in all ages, wherever power has been vested in a class, no matter how intelligent, they have exercised it by legislation oppressive to those who were disfranchised, and that even if selfishness can be eliminated, ignorance of the wants of the disfranchised produces a similar result. For proof of this we need not go back to the republics of Greece and Rome, to the Italian cities of the middle ages, or even to England and France during the eighteenth century. It is evident in the unfair treatment of the Hindoos by Great Britain at the present time, in the legislation against the colored freedmen in the South before the adoption of the Fourteenth and Fifteenth Amendments, in the liquor and Sunday laws, with which the inhabitants of the country districts still oppress the poorer classes in New York city.[3] All of these were and are supported by a large majority of those with the greatest amount of property and the most scholastic education, and in the latter case, undoubtedly, in the benevolent belief that the poor will be benefited by the denial of privileges which they themselves can exercise. The possession of wealth does not destroy selfishness, nor the study of books give a knowledge of the wants of human nature.[4] The instinct of the people

[2] Webster and Kent both opposed the removal of property qualifications. See the debate in the New York Constitutional Convention of 1821, and that of Massachusetts in 1820.

[3] In August, 1895, a man was arrested in New York City for selling ice on Sunday to the inmates of tenement houses. See the New York World for that month.

[4] "It is a fact, the full significance of which has not yet been perceived by the masses, that the condition of society which renders the right of entry to the institutions for higher education the almost exclusive privilege of wealth, tends, from the close connection of these institutions with the intellectual life of society, to render them (however much they may, and do, from the highest motives endeavor to resist such tendency) influences retarding to a considerable degree the progress of the development which society is undergoing.

"We have, consequently, at the present day, in most of our advanced societies the remarkable phenomenon of the intellectual and educated classes at first almost invariably condemning and resisting the successive steps in our social development, uttering the most gloomy warnings and forebodings as these steps have been taken — and then tardily justifying them when they have become matters of history; that is to say, when approval or disapproval has long ceased to be of practical importance. It has to be confessed that in England during the

is usually wiser than the theory evolved in his library by a philosopher. In a state of civilization, where some of the richest do not own a rood of land, the limitation of the suffrage to freeholders is manifestly absurd, as well as impracticable. No logical line of demarcation can be drawn between the owners of personal property, which should divide a governing from a subject class, unless all tax-payers are included in the first. The limitation of the right to vote to tax-payers is still tried in some States, but has become an expensive farce, since it only results in an increase of the cost of the campaign, without raising the intelligence of the voters. For the poll-taxes of the poor are paid by the political parties who expect to receive their votes. More plausible are the arguments in favor of an educational qualification; but this requires a degree of impartiality in the examiners such as is rarely found among politicians or public servants. The section of the Constitution shown to the voter is first taught him by heart, as was the neck-verse to the malefactors who wished to plead benefit of the clergy.[5] Moreover, the uneducated need protection from oppression even more than those who have been to school.

But the opponents of universal suffrage contend that, although there may be danger of class tyranny in an oligarchy, there is far more in a democracy; and that tyranny by the lowest class, which is without property and education, is the most oppressive of all. The history of the United States does not support the claim. A careful student of the different periods since the declaration of

nineteenth century the educated classes, in almost all the great political changes that have been effected, have taken the side of the party afterward admitted to have been in the wrong — they have almost invariably opposed at the time the measures they have subsequently come to defend and justify. This is to be noticed alike of measures which have extended education, which have emancipated trade, which have extended the franchise. The educated classes have even, it must be confessed, opposed measures which have tended to secure religious freedom and to abolish slavery. The motive force behind the long list of progressive measures carried during this period has in scarcely any appreciable measure come from the educated classes; it has come almost exclusively from the middle and lower classes, who have in turn acted not under the stimulus of intellectual motives, but under the influence of their altruistic feelings." (Kidd, Social Evolution, American ed., pp. 252–353.)

[5] See Gray's notes to Hudibras.

independence must be convinced that the character of public men is quite as high now as it was before the suffrage was enlarged. And when we compare the corruption in France, under Napoleon III, with the condition of affairs under the present French republic, there can be no doubt as to the superiority of the latter. The approval of the two Napoleons by plebiscites was, in so far as it was voluntary,[6] due to a preference for the will of one strong man, who could preserve order and save property from pillage, over an oligarchy subject only to the threats of the mob at Paris, who not only denied local self-government to the provinces, but were powerless to enforce their own orders, and threatened legislation of the most communistic character.

In the Spanish-American so-called republics, where suffrage is nominally universal, by means of suspensions of the constitution and the declaration of states of siege, the maintenance of soldiers at the polls, and manipulation of the count, the cast of the ballot is an idle ceremony, and the real government a military despotism. Neither France nor America, south of the United States, has local self-government, or courts which are empowered to uphold the written constitutions.

At the present time there is a growing feeling that much mischief has been caused by the liberal extension of the suffrage to foreigners; and the recent New York Constitution shows a reaction in the other direction. But if their immigration is to be allowed, not only their own interests but those of the community seem to demand that they have a voice in making the laws and in selecting those who are to enforce them, if they are to obey those laws and officers, and not to suffer injustice and persecution. No student of life to-day in our great cities, as well as in those of Europe, can fail to be impressed by the constant discrimination on grounds of race and religion by public officials, some of them judicial, whose duties bring them into contact with the poor, and by the need of protection through a share in the government to immigrants of despised races, if they are to be permitted to pursue their trades unmolested.[7]

[6] See Lieber, Civil Liberty, Appendix I.

[7] The testimony before the Lexow Committee, appointed by the New York Senate in 1894, furnishes abundant proof of this. In the case of

The only facts in the United States that support the opponents of universal suffrage are the corruption in the South coincident with the extension of the franchise to the blacks; the maladministration of our great cities in recent times; and the present condition of our State legislatures. But the thefts of the colored legislatures of the South were not the result of the extension of the suffrage to the blacks, but of their support by corrupt Federal officials and the Federal army. As soon as the troops were removed, the influence of property and education gained their normal balance. Even in the States where the negroes are in a majority, the white race has ruled. In but one of them, Mississippi, has it been considered necessary to disfranchise the illiterate and non-taxpayers. While the effect of the ballot in the hands of the blacks has been such that their leaders, many of whom are men of a very high degree of intelligence as well as zeal, can point out no governmental acts which are unjust to them in any States, and confine their complaints to social grievances.[8] Were the colored race again disfranchised, there can be little doubt but that the Fourteenth Amendment would be inadequate to give them full protection, not only from oppressive legislation in the South, but even from oppressive administrative government in the North.

The source of the corruption in the cities of the North, when analyzed, will be found to lie rather in the acts of State legislatures, where the cities' representatives are in a minority, than in those of the municipal officials unbuttressed from without. The condition of the State legislatures is the most crying disgrace to universal suffrage; but, upon inspection, they seem to be little worse than those chosen when freeholders had the exclusive right to share in the election of upper houses;[9] and they are far

People *ex rel.* Nechamcus *v.* Warden of City Prison, 144 N. Y., 529, where the writer was counsel, it was admitted that it was almost impossible for a Polish Jew to obtain a license to act as a master or employing plumber in New York City.

[8] See the Afro-American Notes, and correspondence, especially that of T. Thomas Fortune, in the New York Sun, which are of great interest to students of sociology. See also Justice and Jurisprudence, by a colored enthusiast; and the remarkable symposium on negro suffrage in the North American Review, vol. 128. The South Carolina Convention, now in session, seems resolved to follow the example of Mississippi.

[9] See the illustrations in Ham-

superior to the parliaments elected by the rotten boroughs of England. Upon close examination, it will be found that the larger number of their members, in matters which immediately affect their constituents, and those which relate to the State at large, follow the wishes, and usually the interests, of those who elected them; and that their misdeeds, blackmail and bribes, are confined to bills which relate to other constituencies, the remedy for which will eventually be found in new provisions in State constitutions to secure home-rule for cities, and establish local self-government, free from interference by the State as well as the national legislature. They can no more properly be charged to the account of self-government by universal suffrage than can the castle rule and despotic acts of the magistrates appointed from the class of land-owners be treated as supported by the public sentiment of Ireland.

In every struggle for control, property and education will in the end outweigh poverty and illiteracy, although the latter have the numerical advantage. The leaders of the French revolution were outcast noblemen, such as Mirabeau, Talleyrand and Barras, and clientless members of the learned professions, such as Robespierre and Marat. The reconstructed governments in the South were headed, and the greater part of the spoils retained, by educated white adventurers, who cajoled the colored vote, and were supported by Northern bayonets. And as soon as the army was removed, the tax-payers had no difficulty in assuming and retaining political power. The absolute control of private credit, and the power to give employment to labor, will always, in the end, afford to the owners of capital ample protection for the legitimate use of property which they have legitimately acquired.

The great danger of universal suffrage, of mob-rule as it is called by its enemies, consists in its liability to sudden gusts of passion, which cause ill-considered acts for the destruction of property and for repudiation, intended to injure the fortunate few, which ultimately react against all. Sectional differences in the location of creditors and wealth make these more likely to occur and harder

mond's Political History of New York and The Political Depravity of the Fathers, by John Bach McMaster, Atlantic Monthly, vol. lxxv, p. 626.

to control.[10] Ample protection against them has been afforded hitherto by the barriers of written constitutions enforced by the courts, in which the conservative elements of the community have always found adequate representation; and the breathing space which their resolute action has compelled has been to the present enough to give time for the passion to subside, and common sense again to resume its sway.

These words, however, are not intended as an argument in favor of universal suffrage for all times and peoples. That many of the human race are, in their present condition, incapable of self-government, and need despotic rule to preserve order and save from theft the fruits of toil and self-denial, cannot be doubted. That where the land is in the hands of a small class, of a race different from the majority, it will be better for their interests to keep the rule in their own hands, is as clear as that it is foolish to drive a horse without a bridle. Although a small property test has been proved to be impracticable, except as a transitional expedient, and

[10] "If we should extend our candor so far as to own that the majority of mankind are generally under the dominion of benevolence and good intentions, yet it must be confessed that a vast majority frequently transgress, and, what is more decidedly in point, not only a majority, but almost all, confine their benevolence to their families, relations, personal friends, parish, village, city, county, province, and that very few indeed extend it impartially to the whole community. Now, grant but this truth and the question is decided. If a majority are capable of preferring their own private interests or that of their families, counties, and party, to that of the nation collectively, some provision must be made in the Constitution in favor of justice, to compel all to respect the common right, the public good, the universal law in preference to all private and partial considerations."

"Of all possible forms of government a sovereignty in one assembly, successively chosen by the people, is, perhaps, the best calculated to facilitate the gratification of self love, and the pursuit of the private interest of a few individuals. A few eminent, conspicuous characters will be continued in their seats in the sovereign assembly from one election to another, whatever changes are made in the seats around them. By superior art, address, and opulence, by more splendid birth, reputations, and connections they will be able to intrigue with their people and their leaders out of doors, until they worm out most of their opposers and introduce their friends. To this end they will bestow all offices, contracts, privileges in commerce and other emoluments on the latter, and their connections." Adams, Defence of American Constitutions, vol. iii, Letter 6, pp. 215–216. See North American Review, Oct., 1827, p. 263; Story on the Constitution, 5th ed., § 552.

a poll-tax is paid by the managers of the political parties, it may be that where the majority is entirely illiterate, an educational qualification is essential. But every such case hitherto has been accompanied by injustice toward those who were disfranchised. And wherever the illiterate have been few, as in the Northern States of the Union, no harm to the rest can be perceived to have followed their admission to the right of suffrage, while they have benefited by the ballot as a means of self-protection. As the condition of the human race advances, there can be no doubt that universal manhood suffrage will eventually spread throughout the civilized world.[11] Whether it will be accompanied by the admission of women to the franchise is a question, an answer to which seems premature.

[11] The first suggestion of universal manhood suffrage that I have found was in the council of officers of Cromwell's army, when a form of government was prepared by them. (See the Clarke Papers, vol. i, pp. 307–330. It seems to have been first established by the Vermont Constitution of 1777. It was first introduced in Europe by the National Convention. (Constitution du 24 Juin 1793; Hélie, Constitutions de la France.)

CHAPTER VII.

NECESSARY QUALIFICATIONS FOR SENATORS AND REPRESENTATIVES.

§ 60. Constitutional Provisions concerning Qualifications of Members of Congress.

THE next clause in the Constitution provides that —

"no Person shall be a Representative who shall not have attained to the Age of twenty-five Years and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."[1]

It seems more convenient to consider the qualifications of a representative and of a senator together. A subsequent clause provides that —

"no Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."[2]

A still later provision is that "no Person holding any office under the United States, shall be a member of either House during his continuance in Office."[3] This last clause will be discussed later in the section on disqualifications from office.[4] The Fourteenth Amendment provides that "no person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as the executive or judicial officer of any State, to support the Constitution of the United

§ 60. [1] Constitution, Article I, Section 2. For the provisions of the Confederate Constitution on this subject, see *supra*, § 37.

[2] Constitution, Article I, Section 3.

[3] Constitution, Article I, Section 6.

[4] *Infra*.

States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House remove such disability."[5] Nearly all the disabilities of the survivors of the Civil War have been removed. While they were in force, it was held that the election to the House or Senate of a person laboring under a disability imposed by the Fourteenth Amendment was voidable, not void, and that a subsequent removal of the disability entitled him to his seat.[6]

§ 61. History of Provisions concerning Qualifications of Members of Congress.

In 1787, the law of England required, as it does still, that no person should sit in either house of Parliament until he had attained his majority; but two of the greatest leaders of the House of Commons — Shaftesbury and Fox — took their seats when under twenty-one; and in earlier times the custom was as common as the appointment of minors to high military office.[1] The other qualifications for membership in the House of Commons, at that time, were, besides citizenship and certain negative disqualifications imposed by law, the ownership of a freehold with an estate worth at least three hundred pounds a year, with exceptions in favor of the eldest sons of peers and members of the universities.[2] It was, however, the custom to circumvent the law by the transfer of a small piece of property from one member to another, so as to qualify each to take the necessary oath.[3] The requisite qualifications for membership in the different colonial and early State assemblies were various, although usually the right of membership was confined to freeholders or the owners of a specified amount of property, or taxpayers: and occasionally higher qualifications were required for member-

[5] Fourteenth Amendment, Section 3.

[6] R. B. Butler's Case, House Contested Election Cases, 1855-1871, p. 464; Young's Case, ibid.; Ransom v. Abbott, Taft's Senate Election Cases, continued by Furber, pp. 300, 305.

§ 61. [1] Shaftesbury sat in Parliament when only nineteen (Traill's Shaftesbury, p. 18.) Fox at the same age. In one of the Parliaments of James I there were forty members who were under age, some not more than sixteen (Traill's Shaftesbury, p. 18, note). See *infra*, note 6.

[2] Blackstone's Commentaries, vol. i, p. 176.

[3] May, Constitutional History, vol. i.

ship in the upper than the lower house.[4] In all of them, the law required that each member should be of full age; but this requirement there, as in England, was sometimes waived. In some, clergymen were disqualified, — an injustice which the Federal Convention wished not to extend to Congress. In South Carolina till 1790, and in New Hampshire, until 1877, all who did not adhere to the Protestant religion were excluded.[5] In all, the law required that each member should be of full age; but this requirement there, as in England, was sometimes waived.[6]

The provisions concerning the requisite age for senators and representatives were adopted with little discussion in the Federal Convention. The evident object was to secure sufficient maturity of judgment; and greater age was required for a senator than for a representative, on account of the greater importance of the duties of the former office. The only division upon this point in the Convention was upon a motion to disqualify from membership in the House all under twenty-five years of age, — the period of minority and of disqualification from the right of suffrage usually

[4] Poore's Charters and Constitutions, *passim*.

[5] Ibid., pp. 1286, 1298, 1309, 1623.

[6] The following incident is described in Warfield's Kentucky Resolutions of 1798, pp. 52–53: John Breckenridge "was about to set out from home for his third year at college when he was elected to represent his county in the House of Delegates. This was in the autumn of 1780, when he was only nineteen years of age. He had made no canvass, and was in no true sense a candidate. His election was the result of one of those silent movements when men are brought, under the pressure of events, to select those who can best represent them, without regard to the much pressed claims of office seekers. No one could have been more surprised at his election than was John Breckenridge himself, but he cheerfully undertook the task imposed upon him, and set out for Williamsburgh. The House of Delegates, however, set aside the election on account of his youth, feeling, no doubt, that the choice was both unprecedented and out of place in a time so full of danger and demanding the most far-sighted counsels. But the hardy frontiersmen had not made their choice without being convinced of its wisdom, and promptly re-elected Mr. Breckenridge. The House again set the election aside, and again the electors cast their ballot as before, and this time the election was acquiesced in, and the young student left his academy pursuits in the one part of the town, and took his seat in the council hall at the other."

Henry Clay was elected to the Senate of the United States, took his seat and occupied an influential position there before he was thirty. (Shurz, Clay, vol. I, pp. 38–39.)

imposed in countries that have adopted the system of jurisprudence founded on the civil law, which is less liberal than the common law to youth.[7] Some debate took place upon the question as to the length of citizenship which should be requisite. In the report of the committee of detail, a citizenship of four years for the Senate and three years for the House was all that was required.[8] Subsequent changes were made after some debate, a minority fearing lest the enlarged restriction might discourage immigration.[9] Before the reference of the original resolutions to the committee of detail, attempts were made to disqualify pensioners and "persons having unsettled accounts with, or being indebted to, the United States;" but Gouverneur Morris showed that this clause would empower the officers of the treasury, by delaying settlements, to disqualify all who had previously been in office, and that all importing merchants were continually in debt to the United States. So the propositions were defeated by large majorities.[10]

[7] "Col. Mason moved to insert 'twenty-five years of age as a qualification for the members of the first branch.' He thought it absurd that a man to-day should not be permitted by the law to make a bargain for himself, and to-morrow should be authorized to manage the affairs of a great nation. It was the more extraordinary, as every man carried with him, in his own experience, a scale for measuring the deficiency of young politicians; since he would, if interrogated, be obliged to declare that his political opinions at the age of twenty-one were too crude and erroneous to merit an influence on public measures. It had been said, that Congress had proved a good school for our young men. It might be so, for anything he knew; but if it were, he chose that they should bear the expense of their own education." "Mr. Wilson was against abridging the rights of election in any shape. It was the same thing whether this were done by disqualifying the objects of choice, or the persons choosing. The motion tended to damp the efforts of genius and of laudable ambition. There was no more reason for incapacitating *youth* than *age*, where the requisite qualifications were found. Many instances might be mentioned of signal services, rendered in high stations to the public, before the age of twenty-five. The present Mr. Pitt and Lord Bolingbroke were striking instances. On the question for inserting 'twenty-five years of age,' Connecticut, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, ay, 7; Massachusetts, Pennsylvania, Georgia, no, 3; New York, divided." (Madison Papers, Elliot's Debates, 2d ed., vol. v, pp. 228–229.)

[8] Madison Papers, Elliot's Debates, 2d ed., vol. v, p. 377.

[9] Ibid., pp. 389, 398–401.

[10] Ibid., pp. 370–374.

In the report by the committee of detail, it was required that a member of each house should be a resident of the State which he represented.[11] The change from resident to inhabitant was made by unanimous consent at the motion of Roger Sherman, seconded by Madison, upon the ground that inhabitancy was more easily determined than residence.[12] The last resolution referred to this committee of detail was: —

"Resolved, That it be an instruction to the committee to whom were referred the proceedings of the Convention for the establishment of a national government, to receive a clause, or clauses, requiring certain qualifications of property and citizenship in the United States for executive, the judiciary, and the members of both branches of the legislature of the United States."

The report of this committee provided that "the legislature of the United States shall have authority to establish such uniform qualifications of the members of each House, with regard to property, as to the legislature shall seem expedient."[13] The explanation of this part of the report, as given by a member of the committee, is the best statement of the objections to such a qualification: —

"The committee had reported no qualifications, because they could not agree among themselves, being embarrassed by the danger, on one side, of displeasing the people by making them too high, and on the other of rendering them nugatory by making them too low."[14]

Upon the consideration of the report, Pinckney moved that the Constitution should contain a provision requiring a property qualification for the President, judges and members of Congress.

[11] Madison Papers, Elliot's Debates, 2d ed., vol. v, p. 377.

[12] "Mr. Sherman moved to strike out the word 'resident' and insert the word 'inhabitant,' as less liable to misconstruction. Mr. Madison seconded the motion. Both were vague, but the latter least so in common acceptation, and would not exclude persons absent occasionally, for a considerable time, on public or private business. Great disputes had been raised in Virginia concerning the meaning of residence as a qualification of representatives, which were determined more according to the affection or dislike to the man in question than to any fixed interpretation of the word." Madison Papers, Elliot's Debate's, 2d ed., vol. v, p. 389; see also pp. 390 and 401.

[13] Ibid., pp. 376–378.

[14] Rutledge; ibid., p. 403.

"Were he to fix the quantity of property which should be required, he should not think of less than one hundred thousand dollars for the President, half of that sum for each of the judges, and in like proportion for the members of the national legislature. He would, however, leave the sums in blank." [15]

"Dr. Franklin expressed his dislike to everything that tended to debase the spirit of the common people. If honesty was often the companion of wealth, and if poverty was exposed to peculiar temptation, it was not less true that the possession of property increased the desire for more property. Some of the greatest rogues he was ever acquainted with were the richest rogues. We should remember the character which the Scripture requires in rulers, that they should be men hating covetousness. This Constitution will be much read and attended to in Europe; and if it should betray a great partiality to the rich, will not only hurt us in the esteem of the most liberal and enlightened men there, but discourage the common people from removing to this country. The motion of Mr. Pinckney was rejected by so general a no that the States were not called." [16]

"Mr. Madison was opposed to the section, as vesting an improper and dangerous power in the legislature. The qualifications of electors and elected were fundamental articles in a republican government, and ought to be fixed by the Constitution. If the legislature could regulate those of either, it can by degrees pervert the Constitution." He referred also to the abuses in the acts of Parliament regulating the qualifications of members. "They had made the changes, in both cases, subservient to their own views or to the views of political and religious parties." [17]

The whole section was thrown out by the vote of seven States to three,[18] and the Convention proceeded to fix the length of citizenship as previously stated.

Time has proved the wisdom of this proceeding. It has been found that the people can protect themselves, and that there is no benefit in imposing obstacles to their choice. Property qualifications for membership in their legislatures have now been abolished in all the United States, and usually residence for a specified

[15] Madison Papers, Elliot's Debates, 2d ed., vol. v, p. 403.

[16] Ibid.

[17] Ibid., p. 404.

[18] The question was whether they should agree to the section: New Hampshire, Massachusetts, Georgia, ay, 3; Connecticut, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, no, 7. (Ibid., p. 404.)

time within the State or district, and the age of twenty-one years, are the sole qualifications required for membership in either House. In one State a member of the upper house must be thirty,[19] and in two twenty-five years of age.[20] In Delaware a representative must be twenty-four years of age.[21] Some States make officers of the United States and judicial or municipal officers ineligible,[22] but in most the people have wisely allowed the voters of each district to choose their representatives in the legislature with few restrictions. It is the constant practice in Great Britain and France for the constituents to choose representatives irrespective of their places of residence. In the United States local prejudice rarely permits this in the case of members of Congress where it is allowed, and it is usual in State constitutions to forbid it in the election of members of the State legislature. The former practice, by the broader choice which it affords, is apt to secure the election of abler men; but by the latter the representative is more apt to be acquainted with the wishes of his constituents and to obey them.[23]

[19] New Jersey Constitution, Article IV, Section 2.

[20] Illinois Constitution, Article V, Section 3, and North Dakota Constitution, Article II, Section 28.

[21] Delaware Constitution, Article II.

[22] New York, Article III, Section 8; Florida, Article III, Section 7; Illinois, Article V, Section 3; Iowa, Article III, Section 6. In the Republic of Hawaii, "In order to be eligible to election as a senator, a person shall be a male citizen of the Republic; have attained the age of thirty years; be able understandingly to speak, read, and write the English or the Hawaiian language; have resided in the Hawaiian Islands not less than three years; be the owner, in his own right, of property in the Republic of the value of not less than three thousand dollars over and above all incumbrances; or have been in the receipt of a money income of not less than twelve hundred dollars during the year immediately preceding the date of the election, for the proof of which he may be required to produce original accounts of the receipt of such income" (Article 56).

Similiar qualifications as to citizenship, previous residence and education are required of representatives. The requisite age for a representative is twenty-five years; and the property qualification, one thousand dollars net of principal, or an income for the past twelve months of six hundred dollars (Article 58).

[23] It is hard to believe that a speech like that of Burke to the electors of Bristol could have been made by a candidate for Congress in the United States.

§ 62. Congressional Decisions on Qualifications of Senators and Representatives.

The word "inhabitant" has a different meaning from "resident." Residence implies permanency, or at least an intention to remain. Habitancy may be temporary. A man's residence is often a legal conclusion from statements showing his intention. Habitancy is a physical fact which may be proved by eye-witnesses.[1] It was held by the Senate that an army officer stationed in Mississippi might be elected senator from that State if he had announced his intention to permanently reside there, although he was originally appointed from another State.[2] It was held by the House of Representatives that a citizen of Massachusetts who was a clerk in the Department of State at Washington, was not an inhabitant of any State, and was consequently ineligible to a seat in Congress;[3] but that a minister of the United States, while discharging his official functions at a foreign court, did not cease to be an inhabitant of the State from which he was appointed, and might be elected to Congress.[4] In the cases of Albert Gallatin, afterward Secretary of the Treasury,[5] and James Shields,[6] of Illinois, the Senate refused admission to the persons elected, upon the ground that

§ 62. [1] See the remarks of Madison in the Federal Convention, *supra*, § 61, note 12. McCrary says, in McCrary on Elections (3rd ed.), § 289: "It would seem that the framers of the Constitution were impressed with a deep sense of the importance of an actual *bona fide* residence of the representative among the constituency, — a residence in the sense of actual living among them and commingling with them, — and therefore employed the term inhabitant in the sense of living or abiding, and not in the sense of technical residence."

[2] Case of Adelbert Ames, Taft's Senate Election Cases, continued by Furber, p. 279.

[3] Electors *v.* Bailey, Cl. & Hall, 411.

[4] Case of John Forsyth of Georgia, Cl. & Hall, 497. McCrary says of this case, in McCrary on Elections (3d ed.), § 290: "The foreign representative carries with him the sovereignty of the government to which he belongs; his rights as a citizen are not impaired by his absence; children born in the house he occupies are considered as born within the territory and jurisdiction of the government in whose service he is; he does not possess the capacity, by residence in the foreign country, to become one of its citizens, or to lose his allegiance to the country from which he comes. None of these things attach to those persons who are employed in the home service of the government."

[5] Taft's Senate Election Cases, continued by Furber, p. 61; see also Life of Albert Gallatin, by Henry Adams, pp. 119, 120.

[6] Taft's Senate Election Cases, continued by Furber, p. 122.

they had not been citizens of the United States for the requisite term of years. The certificate of the governor of a State that the person elected a senator is a citizen thereof is sufficient *prima facie* evidence of the fact.[7] Notwithstanding the decision in the Dred Scott case,[8] it was held that a person of African blood might be elected to the Senate within less than nine years after the adoption of the Fourteenth Amendment.[9] The States have no power to add to the qualifications which are required for a senator or representative; and all provisions in their statutes or constitutions which forbid a member of the legislature or other State officer from being chosen senator have been rejected by the Senate as void.[10] A sen-

[7] Case of Stanley Griswold. Taft's Senate Election Cases, continued by Furber, p. 78.

[8] Dred Scott *v.* Sandford, 19 How., 393.

[9] Revels' Case, Taft's Senate Election Cases, continued by Furber, p. 274.

[10] Cases of Lyman Trumbull, Taft's Senate Election Cases, continued by Furber, p. 132, and Lucas V. Faulkner, ibid., 626. Judge Story's comments on this point are instructive: "A question, however, has been suggested upon this subject which ought not to be passed over without notice. And that is, whether the States can superadd any qualifications to those prescribed by the Constitution of the United States. The laws of some of the States have already required that the representative should be a freeholder, and be resident within the district for which he is chosen. If a State legislature has authority to pass laws to this effect, they may impose any other qualifications beyond these provided by the Constitution, however inconvenient, restrictive, or even mischievous they may be to the interests of the Union. The legislature of one State may require that none but a Deist, a Catholic, a Protestant, a Calvinist, or a Universalist shall be a representative. The legislature of another State may require that none shall be a representative but a planter, a farmer, a mechanic, or a manufacturer. It may exclude merchants and divines and physicians and lawyers. Another legislature may require a high moneyed qualification, a freehold of great value, or personal estate of great amount. Another legislature may require that the party shall have been born and always lived in the State, or district, or that he shall be an inhabitant of a particular town or city, free of a corporation, or an eldest son. In short there is no end to the varieties of qualifications which, without insisting upon extravagant cases, may be imagined. A State may, with the sole object of dissolving the Union, create qualifications so high and so singular that it shall become impracticable to elect any representative." Citing the Federalist, No. 52; 1 Tucker's Black Comm., App., 213.

"It would seem, but fair reasoning, upon the plainest principles of interpretation, that when the Constitution established certain qualifications as necessary for office, it meant to exclude all others as prerequisites. From the very nature of such a provision, the affirmation of these quali-

ator, "laboring under mental and physical debility, but not of un-

fications would seem to imply a negative of all others. And a doubt of this sort seems to have pervaded the mind of a learned commentator. A power to add new qualifications is certainly equivalent to a power to vary them. It adds to the aggregate what changes the nature of the former requisites. The House of Representatives seems to have acted upon this interpretation, and to have held that the State legislatures have no power to prescribe new qualifications, unknown to the Constitution of the United States. A celebrated American statesman, however, with his avowed devotion to State power, has intimated a contrary doctrine. 'If,' says he, 'whenever the Constitution assumes a single power out of many which belong to the same subject, we should consider it as assuming the whole, it would vest the general government with a mass of powers never contemplated. On the contrary, the assumption of particular powers seems an exclusion of all not assumed. This reasoning appears to me to be sound, but on so recent a change of view, caution requires us not to be overconfident.' He intimates, however, that unless the case be either clear or urgent, it would be better to let it lie undisturbed. It does not seem to have occurred to this celebrated statesman, that the whole of this reasoning, which is avowedly founded upon the amendment to the Constitution which provides that 'the powers not delegated nor prohibited to the States are reserved to the States respectively, or to the people,' proceeds upon a basis which is inapplicable to the case. In the first place, no powers could be reserved to the States, except those which existed in the States before the Constitution was adopted. The amendment does not profess, and, indeed, did not intend, to confer on the States any new powers, but merely to reserve to them what were not conceded to the government of the Union. Now, it may properly be asked, where did the States get the power to appoint representatives in the national government?" Citing Tucker's Black Comm., App., vol. i, p. 213; Jefferson's Correspondence, vol. iv, pp. 238,239. "Was it a power that existed at all before the Constitution was adopted? If derived from the Constitution, must it not be derived exactly under the qualifications established by the Constitution, and none others? If the Constitution has delegated no power to the States to add new qualifications, how can they claim any such power by the mere adoption of that instrument, which they did not before possess? The truth is, that the States can exercise no powers whatsoever which exclusively spring out of the existence of the national government, which the Constitution does not delegate to them. They have just as much right, and no more, to prescribe new qualifications for a representative, as they have for a President. Each is an officer of the Union, deriving his powers and qualifications from the Constitution, and neither created by, dependent upon, nor controllable by the States. It is no original prerogative of the State power to appoint a representative, a senator, or President for the Union. Those officers owe their existence and functions to the united voice of the whole, not of a portion of the people. Before a State can assert the right, it must show that the Constitution has delegated and recognized it. No State can say that it has reserved what it never possessed. Besides,

sound mind," was admitted.[11] It would probably be held that a lunatic was disqualified as an exception recognized by the common law and included in the Constitution by implication.[12] The disqualification of the candidate with the highest number of votes does not entitle his competitor to a seat in Congress.[13] During the Civil War, and before the adoption of the Fourteenth Amend-

independent of this, there is another fundamental objection to the reasoning. The whole scope of the argument is, to show that the legislature of the State has a right to prescribe new qualifications. Now, if the State in its political capacity had it, it would not follow that the legislature possessed it. That must depend upon the powers confided to the State legislature by its own constitution. A State, and the legislature of a State, are quite different political beings. Now it would be very desirable to know in which part of any State constitution this authority, exclusively of a national character, is found delegated to any State legislature. But this is not all. The amendment does not reserve the powers to the States exclusively, as political bodies, for the language of the amendment is, that the powers not delegated, etc., are reserved to the States or to the *people*. To justify, then, the exercise of the power by a State, it is indispensable to show that it has not been reserved by the people of the State. The people of the State, by adopting the Constitution, have declared what their will is, as to the qualifications for office. And here the maxim, if ever, must apply, *expressio unius est exclusio alterius*. It might further be urged, that the Constitution, being the act of the whole people of the United States, formed and fashioned according to their own views, it is not to be assumed, as the basis of any reasoning, that they have given any control over the functionaries created by it to any State, beyond what is found in the text of the instrument. When such a control is asserted, it is matter of proof, not of assumption; it is matter to be established, as of right, and not to be exercised by usurpation, until it is displaced. The burthen of proof is on the State, and not on the government of the Union. The affirmative is to be established; the negative is not to be denied, and the denial taken for a concession.

"In regard to the power of a State to prescribe the qualification of inhabitancy or residence in a district, as an additional qualification, there is this forcible reason for denying it, that it is undertaking to act upon the very qualification prescribed by the Constitution, as to inhabitancy in the State, and abridging its operation. It is precisely the same exercise of power on the part of the States, as if they should prescribe that a representative should be forty years of age, and a citizen for ten years. In each case, the very qualification fixed by the Constitution is completely evaded and indirectly abolished." (Story on the Constitution, 5th ed., §§ 624–629, pp. 460–463.)

[11] Case of John M. Niles, Taft's Senate Election Cases, continued by Furber, p. 120.

[12] See *supra*, § 55, note 24. Burgess expresses this opinion in his Political Science, vol. ii, p. 52.

[13] *Infra*, Ch. XVI.

ment, the House of Representatives refused admission to members-elect who had been disloyal to the Union.[14] The Senate at first refused to pursue this practice,[15] although they expelled several members for disloyalty.[16] Finally, after the Fourteenth Amendment had passed both houses of Congress, and been ratified by three-fourths of the States there represented, but not by three-fourths of the entire number, the Senate refused to allow a Senator-elect to take the oath, or to hold a seat, upon the ground that he had "voluntarily given aid, countenance and encouragement to persons engaged in armed hostility to the United States."[17]

[14] Kentucky Election Cases, 2 Bart., 327, 368; McCrary on Elections, § 284.

[15] In the case of Benjamin Stark of Oregon, against whom charges of disloyalty were made, the Senate, Jan. 10, 1862, resolved that the oath be not administered to him until after the report of the committee on the judiciary upon his credentials and the charges, which were referred to them. On Feb. 7, 1862, the following report was made: —

"The Committee on the Judiciary, to whom were referred the credentials of Benjamin Stark, as Senator from the State of Oregon, with the accompanying papers, have had the same under consideration, and, without expressing any opinion as to the effect of the papers before them upon any subsequent proceedings in the case, they report the following resolutions: *Resolved*, that Benjamin Stark, of Oregon, appointed a Senator of that State by the governor thereof, is entitled to take the Constitutional oath of office." The resolution was amended by adding the words, "without prejudice to any subsequent proceedings in the case"; and thus passed by twenty-six yeas to nineteen nays, Feb. 27, 1862. Lyman Trumbull made a strong minority report in which he argued that disloyalty was a disqualification (see *infra*, note 20). After the oath had been administered to Stark the papers were referred to a select committee who after investigation reported, April 2, 1862, in favor of his expulsion. On June 6, 1862, a motion for his expulsion was negatived; there being sixteen yeas and twenty-one nays. (Taft's Senate Election Cases, continued by Furber, pp. 188–201.)

[16] Cases of James M. Mason, John C. Breckinridge, Trusten Polk, Waldo P. Johnson, Jesse D. Bright and others. (Ibid., pp. 741, 743, 744, 746, 748.)

[17] In the case of Philip F. Thomas of Maryland, Feb. 19, 1868, the following resolution was adopted after an investigation by the Committee on the Judiciary: *Resolved*, that Philip F. Thomas, having voluntarily given aid, countenance and encouragement to persons engaged in armed hostility to the United States, is not entitled to have the oath of office as a Senator of the United States from the State of Maryland, or to hold a seat in this body as such Senator; and that the president *pro tempore* of the Senate inform the governor of the State of Maryland of the action of the Senate in the premises." It was argued in the debate that the Fourteenth Amendment had been effectively ratified and that the excluded States should not be taken into consideration in that connection. (Ibid., pp., 237–243.)

It has since been held by the House of Representatives that a member duly elected could not be disqualified for a cause not named in the Constitution, such as immorality, and that the remedy in such a case, if any, was expulsion.[18] The distinction between the right to refuse admission and the right of expulsion upon the same ground is important, since the former can be done by a majority of a quorum, whereas expulsion requires the vote of two-thirds.[19] The question cannot be said to have been authoritatively decided. The principle that each house has the right to impose a qualification upon its membership which is not prescribed in the Constitution, if established, might be of great danger to the republic. It was on this excuse that the French Directory procured an annulment of elections to the Council of Five Hundred, and thus maintained themselves in power against the will of the people, who gladly accepted the despotism of Napoleon as a relief.[20]

[18] Maxwell v. Cannon, 43d Congress, cited in McCrary on Elections, 3d ed., § 590.

[19] Constitution, Article I, Section 5.

[20] The arguments in support of the right of either house to exclude for disloyalty are well set forth in the minority report of Lyman Trumbull in Stark's Case (ibid., pp. 190-191): "It is admitted that neither the Senate, Congress, nor a State can superadd other quallfications for a Senator to those prescribed by the Constitution, and yet either may prevent a person possessing all those qualifications, and duly elected, from taking his seat in the Senate. Does any one question the right of a State to arrest for crime a person duly qualified for and appointed Senator, hold him in confinement, and thereby prevent his appearing in the Senate to qualify? Suppose a Senator, after his appointment and before qualifying, to commit the crime of murder, would anyone question the right of the State authorities where the crime was committed to arrest, confine, and if found guilty execute the murderer, and thereby prevent his taking his seat? Or if the punishment for the offence was imprisonment, would any one question the right to hold the Senator in prison and thereby prevent his appearing in the Senate? Could the Senate in such a case expel him before he had been admitted to a seat? Or must he be brought from the felon's cell, be introduced into the Senate, and sworn as a member before his seat could be declared vacant? If not, must the State go unrepresented till the time for which he was appointed has expired? Or would it be competent for the Senate, in such a case, by a majority vote to declare the convict incompetent to hold a seat in the body, and thereby open the way for the appointment of a successor? It is manifest that the prescribing of the qualifications for a Senator in the Constitution was not intended to prevent his being amenable for his crimes. The fact that the Constitution declares that Senators and Representatives 'shall in all cases, ex-

cept for felony and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses, and in going to and returning from the same,' is conclusive that for those offences they may be arrested. As a punishment for crime, then, it is clear that a senator-elect, possessing all the Constitutional qualifications of age, citizenship and inhabitancy, may be prevented from taking the oath of office. Congress has repeatedly acted upon the presumption that it was entirely competent for it to prescribe, as a punishment for crime, an inability forever afterwards to hold any office of honor, profit or trust, under the United States." "If it be competent for Congress to make disqualification to hold office as punishment for an offence against the United States, then it is clearly competent for the Senate, which by the Constitution is made 'the judge of the elections, returns, and qualifications of its own members,' to do the same thing, so far as the right to take a seat in that body is concerned. Doubtless a law of Congress declaring that a person convicted of a particular offence should not hold office under the United States, and the decision of the courts sustaining such a law, would not preclude the Senate from admitting such a person to a seat, should it think proper, because the Senate is the exclusive judge of the elections, returns, and qualifications of its own members; yet it is hardly conceivable that the Senate ever would admit such a person to be sworn; nor does the fact that Congress has not adopted such a punishment for disloyalty or treason prevent the Senate from refusing to allow to be sworn as a member a person believed by the body to be guilty of those offences or other infamous crimes. That an armed traitor, a convicted felon, or a person known to be disloyal to the government, has a constitutional right to be admitted into that body, would imply that the Senate had no power of protecting itself — a power which, from the nature of things, must be inherent in every legislative body. Suppose a member sent to the Senate, before being sworn, were to disturb the body and by violence interrupt its proceedings, would the Senate be compelled to allow such a person to be sworn as a member of the body before it could cast him out? Surely not, unless the Senate is unable to protect itself and preserve its own order. The Constitution declares that 'each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.' The connection of the sentence in which the power of expulsion is given would indicate that it was intended to be exercised for some act done as a member, and not for some cause existing before the member was elected or took his seat. For any crime or infamous act done before that time, the appropriate remedy would seem to be to refuse to allow him to qualify, which, in the judgment of the undersigned, the Senate may properly do, not by way of adding to the qualifications imposed by the Constitution, but as a punishment done to his crimes or the infamy of his character." This argument, it will be observed, is based upon the assumption that a Senator cannot be expelled before he has been sworn and admitted to his seat.

CHAPTER VIII.

APPORTIONMENT OF REPRESENTATIVES AND DIRECT TAXES.

§ 63. Constitutional Provisions concerning Apportionment of Representatives and Direct Taxes.

THE next clause of the Constitution ordains: —

"Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of Free Persons, including those bound to service for a Term of Years, and excluding Indians not taxed, three-fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, and in such manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three."[1]

The Fourteenth Amendment: —

"Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in Congress, the executive or judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States, or in any

§ 63. [1] Article I, Section 2.

way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." [2]

§ 64. History of the Clause concerning the Apportionment of Representatives and Direct Taxes.

The clause concerning the apportionment of representatives and direct taxes was the second of the three great compromises of the Constitution, and the adjustment of a controversy which had been the cause of discord since the colonies first confederated together. Although so much thereof as applied to the apportionment of representatives has been materially modified, the other remains in the original language. Since the meaning of this is still the subject of a dispute between two sections of the country, the importance of the subject seems to demand a full consideration of the history of the proceedings which led to its adoption.

On the day after the meeting of the first Congress of the United States, September 6th, 1774, their first legislative act was adopted as follows: —

"Resolved, that, in determining questions in Congress, each colony shall have one vote, the Congress not being possessed of, or at present able to procure, proper materials for ascertaining the importance of each colony."

The advantage then secured by the smaller States they refused to relinquish and retained in the Articles of Confederation, which were adopted March 1st, 1781,[1] and until these were abrogated by the Constitution. The articles provided that —

"in determining questions in the United States, in Congress assembled, each State shall have one vote." [2]

The continuance of this rule was one of the chief obstacles to the formation of the Articles of Confederation. In 1777 it was proposed that Rhode Island, Delaware, and Georgia should each have one vote and the other States one vote for every fifty thousand white inhabitants; [3] but this was supported only by Virginia and

[2] Fourteenth Amendment, Section 2.

§ 64. [1] Curtis, Constitutional History, vol. i, p. 86.

[2] Article V.

[3] See Jefferson's Notes of Debate on Confederation in Congress, during July

Pennsylvania. A delegate from Virginia then moved that each State should have one vote for every thirty thousand such inhabitants, but no other State voted for the motion. By a similar vote, a motion that representation should be proportioned to the amount of taxes paid by each colony was negatived. Finally, after a debate of nearly two months, all the States in Congress yielded to the principle of State equality except Virginia, which subsequently ratified the Articles of Confederation that contained it.[4]

Before their adoption, the only financial means at the command of Congress were the continental paper currency, and loans from foreign nations and from provincial congresses, the latter of which exercised the power of taxation for their local efforts in the prosecution of the war. A quota of the currency was assigned to each colony, which was directed to discharge a fraction of the whole proportioned "to the number of inhabitants of all ages, including negroes and mulattoes," an obligation generally repudiated.[5] So limited were the revenues of Congress that Washington was obliged to impress supplies for the army, without which he could not have withstood the enemy.[6]

The eleventh article of Confederation in the original draft was as follows: —

"All charges of war, and all other expenses that shall be incurred for the common defence, or general welfare, and allowed by the United States assembled, shall be defrayed out of a common treasury, which shall be supplied by the several colonies in proportion to the number of inhabitants of every age, sex and quality, except Indians not paying taxes in each colony,— a true account of which, distinguishing the white inhabitants, shall be triennially taken, and transmitted to the Assembly of the United States."[7]

The Southern States, however, objected that it would be unfair

and August, 1777. Elliot's Debates, 2d ed., vol. i, pp. 70-78. Chase of Maryland proposed as a compromise "that, in votes relating to money, the voice of each colony should be proportioned to the number of its inhabitants." (Ibid., p. 74.)

[4] Towle, History and Analysis of the Constitution, 3d ed., p. 49.

[5] Journals, vol. i, p. 125, June 23, 1775; ibid., vol. i, p. 185-186, June 29, 1875; cited by Curtis, Constitutional History of the United States, vol. i, p. 22.

[6] See the remarks of Governor Clinton in the New York Convention (Elliot's Debates, 2d ed., vol. ii, p. 360); and of Grayson in the Virginia Convention (ibid., vol. iii, p. 290).

[7] Ibid., vol. i, p. 70.

to assess their colored bondsmen at the same value as the free white laborers of the North, since their work was far less efficient. The Southern delegates moved that the assessment be proportioned to the "white inhabitants." A compromise was suggested, which the South was willing to accept, "that two slaves should be counted as one freeman." [8] Both propositions were rejected by the seven Northern against five Southern States, Georgia being divided.[9] As a compromise the requisitions were proportioned to the value of land in each State, which was then believed by many to correspond to the population; but no power to collect taxes was given to Congress which was authorized merely to assess a requisition upon a State to be collected by the State legislature if it chose to act upon the subject. The Eleventh Article as finally adopted was in these words: —

"All charges of war and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted or surveyed for any person, and such land, and the buildings or improvements thereon, shall be estimated according to such mode as the United States in Congress assembled shall from time to time direct and appoint. The taxes for paying that proportion shall be levied and paid by the authority and direction of the legislatures of the United States in Congress assembled." [10]

This system proved absolutely impracticable. Four States paid nothing toward the requisitions which Congress levied; and all but two, less than the amount required of them.[11] The unfairness of the assessment, which must always be a ground of controversy wherever the value of land is an element in the computation, was an excuse set up by some of the delinquent States; but the feeling against them ran high in Congress, and more than once it was proposed to use force to collect the balances.[12] The bank-

[8] Ibid., vol. i, p. 72; vol. v, p. 79.

[9] August 1, 1777. Ibid., vol. i, pp. 73-74.

[10] Article VIII.

[11] See § 3, note 1, *supra*. In 1786, Rhode Island and New Jersey passed laws to make their own paper money sufficient payment of all arrears due from them to the United States. Congress naturally protested. Journals XI, p. 224; Curtis, Constitutional History, vol. i, p. 163.

[12] Elliot's Debates, 2d ed., vol. iii, p. 243.

ruptcy of the treasury and the depreciation of the continental currency at the close of the war, when foreign sovereigns had no longer any incentive to continue loans originally made for use in crippling England, made some new measure of finance indispensable. On March 6th, 1783, the Committee on Revenue reported to Congress a series of resolutions which proposed that the States grant to Congress for the period of twenty-five years and for the purpose of paying "the debts which shall have been contracted on the faith of the United States for supporting the present war," the power to levy an impost or tariff of five per cent, upon all importations, with special rates on salt, liquors, tea and sugar. They further recommended: —

"11. That, as a more convenient and certain rule of ascertaining the proportions to be supplied by the states, respectively, to the common treasury, the following alteration, in the Articles of Confederation and perpetual Union between these states, be, and the same is, hereby agreed to in Congress; and the several states are advised to authorize their respective delegates to subscribe and ratify the same, as part of the said instrument of union, in the words following, to wit: —

"'So much of the eighth of the Articles of Confederation and Perpetual Union between the thirteen states of America as is contained in the words following, to wit: "All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states, in proportion to the value of all land within each state granted to, or surveyed for, any person, and such land, and the buildings and improvements thereon, shall be estimated according to such mode as the United States in Congress assembled shall, from time to time, direct and appoint," is hereby revoked and made void, and in place thereof it is declared and concluded, the same having been agreed to in a Congress of the United States, that all charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states in proportion to the number of inhabitants, of every age, sex, and condition, except Indians not paying taxes in each state; which number shall be triennially taken and transmitted to the United States, in Congress assembled, in such mode as they shall direct and appoint; provided, always, that in such numeration no persons shall be included

who are bound to servitude for life, according to the laws of the state to which they belong, other than such as may be between the ages of —— years.' " [18]

In the debate upon the resolutions recommended in the report, on Thursday, March 27th, 1783: —

" Mr. Bland, in opposition, said, that the value of land was the best rule, and that, at any rate, no change should be attempted until its practicability should be tried.

" Mr. Madison thought the value of land could never be justly or satisfactorily obtained; that it would ever be a source of contentions among the states; and that, as a repetition of the valuation would be necessary within the course of twenty-five years, it would, unless exchanged for a more simple rule, mar the whole plan.

" Mr. Gorham was in favor of the paragraphs. He represented, in strong terms, the inequality and clamors produced by valuations of land in the state of Massachusetts and the probability of the evils being increased among the states themselves, which were less tied together, and more likely to be jealous of each other.

" Mr. Williamson was in favor of the paragraphs.

" Mr. Wilson was strenuous in their favor; said he was in Congress when the Articles of Confederation directing a valuation of land were agreed to; that it was the effect of the impossibility of compromising the different ideas of the Eastern and Southern States, as to the value of slaves compared with the whites, the alternative in question.

" Mr. Clark was in favor of them. He said, that he was also in Congress when this article was decided; that the Southern States would have agreed to numbers in preference to the value of land, if half their slaves only should be included; but that the Eastern States would not concur in that proposition.

" It was agreed, on all sides, that instead of fixing the proportion by ages, as the report proposed it, it would be best to fix the proportion in absolute numbers. With this view, and that the blank might be filled up, the clause was recommitted.

" Friday, March 28.

" The committee last mentioned reported that two blacks be rated as one freeman.

" Mr. Wolcott was for rating them as four to three.

" Mr. Carroll as four to one.

[18] Report of Debates in Congress of the Confederation, by Madison. Madison Papers, Elliot's Debates, 2d ed., vol. v, pp. 63–64.

"Mr. Williamson said, he was principled against slavery; and that he thought slaves an encumbrance to society, instead of increasing its ability to pay taxes.

"Mr. Higginson as four to three.

"Mr. Rutledge said, for the sake of the object, he would agree to rate slaves as two to one, but he sincerely thought three to one would be a juster proportion.

"Mr. Holten as four to three.

"Mr. Osgood said, he did not go beyond four to three.

"On a question for rating them as three to two, the votes were, New Hampshire, ay; Massachusetts, no; Rhode Island, divided; Connecticut, ay; New Jersey, ay; Pennsylvania, ay; Delaware, ay; Maryland, no; Virginia, no; North Carolina, no; South Carolina, no.

"The paragraph was then postponed, by general consent, some wishing for further time to deliberate on it, but it appearing to be the general opinion that no compromise would be agreed to.

"After some further discussions on the report, in which the necessity of some simple and practicable rule of apportionment came fully into view, Mr. Madison said, that in order to give a proof of the sincerity of his professions of liberality, he would propose that slaves should be rated as five to three. Mr. Rutledge seconded the motion. Mr. Wilson said, he would sacrifice his opinion on this compromise.

"Mr. Lee was against changing the rule, but gave it as his opinion that two slaves were not equal to one freeman.

"On the question for five to three, it passed in the affirmative; New Hampshire, ay; Massachusetts, divided; Rhode Island, no; Connecticut, no; New Jersey, ay; Pennsylvania, ay; Maryland, ay; Virginia, ay; North Carolina, ay; South Carolina, ay.

"A motion was then made by Mr. Bland, seconded by Mr. Lee, to strike out the clause so amended, and, on the question, 'Shall it stand?' it passed in the negative; New Hampshire, ay; Massachusetts, no; Rhode Island, no; Connecticut, no; New Jersey, ay; Pennsylvania, ay; Delaware, no; Rhode Island, no; Connecticut, no; North Carolina, ay; South Carolina, no; so the clause was struck out.

"The arguments used by those who were for rating slaves high, were that the expenses of feeding and clothing them was far below that incident to freemen, as their industry and ingenuity were below those of freemen; and that the warm climate within which the states having slaves lay, compared with the rigorous climate and inferior fertility of the others, ought to have great weight in the case, and that the exports of the former states were greater than of the latter. On the other

side, it was said that slaves were not put to labor as young as the children of laboring families; that, having no interest in their labor, they did as little as possible, and omitted every exertion of thought requisite to facilitate and expedite it; that if the exports of the states having slaves exceeded those of the others, their imports were in proportion, slaves being employed wholly in agriculture, not in manufactures, and that, in fact, the balance of trade formerly was much more against the Southern States than the others.

"On the main question, New Hampshire, ay; Massachusetts, no; Rhode Island, no; Connecticut, no; New York (Mr. Floyd), ay; New Jersey, ay; Delaware, no; Maryland, ay; Virginia, ay; North Carolina, ay; South Carolina, no." [14]

On April 18th, 1783, Congress by the vote of ten States, New York being divided, Georgia absent, and Rhode Island alone opposing, sent to the several States the recommendation of a grant of the power to levy the impost and of an amendment of the Eighth Article of Confederation so that the treasury should —

"be supplied by the several States in proportion to the whole number of white and other free citizens and inhabitants, of every age, sex, and condition, including those bound to servitude for a term of years, and three-fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes, in each State; which number shall be triennially taken and transmitted to the United States in Congress assembled, in such mode as they shall direct and appoint." [15]

All of the States except New York, which imposed impracticable conditions,[16] granted the impost; but only eleven ratified the proposed amendment. So the project failed.

The second of the resolutions proposed by the Virginia delegation, introduced by Randolph at the opening of the convention, was in these words: —

"that the right of suffrage in the national legislature ought to be proportioned to the quotas of contribution or to the number of free inhabitants, as the one or the other rule may seem best in different cases." [17]

[14] Elliot's Debates, 2d ed., vol. v, pp. 78–80.

[15] Ibid., vol. i, p. 95.

[16] The State did not wish to relinquish to the United States the large revenues derived from the duties on imports at New York Harbor.

[17] Madison Papers, Elliot's Debates, 2d ed., vol. v, p. 127.

The consideration of this was postponed till it had been determined by the committee of the whole, that a national government should be established with three departments; that the national legislature should consist of two branches; that the Senate should be elected by the State legislatures and the lower house by the people. It was then moved —

"that the right of suffrage in the first branch," the lower house, "of the national legislature, ought not to be according to the rule established by the Articles of Confederation, but according to some equitable ratio of representation." [18]

Rutledge of South Carolina had just —

"proposed, that the proportion of suffrage in the first branch should be according to the quotas of contribution. The justice of this rule, he said, could not be contested. Mr. Butler urged the same idea, adding that money was power; and that the States ought to have weight in the government in proportion to their wealth." [19]

Rufus King had previously observed that a system founded upon the quotas of contribution —

"would not answer; because, waiving every other view of the matter, the revenue might hereafter be so collected by the general government, that the sums respectively drawn from the States would not appear, and would besides be continually varying." [20]

"On the question for agreeing to Mr. King and Mr. Wilson's motion, it passed in the affirmative. Massachusetts, Connecticut, Pennsylvania, Virginia, North Carolina, South Carolina, Georgia, ay, 7; New York, New Jersey, Delaware, no, 3; Maryland, divided.

"It was then moved by Mr. Rutledge, seconded by Mr. Butler, to add to the words 'equitable ratio of representation' at the end of the motion just agreed to, the words 'according to the quotas of contribution.' On motion of Mr. Wilson seconded by Mr. Pinckney this was postponed in order to add after the words 'equitable ratio of representation' the words following — 'in proportion to the whole number of white and other free citizens and inhabitants of every age, sex, and condition, including those bound to servitude for a term of years, and three-fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes in each State' — this being

[18] Madison Papers, Elliot's Debates, 2d ed., vol. v, p. 178.

[19] Ibid.

[20] Ibid., p. 134. See also his remarks, p. 178.

the rule in the act of Congress agreed to by eleven states, for apportioning quotas of revenue on the states, and requiring a census only every five, seven, or ten years.

"Mr. Gerry thought property not the rule of representation. Why then should the blacks who were property in the South, be, in the rule of representation, more than the cattle and horses of the North?

"On the question — Massachusetts, Connecticut, New York, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, ay, 9; New Jersey, Delaware, no, 2."[21]

It was understood that these resolutions were provisional, and many who voted for the measure did so in the hope that it would facilitate the settlement which gave to the smaller States an equality in the Senate. The larger States, however, immediately, by a vote of six to five, adopted a resolution making the ratio of representation in both houses the same.[22] The small States thereupon combined for mutual protection and were aided by the support of a majority of the delegation of New York and Luther Martin of Maryland, who became convinced that the system which was in the course of construction was too much of a consolidation. The "propositions from New Jersey" were moved as a substitute for the report of the committee of the whole. These resolved for an amendment of the Articles of Confederation so as to give Congress the power to raise a revenue by means of a tariff on imports, stamps on paper, vellum and parchment and postage, besides other powers; but no other power of taxation except by requisitions in proportion to the ratio finally adopted, which Congress could not collect until after refusal by the States to pay within a time therein specified.[23] Although these propositions were defeated, their supporters rallied upon a motion to strike out the word "not" from the resolution as to the rule of suffrage so that it should read: —

"that the rule of suffrage in the first branch ought to be according to that established by the Articles of the Confederation,"

but they were defeated by six votes to four. Massachusetts,

[21] Madison Papers, Elliot's Debates, 2d ed., vol. v, p. 181.

[22] Massachusetts, Pennsylvania, Virginia, North Carolina, South Carolina, Georgia, ay, 6; Connecticut, New York, New Jersey, Delaware, Maryland, no, 5 (Ibid., p. 182).

[23] Ibid., p. 192. See *supra*, § 17.

Pennsylvania, Virginia, North Carolina, South Carolina, Georgia, ay, 6; Connecticut, New York, New Jersey, Delaware, no; Maryland being divided, and New Hampshire, which would have aided the other small States, being not represented.[24] Through the division of Georgia, the vote was a tie on the proposition that the States should have an equal voice in the Senate; and the subject was then referred to a committee of one for each State in the hope that a compromise might be arranged.[25] Franklin left the side of the larger States, and at the end of three days the following report was made: —

"The Committee to whom was referred the eighth resolution of the report from the Committee of the whole House, and so much of the seventh as has not been decided on, submit the following report: — That the subsequent propositions be recommended to the Convention on condition that both shall be generally adopted. 1. That, in the first branch of the legislature, each of the States now in the Union shall be allowed one member for every forty thousand inhabitants, of the description reported in the seventh resolution of the Committee of the whole House; that each State not containing that number shall be allowed one member; that all bills for raising or appropriating money, and for fixing the salaries of the officers of the government of the United States, shall originate in the first branch of the legislature, and shall not be altered or amended by the second branch; and that no money shall be drawn from the public treasury but in pursuance of appropriations to be originated in the first branch. 2. That, in the second branch, each state shall have an equal vote." [26]

In the subsequent debate, Gouverneur Morris said: —

"He looked forward, also, to that range of new states which would soon be formed in the West. He thought the rule of representation ought to be so fixed, as to secure to the Atlantic States a prevalence in the national councils. The new states will know less of the public interest than these; will have an interest in many respects different; in particular, will be less scrupulous of involving the community in wars, the burdens and operations of which would fall chiefly on the maritime states. Provision ought, therefore, to be made to prevent the maritime states from being hereafter outvoted by them. He thought this might be easily done, by irrevocably fixing the number of repre-

[24] Madison Papers, Elliot's Debates, 2d ed., vol. v, p. 259.

[25] Ibid., p. 273.

[26] Ibid.

sentatives which the Atlantic States should respectively have, and the number which each new state will have. This would not be unjust, as the western settlers would previously know the conditions on which they were to possess their lands. It would be politic, as it would recommend the plan to the present, as well as future, interest of the states which must decide the fate of it." [27]

Col. Mason said: —

"The case of new states was not unnoticed in the committee; but it was thought, and he was himself decidedly of opinion, that if they made a part of the Union, they ought to be subject to no unfavorable discriminations. Obvious considerations required it." [28]

The subject of the apportionment of representation was referred to a new committee, who subsequently recommended: —

"That, in the first meeting of the legislature, the first branch thereof consist of fifty-six members of which number New Hampshire shall have 2, Massachusetts, 7, Rhode Island, 1, Connecticut, 4, New York, 5, New Jersey, 3, Pennsylvania, 8, Delaware, 1, Maryland, 4, Virginia, 9, North Carolina, 5, South Carolina, 5, Georgia, 2. But as the present situation of the states may probably alter, as well in point of wealth as in the number of their inhabitants, that the legislature be authorized from time to time to augment the number of representatives. And in case any of the states shall hereafter be divided, or any two or more states united, or any new states created within the limits of the United States, the legislature shall possess authority to regulate the number of representatives, in any of the foregoing cases, upon the principles of their wealth and number of inhabitants."

"Mr. Sherman wished to know on what principles or calculations the report was founded. It did not appear to correspond with any rule of numbers, or of any requisition hitherto adopted by Congress."

Mr. Gorham: —

"Some provision of this sort was necessary in the outset. The number of blacks and whites, with some regard to supposed wealth, was the general guide. Fractions could not be observed. The legislature is to make alterations from time to time, as justice and propriety may require. Two objections prevailed against the rule of one member for every forty thousand inhabitants. The first was, that the representation would soon be too numerous; the second, that the Western States, who may have a different interest, might, if admitted on that principle,

[27] Ibid., p. 279. [28] Ibid.

by degrees outvote the Atlantic. Both these objections are removed. The number will be small in the first instance, and may be continued so. And the Atlantic States, having the government in their own hands, may take care of their own interest, by dealing out the right of representation in safe proportions to the Western States. These were the views of the Committee." [29]

The subject was referred to a new committee, who increased the number of representatives in their report: —

"that the States at the first meeting of the general legislature, should be represented by sixty-five members, in the following proportions, to wit: New Hampshire, by 3; Massachusetts, 8; Rhode Island, 1; Connecticut, 5; New York, 6; New Jersey, 4; Pennsylvania, 8; Delaware, 1; Maryland, 6; Virginia, 10; North Carolina, 5; South Carolina, 5; Georgia, 3." [30]

After the defeat of several motions to change the numbers allotted to different States, the report was adopted by nine States against two.[31]

"Mr. Randolph moved as an amendment to the report of the committee of five 'that, in order to ascertain the alterations in the population and wealth of the several states, the legislature should be required to cause a census and estimate to be taken within one year after its first meeting'; and every —— years thereafter; and that the legislature arrange the representation accordingly."

"Mr. Gouverneur Morris opposed it, as fettering the legislature too much. Advantage may be taken of it in time of war or the apprehension of it, by new states, to extort particular favors. If the mode was to be fixed for taking a census, it might certainly be extremely inconvenient; if unfixed, the legislature may use such a mode as will defeat the object, and perpetuate the inequality. He was always against such shackles on the legislature. They had been found very pernicious in

[29] Madison Papers, Elliot's Debates, 2d ed., vol. v, p. 288. See also the remarks of Rutledge, ibid., p. 297, and of Gouverneur Morris, ibid., pp. 294, 298. The latter said: "If the western people get the power into their hands, they will ruin the Atlantic interests. The back members are always most averse to the best measures. He mentioned the case of Pennsylvania formerly. The lower part of the state had the power in the first instance. They kept it in their own hands, and the country was the better for it."

[30] Ibid., p. 290.

[31] Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, ay, 9; South Carolina, Georgia, no, 2. Ibid., p. 293.

most of the state constitutions. He dwelt much on the danger of throwing such a preponderance into the western scale; suggesting that, in time, the western people would out-number the Atlantic States. He wished therefore to put it in the power of the latter to keep a majority of votes in their own hands. It was objected, he said, that if the legislature are left at liberty, they will never readjust the representation. He admitted that this was possible, but he did not think it probable, unless the reasons against a revision of it were very urgent, and in this case it ought not to be done." [32]

Had his arguments prevailed, the citizens of the West would soon have regarded those of the East in the same manner that the English did the owners of their rotten boroughs, and dissensions have arisen that might easily have torn the United States apart long before the extension of slavery became a vital issue.[33]

Meanwhile, the Southern States had perceived that the power thus vested in those on the North Atlantic to discriminate against the new States that would be formed in the West, might be used against them too. Mason, of Virginia, who, more than any one of his time, foresaw the danger to slavery which lay in the Constitution,[34] gave voice to this feeling: —

"The greater the difficulty we find in fixing a proper rule of representation, the more unwilling ought we to be to throw the task from ourselves on the general legislature. He did not object to the conjectural ratio which was to prevail in the outset, but considered a revision, from time to time, according to some permanent and precise standard, as essential to the fair representation required in the first branch. According to the present population of America, the northern part of it had a right to preponderate, and he could not deny it. But he wished it not to preponderate hereafter, when the reason no longer continued. From the nature of man, we may be sure that those who have power in their hands will not give it up while they can retain it. On the contrary, we know that they will always, when they can, rather increase it. If the Southern States, therefore, should have three-fourths of the people of America within their limits, the Northern will hold fast the majority of representatives. One-fourth will govern the three-fourths. The Southern States will complain; but they may complain from generation

[32] Madison Papers, Elliot's Debates, 2d ed., vol. v, pp. 293-294.

[33] See the remarks of Mason, *infra*, over note 35.

[34] *Supra*, § 28, note 1.

to generation without redress. Unless some principle, therefore, which will do justice to them hereafter, shall be inserted in the Constitution, disagreeable as the declaration was to him, he must declare he could neither vote for the system here, nor support it in his state.

"Strong objections had been drawn from the danger to the Atlantic interests from new Western States. Ought we to sacrifice what we know to be right in itself lest it should prove favorable to states which are not yet in existence? If the Western States are to be admitted into the Union, as they arise, they must, he would repeat, be treated as equals, and subjected to no degrading discriminations. They will have the same pride, and other passions, which we have, and will either not unite with or will speedily revolt from, the Union, if they are not in all respects placed on an equal footing with their brethren. It has been said, they will be poor, and unable to make equal contributions to the general treasury. He did not know but that in time, they would be both more numerous and more wealthy than their Atlantic brethren. The extent and fertility of their soil made this probable; and though Spain might for a time deprive them of the natural outlet for their productions, yet she will, because she must, finally yield to their demands. He urged that numbers of inhabitants, though not always a precise standard of wealth, was sufficiently so for every substantial purpose.

"Mr. Williamson was for making it a duty of the legislature to do what was right, and not leave it at liberty to do or not to do it. He moved that Mr. Randolph's propositions be postponed in order to consider the following: — 'That in order to ascertain the alterations that may happen in the population and wealth of the several states, a census shall be taken of the free white inhabitants, and three-fifths of those of other descriptions, on the first year after this government shall have been adopted, and every —— year thereafter; and that the representation be regulated accordingly.'" [85]

The delegates from South Carolina then moved that slaves should be placed upon the same footing as freemen in the apportionment of representation; but only Delaware and Georgia supported the proposition.

Gouverneur Morris again insisted that the original States should retain the control: —

"If the western people get the power into their hands, they will ruin the Atlantic interests." [86]

[85] Elliot's Debates, 2d ed., vol. v, pp. 294–295.

[86] Ibid., p. 298; *supra*, note 29.

The general sentiment was, however, opposed to him.

"On the question of the first clause of Mr. Williamson's motion, as to taking a census of the free inhabitants, it passed in the affirmative, — Massachusetts, Connecticut, New Jersey, Pennsylvania, Virginia, North Carolina, ay, 6; Delaware, Maryland, South Carolina, Georgia, no, 4." [37]

"On the question for agreeing to include three-fifths of the blacks — Connecticut, Virginia, North Carolina, Georgia, ay, 4; Massachusetts, New Jersey, Pennsylvania, Delaware, Maryland, South Carolina, no, 6." [38]

In the course of the debate, delegates from Massachusetts and Pennsylvania had expressed a fear lest their constituents might not submit to the rule that slave-owners should have increased representation for their slaves.[39]

At the end of the day, Williamson's motion was rejected unanimously. On the next day —

"Mr. Gouverneur Morris moved to add to the clause empowering the legislature to vary the representation according to the principles of wealth and numbers of inhabitants, a proviso, 'that the taxation shall be in proportion to representation.'

"Mr. Butler contended, again, that representation should be according to the full number of inhabitants, including all the blacks; admitting the justice of Mr. Gouverneur Morris's motion.

"Mr. Mason also admitted the justice of the principle, but was afraid embarrassments might be occasioned to the legislature by it. It might drive the legislature to the plan of requisitions.

"Mr. Gouverneur Morris admitted that some objections lay against his motion, but supposed they would be removed by restraining the rule to *direct* taxation. With regard to indirect taxes on *exports* and imports, and on consumption, the rule would be inapplicable. Notwithstanding what had been said to the contrary, he was persuaded that the imports and consumption were pretty nearly equal throughout the Union.

"Gen. Pinckney liked the idea. He thought it so just that it could not be objected to, but foresaw that if the revision of the census was left to the discretion of the legislature, it would never be carried into execution. The rule must be fixed, and the execution of it enforced by the Constitution. He was alarmed at what was said (by Mr. Gouver-

[37] Ibid., p. 300.
[38] Ibid., p. 301.
[39] Rufus King and Gouverneur Morris, ibid., pp. 300–301.

neur Morris), yesterday, concerning the negroes. He was now again alarmed at what had been thrown out concerning the taxing of exports. South Carolina has, in one year, exported to the amount of £600,000 sterling, all which was the fruit of the labor of her blacks. Will she be represented in proportion to this amount? She will not. Neither ought she then to be subject to a tax on it. He hoped a clause would be inserted in the system, restraining the legislature from taxing exports.

"Mr. Wilson approved the principle, but could not see how it could be carried into execution, unless restrained to direct taxation.

"Mr. Gouverneur Morris having so varied his motion by inserting the word 'direct', it passed *nem. con.*, as follows: 'provided always that direct taxation ought to be proportioned to representation.'" [40]

"Mr. Ellsworth, in order to carry into effect the principle established, moved to add to the last clause adopted by the House the words following: 'and that the rule of contribution by direct taxation, for the support of the government of the United States, shall be the number of white inhabitants and three-fifths of every other description, in the several states, until some other rule, that shall more accurately ascertain the wealth of the several states, can be devised and adopted by the legislature.'

"Mr. Butler seconded the motion, in order that it might be committed.

"Mr. Randolph was not satisfied with the motion. The danger will be revived, that the ingenuity of the legislature may evade or pervert the rule, so as to perpetuate the power where it shall be lodged in the first instance. He proposed, in lieu of Mr. Ellsworth's motion, 'that, in order to ascertain the alterations in representation that may be required, from time to time, by changes in the relative circumstances of the states, a census shall be taken within two years from the first meeting of the general legislature of the United States, and once within the term of every —— years afterwards, of all the inhabitants, in the manner and according to the ratio recommended by Congress, in their resolution of the 18th of April, 1783 (rating the blacks at three-fifths of their numbers), and that the legislature of the United States shall arrange the representation accordingly.' He urged strenuously, that express security ought to be provided for including slaves in the ratio of representation. He lamented that such a species of property existed; but, as it did exist, the holders of it would require this security. It was perceived that the design was entertained by some of excluding slaves altogether; the legislature, therefore, ought not to be left at liberty.

[40] Madison Papers, Elliot's Debates, vol. v, p. 302.

"Mr. Ellsworth withdraws his motion, and seconds that of Mr. Randolph.

"Mr. Wilson observed that less umbrage would, perhaps, be taken against an admission of the slaves into the rule of representation, if it should be so expressed as to make them indirectly only an ingredient in the rule, by saying that they should enter into the rule of taxation; and as representation was to be according to taxation, the end would be equally attained. He accordingly moved, and was seconded, so to alter the last clause adopted by the House, that, together with the amendment proposed, the whole should read as follows: 'provided always that the representation ought to be proportioned according to direct taxation; and, in order to ascertain the alterations in the direct taxation which may be required, from time to time, by the changes in the relative circumstances of the states, *Resolved*, that a census be taken within two years from the first meeting of the legislature of the United States, and once within the term of every —— years afterwards, of all the inhabitants of the United States, in the manner and according to the ratio recommended by Congress in their resolution of the 18th of April, 1783, and that the legislature of the United States shall proportion the direct taxation accordingly.'" [41]

"On Mr. Pinckney's motion, for rating blacks as equal to whites, instead of as three-fifths, —

"South Carolina, Georgia, ay, 2; Massachusetts, Connecticut, (Dr. Johnson, ay,) New Jersey, Pennsylvania, (three against two,) Delaware, Maryland, Virginia, North Carolina, no, 8.

"Mr. Randolph's proposition, as varied by Mr. Wilson, being read, for taking the question on the whole, —

"Mr. Gerry urged that the principle of it could not be carried into execution, as the states were not to be taxed as states. With regard to taxes on imposts, he conceived they would be more productive where there were no slaves, than where there were, the consumption being greater.

"Mr. Ellsworth. In case of a poll-tax, there would be no difficulty. But there would probably be none. The sum allotted to a state may be levied without difficulty, according to the plan used by the state in raising its own supplies.

"On the question on the whole proposition, as proportioning representation to direct taxation, and both to the white and three-fifths of the black inhabitants, and requiring a census within six years, and within every ten years afterwards, —

[41] Ibid., pp. 303, 304.

"Connecticut, Pennsylvania, Maryland, Virginia, North Carolina, Georgia, ay, 6; New Jersey, Delaware, no, 2; Massachusetts, South Carolina, divided."[42]

"On the question for agreeing to the whole report, as amended, and including the equality of votes in the second branch, it passed in the affirmative.

"Connecticut, New Jersey, Delaware, Maryland, North Carolina (Mr. Spaight, no,) ay, 5; Pennsylvania, Virginia, South Carolina, Georgia, no, 4; Massachusetts, divided (Mr. Gerry, Mr. Strong, ay; Mr. King, Mr. Gorham, no).

"The whole, thus passed, is in the words following, viz.:

"*Resolved*, That, in the original formation of the legislature of the United States, the first branch thereof shall consist of sixty-five members, of which number New Hampshire shall send 3; Massachusetts, 8; Rhode Island, 1; Connecticut, 5; New York, 6; New Jersey, 4; Pennsylvania, 8; Delaware, 1; Maryland, 6; Virginia, 10; North Carolina, 5; South Carolina, 5; Georgia, 3. But as the present situation of the states may probably alter in the number of their inhabitants, the legislature of the United States shall be authorized, from time to time, to apportion the number of representatives; and in case any of the states shall hereafter be divided, or enlarged by addition of territory, or any two or more states united, or any new states created, within the limits of the United States, the legislature of the United States shall possess authority to regulate the number of representatives, in any of the foregoing cases, upon the principle of their number of inhabitants, according to the provisions hereafter mentioned; provided, always, that representation ought to be proportioned according to direct taxation. And in order to ascertain the alteration in the direct taxation, which may be required from time to time by the changes in the relative circumstances of the states,

"*Resolved*, That a census be taken within six years from the first meeting of the legislature of the United States, and once within the term of every ten years afterwards, of all the inhabitants of the United States, in the manner and according to the ratio recommended by Congress in their resolution of the 18th day of April, 1783; and that the legislature of the United States shall proportion the direct taxation accordingly.

"*Resolved*, That all bills for raising or appropriating money, and for fixing the salaries of officers of the Government of the United States, shall originate in the first branch of the legislature of the United States,

[42] Madison Papers, Elliot's Debates, vol. v, pp. 305-306.

and shall not be altered or amended in the second branch; and that no money shall be drawn from the public treasury but in pursuance of appropriations to be originated in the first branch.

"*Resolved*, That, in the second branch of the legislature of the United States, each state shall have an equal vote." [43]

In this form, the matter was referred to the committee of detail. Immediately before the reference, —

"Mr. Gouverneur Morris hoped the committee would strike out the whole of the clause proportioning direct taxation to representation. He had only meant it as a bridge to assist us over a certain gulf; having passed the gulf, the bridge may be removed. He thought the principle laid down with so much strictness liable to strong objections." [44]

The committee, however, did not assume the responsibility of disturbing the compromise. In their report the resolution was retained but separated. Section 4 of Article IV is as follows: —

"As the proportions of numbers in different states will alter from time to time; as some of the states may hereafter be divided; as others may be enlarged by addition of territory; as two or more states may be united; as new states will be erected within the limits of the United States, — the legislature shall, in each of these cases, regulate the number of representatives by the number of inhabitants, according to the provisions hereinafter made, at the rate of one for every forty thousand." [45]

Sections 3 and 4 of Article VII read: —

"The proportions of direct taxation shall be regulated by the whole number of white and other free citizens and inhabitants of every age, sex, and condition, including those bound to servitude for a term of years, and three-fifths of all other persons not comprehended in the foregoing description (except Indians not paying taxes); which number shall, within six years after the first meeting of the legislature, and within the term of every ten years afterwards, be taken in such a manner, as the said legislature shall direct." [46]

"No tax shall be laid by the legislature on articles exported from any state; nor on the migration or importation of such persons as the several states shall think proper to admit; nor shall such migration or importation be prohibited." [47]

[43] Ibid., pp. 316, 317.

[44] Ibid., pp. 362, 363. Carroll of Maryland concurred with him.

[45] Ibid., p. 377.

[46] Ibid., p. 379.

[47] Ibid.

In a subsequent debate, —

"Mr. King asked what was the precise meaning of *direct* taxation. No one answered." [48]

Afterwards Luther Martin said:

"The power of taxation is most likely to be criticised by the public. Direct taxation should not be used but in cases of absolute necessity; and then the states will be the best judges of the mode. He therefore moved the following addition to article 7, sect. 3: —

"'And whenever the legislature of the United States shall find it necessary that revenue should be raised by direct taxation, having apportioned the same according to the above rule on the several states, requisitions shall be made of the respective states to pay to the Continental treasury their respective quotas, within a time in the said requisitions specified; and in case of any of the states failing to comply with such requisitions, then, and then only, to devise and pass acts directing the mode, and authorizing the collection of the same.'

"Mr. M'Henry seconded the motion. There was no debate; and, on the question, —

"New Jersey, ay, 1; New Hampshire, Connecticut, Pennsylvania, Delaware, Virginia, North Carolina, South Carolina, Georgia, no, 8; Maryland divided (Jenifer and Carroll, no)." [49]

John Langdon, of New Hampshire, evidently anticipated that direct taxation would be frequent. He said that he "was not here when New Hampshire was allowed three members. It was more than her share; he did not wish for them." [50]

On the consideration of the report of the committee of detail, a few changes were made in the phraseology; and it was unanimously agreed that each State should have at least one vote in the lower house.[51] This was suggested by a similar provision in the Constitution of Massachusetts concerning the representation of towns.[52]

At the close of the Convention, the minimum of representation was reduced to thirty thousand, upon the recommendation of Washington; who then made on this subject his only speech before the Convention, and asked for the amendment in order to

[48] Madison Papers, Elliot's Debates, vol. v, p. 451.

[49] Ibid., p. 453.

[50] Ibid.

[51] Ibid., p. 394.

[52] See Wilson's remark, ibid., p. 281, Massachusetts Constitution of 1780, Article II, ch. I, Sec. 3.

obviate objections which he thought would prejudice the success of the measure when submitted to the people.[53] It is consequently clear that the compromise was made in order to protect property of every kind, as well as slaves, from excessive taxation imposed by a majority who would escape the burden. It was moved by a delegate from the rich, free State of Pennsylvania, who had expressed his fear lest the new States in the West might use their numerical advantage to oppress their richer fellow-citizens on the Atlantic coast;[54] and thus, as said by Hamilton, in The Federalist,[55] the door was effectually shut "to partiality or oppression. The abuse of this power seems to have been provided against with guarded circumspection."

Five of the States did not consider this protection satisfactory. And upon her ratification Massachusetts proposed the following amendment, in which New York, New Hampshire, Rhode Island and South Carolina concurred: —

"That Congress do not lay direct taxes but when the moneys arising from the impost or excise are insufficient for the public exigencies, nor then until Congress shall have first made a requisition upon the States to assess, levy, and pay, their respective proportions of such requisition, agreeably to the terms fixed in the said Constitution in such way and manner as the legislatures of the States shall think best."[56]

Madison opposed this amendment as "calculated to impair the power, only to be exercised in extraordinary emergencies."[57] He said: "If extraordinary aids for the public safety shall not be necessary, direct taxes will not be necessary"; and that the proposed amendment was needless, since "every State which chuses to collect its own quota may always prevent a Federal collection, by keeping a little beforehand in its finances, and making its payment at once into the Federal treasury."[58]

At that time, the system of taxation in the different States was various. All taxed land, with its improvements; some taxed all personal property, with a few exemptions; some taxed imports

[53] Ibid., p. 555.

[54] *Supra*, over notes 27, 29, 36.

[55] No. xxxvi.

[56] Elliot's Debates, vol. i, p. 322.

[57] Chief-Justice Fuller in Pollock v. Farmers' Loan and Trust Co., 158 U. S., 601, 620.

[58] Madison to Colonel Thompson, Jan. 29, 1789; republished by Mr. Worthington C. Ford (51 A. L. J., 292), 325, 326, 329, 335.

and specific articles of personal property, and some imposed a tax on occupations, measured by their profits.[59]

A survey of these proceedings consequently shows the accuracy of the recent statement by Chief-Justice Fuller: —

"The men who framed and adopted that instrument had just emerged from the struggle for independence whose rallying cry had been that 'taxation and representation go together.' The mother country had taught the colonists, in the contests waged to establish that taxes could not be imposed by the sovereign except as they were granted by the representatives of the realm, that self-taxation constituted the main security against oppression. As Burke declared, in his speech on Conciliation with America, the defenders of the excellence of the English Constitution 'took infinite pains to inculcate as a fundamental principle, that, in all monarchies, the people must, in effect, themselves, mediately or immediately, possess the power of granting their own money, or no shadow of liberty could subsist.' The principle was, that the consent of those who were expected to pay it was essential to the validity of any tax.

"The States were about, for all national purposes embraced in the Constitution, to become one, united under the same sovereign authority, and governed by the same laws. But, as they still retained their jurisdiction over all persons and things within their territorial limits, except where surrendered to the general government or restrained by the Constitution, they were careful to see to it that taxation and representation should go together, so that the sovereignty reserved should not be impaired, and that when Congress, and especially the House of Representatives, where it was specifically provided that all revenue bills must originate, voted a tax upon property, it should be with the consciousness, and under the responsibility that in so doing the tax so voted would proportionately fall upon the immediate constituents of those who imposed it.

"More than this, by the Constitution the States not only gave to the Nation the concurrent power to tax persons and property directly, but they surrendered their own power to levy taxes on imports and to regulate commerce. All the thirteen were seaboard States, but they varied in maritime importance, and differences existed between them in popu-

[59] See Report on Direct Taxes, by Oliver Wolcott, Secretary of the Treasury, Dec. 14, 1796 (Annals of Congress, 1795–1797, pp. 2635–2713. Prof. E. R. A. Seligman on the Income Tax in the American Colonies and States, Pol. Sc. Q., vol. x, p. 221. Foster and Abbot on the Income Tax, pp. 1–2.

lation, in wealth, in the character of property, and of business interests. Moreover, they looked forward to the coming of new States from the great West into the vast empire of their anticipations. So when the wealthier States as between themselves and their less favored associates, and all as between themselves and those who were to come, gave up for the common good the great sources of revenue derived through commerce, they did so in reliance on the protection afforded by restrictions on the grant of power." [60]

"In the light of the struggle in the convention as to whether or not the new Nation should be empowered to levy taxes directly on the individual until after the States had failed to respond to requisitions — a struggle which did not terminate until the amendment to that effect, proposed by Massachusetts and concurred in by South Carolina, New Hampshire, New York, and Rhode Island, had been rejected — it would seem beyond reasonable question that direct taxation, taking the place as it did of requisitions, was purposely restrained to apportionment according to representation, in order that the former system as to ratio," which had been proposed by Congress as an amendment to the Articles of Confederation, and ratified by eleven States, "might be retained while the mode of collection was changed." [61]

"The reasons for the clauses of the Constitution in respect of direct taxation are not far to seek. The States respectively possessed plenary powers of taxation. They could tax the property of their citizens in such manner and to such extent as they saw fit; they had unrestricted powers to impose duties or impost, on imports from abroad and excises on manufactures, consumable commodities, or otherwise. They gave up the great sources of revenue derived from commerce; they retained the concurrent power of levying excises and duties if covering anything other than excises; but in respect of them the range of taxation was narrowed by the power granted over interstate commerce, and by the danger of being put at disadvantage in dealing with excises on manufactures. They retained the power of direct taxation, and to that they looked as their chief resource; but even in respect of that, they granted the concurrent power, and if the tax were placed by both governments on the same subject, the claim of the United States had preference. Therefore, they did not grant the power of direct taxation, without regard to their own condition and resources as States; but they granted the power of apportioned direct taxation, a power just as efficacious to serve the needs of the general government, but

[60] Pollock v. Farmers' Loan and Trust Co., 158 U. S., 429, 556–557.

[61] Ibid., 601, 619–620.

securing to the States the opportunity to pay the amount apportioned, and to recoup from their own citizens in the most feasible way, and in harmony with their systems of local self-government. If, in the changes of wealth and population in particular States, apportionment produced inequality, it was an inequality stipulated for, just as the equal representation of the States, however small, in the Senate, was stipulated for. The Constitution ordains affirmatively that each State shall have two members of that body, and negatively that no State shall by amendment be deprived of its equal suffrage in the Senate without its consent. The Constitution ordains affirmatively that representatives and direct taxes shall be apportioned among the several States according to numbers, and negatively that no direct tax shall be laid unless in proportion to the enumeration.

"The founders anticipated that the expenditures of the States, their counties, cities and towns, would chiefly be met by direct taxation on accumulated property, while they expected that those of the Federal government would be for the most part met by indirect taxes. And in order that the power of direct taxation by the general government should not be exercised except on necessity; and, when the necessity arose, should be so exercised as to leave the States at liberty to discharge their respective obligations, and should not be so exercised, unfairly and discriminatingly, as to particular States or otherwise, by a mere majority vote, possibly of those whose constituents were intentionally not subjected to any part of the burden, the qualified grant was made." [62]

§ 65. Manner of Apportionment.

The first apportionment was made by the Constitution itself and was assumed to be upon substantially the same basis as it fixed for all future apportionments, with an extra allowance to Georgia on account of the rapid increase of her population.[1]

The apportionment of direct taxation is easy. It is made by taking the aggregate of the population in all the States according to the constitutional rule, ascertaining the proportion of this population in each State to that of the whole, and then dividing the gross amount of the tax by the ratios thus obtained. Since a sum of money is capable of division down to a fraction of a cent which is too small for consideration, there is no difficulty in the process. A man, however, cannot be subdivided. Conse-

[62] Pollock *v.* Farmers' Loan and Trust Co., 158 U. S., 601, 620–621.

§ 65. [1] Madison Papers, Elliot's Debates, 2d ed., vol. v, p. 300.

quently, any scheme of apportionment, after the determination of the amount of population which shall be entitled to one representative, creates a difficulty by the existence in almost every State, of several thousands of persons, who constitute a fraction of that number, and for whose representation provision should be made. Different methods of providing for these fractions have been considered and adopted. The first apportionment bill, which was introduced in the House of Representatives in 1790, gave one representative for every 30,000 inhabitants, and left the remaining fractions in the several States unrepresented. The bill passed the House in this form and was amended in the Senate by allowing additional representatives to the States having the largest fractions. The House finally concurred. The history of the discussion is thus stated by Chief-Justice Marshall: —

"This bill as originally introduced into the house of representatives, gave to each state one member for every thirty thousand persons. On a motion to strike out the number thirty thousand, the debate turned chiefly on the policy and advantage of a more or less numerous house of representatives; but with the general arguments suggested by the subject, were interspersed strong and pointed allusions to the measures of the preceding Congress, which indicated much more serious hostility to the administration than had hitherto been expressed."[2] "After a long and animated discussion, the amendment was lost; as were also other amendments which were severally proposed, for inserting between the words 'thirty,' and 'thousand,' the words five, four, and three; and the bill passed in its original form. In the senate, it was amended by changing the ratio so as to give one representative for every thirty-three thousand persons in each state; but this amendment was disagreed to by the house of representatives; and each house adhering to its opinion, the bill fell. The argument which operated in the senate is understood to have been, the great amount, and the inequality of unrepresented fractions, which were the result of the ratio originally proposed; a circumstance which pressed with peculiar weight on the small states, where the fraction could not be distributed among several members. A bill was again introduced into the house of representatives under a different title and in a new form, but without any change in its substantial provisions. After a debate in which the inequality and injustice of the fractions produced by the ratio it adopted was strongly insisted on, it passed that house. In the senate, it was again amended,

[2] Marshall's Life of Washington, vol. v, p. 319.

not by reducing, but by enlarging the number of representatives. The Constitution of the United States declares that 'representatives and direct taxes shall be apportioned among the several states which may be included within this union according to their respective numbers;' and that 'the number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative.' Construing the constitution to authorize a process by which the whole number of representatives should be ascertained on the whole population of the United States, and afterwards 'apportioned among the several states according to their respective numbers,' the senate applied the number thirty thousand as a *divisor* to the total population, and taking the *quotient* which was one hundred and twenty, as the number of representatives given by the ratio which had been adopted in the house where the bill had originated, they apportioned that number among the several states by that ratio, until as many representatives as it would give were allotted to each. The residuary members were then distributed among the states having the highest fractions. Without professing the principle on which this apportionment was made, the amendment of the senate merely allotted to the states respectively, the number of members which the process just mentioned would give. The result was a more equitable apportionment of representatives to population, and a still more exact accordance, than was found in the original bill, with the prevailing sentiment, which, both within and without doors, seemed to require that the popular branch of the legislature should consist of as many members as the fundamental laws of the government would admit. If the rule of construing that instrument was correct, the amendment removed objections which were certainly well founded, and was not easily assailable by the advocates for a numerous representative body. But the rule was novel, and overturned opinions which had been generally assumed, and were supposed to be settled. In one branch of the legislature it had already been rejected; and in the other, the majority in its favour was only one. In the house of representatives, the amendment was supported with considerable ingenuity. After an earnest debate, however, it was disagreed to, and a conference took place without producing an accommodation among the members composing the committee. But finally, the house of representatives receded from their disagreement; and, by a majority of two voices, the bill passed as amended in the senate."[3]

The division in Congress on the subject was geographical. The Southern States voted against it, and the Northern in its favor.[4]

[3] Marshall's Life of Washington, vol. v, pp. 320–323.

[4] Story on the Constitution, 5th ed., § 681.

The cabinet divided upon the propriety of the approval of the bill. This division also was upon geographical lines. The Secretary of State, Jefferson, and Attorney-General Randolph, both of whom were from Virginia, expressed their disapproval. The Secretary of the Treasury, Hamilton of New York, and the Secretary of War, Knox of Massachusetts, approved the same.

President Washington, who was from Virginia, vetoed the measure and returned it with two objections: —

"1. That the Constitution has prescribed that representatives shall be apportioned among the several States according to their respective numbers; and there is no proportion or divisor which, applied to the respective members of the States, will yield the number and allotment of representatives proposed by the bill. 2. The Constitution has also provided that the number of representatives shall not exceed one for thirty thousand, which restriction is by the context, and by fair and obvious construction, to be applied to the several and respective numbers of the States, and the bill has alloted to eight of the States more than one for thirty thousand."[5]

Of this Judge Story said: —

"The second reason assigned by the President against the bill was well founded in fact, and entirely conclusive. The other, to say the least of it, is as open to question as any one which can well be imagined in a case of real difficulty of construction. It assumes, at its basis, that a common ratio, or divisor, is to be taken and applied to each State, let the fractions and inequalities left be whatever they may. Now, this is a plain departure from the terms of the Constitution. It is not there said that any such ratio shall be taken. The language is, that the representatives shall be apportioned among the several States according to their respective numbers, that is, according to the proportion of the whole population of each State to the aggregate of all the States. To apportion according to a ratio short of the whole number in a State, is not an apportionment according to the respective numbers of the State. If it is said that it is impracticable to follow the meaning of the terms literally, that may be admitted; but it does not follow that they are to be wholly disregarded, or language substituted essentially different in its import and effect. If we must depart, we must depart as little as practicable. We are to act on the doctrine of *c'y près*, or come as nearly as possible to the rule of the Constitution. If we are at liberty to adopt a rule varying from the terms of the Constitution,

[5] Marshall's Life of Washington, vol. v, pp. 323–324, note. Jefferson's opinion is printed in the appendix to this chapter. *Infra*, pp. 424–430.

arguing *ab inconvenienti*, then it is clearly just as open to others to reason on the other side from opposing inconvenience and injustice." [6]

Two-thirds of the House failed to pass the bill over the President's veto, and it was consequently lost.

It was then believed that the rule of apportionment had been finally determined.[7] Until 1842, this rule still prevailed, and on each apportionment fractions were left unrepresented. It was, however, attacked in the Senate in 1832 in an able report by Daniel Webster, with whom Edward Everett, then in the House, concurred.[8]

This report did not become a basis of apportionment at that time, but it convinced the people; and the rule which it approved was actually adopted as the basis of the Congressional apportionment of 1842. Since then it has been the practice of the committees of Congress, when preparing apportionment bills, after determining the maximum amount of population entitled to one representative, to refer the matter to the Secretary of the Interior to draft a scheme of apportionment by the application of this rule after the population is ascertained by the last census. And several State constitutions require that apportionments of members of their legislatures be similarly made.[9]

The rule is to determine the amount of the population which shall be entitled to one representative in Congress, and after having allowed a representative to each of these numbers, to allow to every State an additional member for each fraction of its numbers exceeding one-half of the ratio, rejecting from consideration the smaller fractions; [10] and to leave to the States the task of dividing themselves into Congressional districts.[11] The power of Congress to legislate upon the subject has never been questioned.[12]

[6] Story on the Constitution, 5th ed., § 682.

[7] Rawle on the Constitution, p. 43; Marshall's Life of Washington, vol. v, p. 324.

[8] This report is printed in the Appendix to this chapter, *infra*, pp. 430–446. See also Edward Everett's speech in the House, May 17, 1832.

[9] Kent's Comm., vol. i, p. 230; Story on the Constitution, 5th ed., § 687, pp. 495–512 and notes; People *ex rel.* Carter *v.* Rice, 135 N. Y., 473, 501–502.

[10] Kent's Comm., vol. i, p. 230. This method of apportionment was approved by the Supreme Court of Michigan in Giddings *v.* Blacker, Secretary of State, 93 Michigan, 1; s. c. 52 N. W. Rep., 944, quoted *infra*, § 66. It is adopted in the New York Constitution of 1894, Art. III, Sec. 4.

[11] *Infra*, Chapter XIV.

[12] Prigg *v.* Pennsylvania, 16 Peters, 539, 619.

§ 66. Revision of Apportionments by the Courts.

No attempt has been made by the courts to interfere with any congressional apportionment. Since a Federal court will grant no injunction to enforce a political right,[1] and has ordinarily no power to grant the writ of mandamus, except as incidental to the exercise of its jurisdiction in another matter,[2] and a State court has no power to grant a mandamus against an officer of the United States,[3] it would be difficult to obtain a ground for the assumption of jurisdiction for that purpose. Apart from technical difficulties, it might be claimed that such a proceeding would be an unwarrantable invasion by one branch of the government into the province of another, and a violation of the independence of the three departments, which should not be undertaken, unless clearly authorized by the language of the Constitution.[4] The only apparent remedy is subsequent legislation.[5] In the different States, however, since the famous gerrymander in Massachusetts in 1812,[6] so many grossly unjust apportionments have been made by partisan majorities, that of late years the power of the courts to examine and hold invalid apportionments of members of State legislatures,[7] which are clearly in violation of the equality enjoined

§ 66. [1] Mississippi *v.* Johnson, 4 Wall., 475; Georgia *v.* Stanton, 6 Wall., 50; Foster's Federal Practice, 2d ed., §§ 12, 23.

[2] McClung *v.* Silliman, 6 Wheaton, 598; Foster's Federal Practice, 2d ed., § 363.

[3] McClung *v.* Silliman, 6 Wheaton, 598; State *ex rel.* Cromelien *v.* Boyd, 36 Nebraska, 181; s. c. 54 N. W. Rep., 252.

[4] People *ex rel.* Clough *v.* Curtis, 134 U. S., 361; *supra*, § 42.

[5] In State *ex rel.* Cromelien *v.* Boyd, 36 Nebraska, 181; 54 N. W. Rep., 252; an attempt was made to cure an injustice in the Congressional apportionment, by an application to the Supreme Court of Nebraska to compel the Governor of that State to call an election for three representatives in addition to those allowed the State in the act. The Court intimated that in their opinion the State was entitled to the number claimed; but denied the application, saying that Congress alone could remedy the deficiency.

[6] So named because the Essex senatorial district was so irregularly shaped as to resemble a salamander; and Elbridge Gerry was the governor who signed the bill. (The Political Depravity of the Fathers, by John Bach McMaster, Atlantic Monthly, vol. lxxv, p. 631.)

[7] State *ex rel.* Attorney-General *v.* Cunningham, 81 Wisconsin, 440; s. c. 51 N. W. Rep., 724; Board of Supervisors of the County of Houghton, *v.* Blacker, 92 Mich., 638; s. c. 52 N. W. Rep., 951; Giddings *v.* Blacker, Secretary of State, 93 Mich., 1; s. c. 52 N. W. Rep., 944.

by their respective constitutions, has been successfully asserted, and seems now to be generally conceded. The New York Constitution of 1894 expressly provides: —

"that an apportionment by the legislature, or other body, shall be subject to review by the Supreme Court, at the suit of any citizen, under such reasonable regulations as the legislature may prescribe."[8]

The established rule seems to be as follows: The legislature must necessarily have some discretion in the matter, since absolute equality is impossible.[9] The courts will not interfere, unless there is such a case of glaring inequality as makes it manifest that the discretion has been abused for the purpose of obtaining a partisan advantage or of unjustly diminishing the influence of particular localities;[10] but when such a case exists the courts will declare the apportionment void.[11] It was held that the fact that

[8] Art. III, Sec. 5.

[9] People *ex rel.* Carter *v.* Rice, 135 N. Y., 473, 499, 511, 521; State *ex rel.* Gardner *v.* Newark, 40 N. J. Law, 297.

[10] People *ex rel.* Carter *v.* Rice, 135 N. Y., 473. State *ex rel.* Attorney-General *v.* Cunningham, 81 Wisconsin, 440, 484; Parker *v.* State *ex rel.* Powell, 133 Indiana, 178; s. c. 32 N. E. Rep., 836.

[11] In People *ex rel.* Carter *v.* Rice, 135 N. Y., 473, an application was made for a mandamus, and an injunction to test the constitutionality of an apportionment law under a State constitution which provided that "each Senate District shall contain as nearly as may be an equal number of inhabitants, excluding aliens, and persons of color not taxed; and shall remain unaltered until the return of another enumeration, and shall at all times consist of contiguous territory; and no county shall be divided in the formation of a senate district, except such county shall be equitably entitled to two or more senators" (New York Constitution, Art. III, Sec. 4). "The members of assembly shall be apportioned among the several counties of this State, by the legislature, as nearly as may be, according to the number of their respective inhabitants, excluding aliens, and persons of color not taxed, and shall be chosen by single districts" (ibid., Art. III, Sec. 5). It was held by a majority of the Court of Appeals, which divided upon party lines, that the words "as nearly as may be" fixed a certain amount of discretion in the legislature; but that the courts could not review the exercise of such discretion, unless it were manifestly a gross and intentional violation; and that in that case, the court would not interfere, as the only claim of inequality consisted in the apportionment of representatives to the fractions of the ratio adopted. Judge Peckham said, when delivering the opinion of the majority (at pp. 498–501): —

"From the formation of government under written constitutions in this country the question of the basis of representation in the legislative branch of the government has been one of the most important and most frequently debated. It is not true that equality of numbers in repre-

the people had acquiesced in an unjust and unconstitutional apportionment has been the leading idea at all times in regard to republican institutions. Political divisions of the state have in New England been the bodies which were entitled to representation, and the town as a town and irrespective of the number of inhabitants has had its representative in the legislature, so that a large town necessarily had no more representation than a much smaller one. This is the case to-day in some of the New England States.

"The power to readjust the political divisions of a sovereignty with the view of representation of those divisions or of the inhabitants thereof, in the legislature, resides of course in the first instance with the people, who in this country are the source of all political power. The essential nature of the power itself is not, however, altered by that fact. In its nature it is political as distinguished from legislative or judicial. In intrusting such power to any particular body, the people could by their Constitution give written instructions as to how it should be carried out, yet the essential nature of the power still remains. If a portion of it be intrusted to a body of men acting as a board for the mere purpose of making a mathematical calculation and with instructions to discharge its duties in a way which is solely mathematical, it is clear that the board has no discretion whatever, and it is bound strictly by the terms of the grant of power. In such case the people have not in reality parted with the whole power. There may then be a power in the court to correct the very slightest deviation from what can be clearly seen to be a mere ministerial duty. There being no possibility for the exercise of the slightest discretion, a violation of the arithmetical rule of proportion would become a violation of the Constitution, and as such might be the subject of review by the courts. The power to review would exist because of the fact that the people had so bound and limited the exercise of the power to readjust the political divisions of the state that the power itself thus limited had become in its exercise by the body to which it was intrusted, one of a ministerial nature only. Its nature as a political power in the board itself would in such case have been changed by the refusal of the people to permit of its exercise upon any other than a mathematical basis. Hence a direction to a body created by the people for such a purpose, which permitted no discretion in its exercise under any circumstances, might properly form the subject of enforcement by the courts. This, however, is not the case under our constitution. The power to alter these political divisions has been deposited by the people with the legislature and under such circumstances as to compel the exercise of legislative discretion, in carrying out the power granted. The political nature of the power is thus retained. The learned judge who delivered the opinion at Special Term in the Pond case himself admits that some discretion is vested in the legislature and that in the nature of things it must be so left. He was of opinion that the discretion thus vested in the legislature had been overstepped and that the constitution had been thereby violated, and that the courts could review and reverse this action of the legislature. Discretion is necessarily reposed in the legislature because of the direction of the constitution that in making up the senate districts they must at all times consist of contiguous territory and that no county shall be

tionment and elected legislatures under it for a period of six years

divided in the formation of a senate district, except such county shall be equitably entitled to two or more senators. It is also provided that in apportioning members of assembly every county shall be entitled to one member.

"This renders the mathematical process impossible, both as regards senate districts and the apportionment of members of assembly. We start then with the proposition that to the legislature is intrusted some discretion in the matter of apportionment. Is the court to interfere with such power whenever it thinks that the legislature might in its exercise possibly have come nearer to an equality, after complying with the special conditions mentioned in the Constitution? This would be to assert a power in the court to supervise the use of the discretion granted to the legislature, if such discretion were exercised in the slightest degree after the constitutional mandate in regard to county lines and county members had been complied with. We do not believe in the propriety or necessity of any such rule. On the contrary, we think that the courts have no power in such case to review the exercise of a discretion intrusted to the legislature by the Constitution, unless it is plainly and grossly abused. The expression 'as nearly as may be,' when used in the Constitution with reference to this subject, does not mean as nearly as a mathematical process can be followed. It is a direction addressed to the legislature in the way of a general statement of the principles upon which the apportionment shall in good faith be made. The legislative purpose should be to make a district of an equal number of inhabitants as nearly as may be, and how far that may be carried out in actual practice must depend generally upon the integrity of the legislature. We do not intimate that in no case could the action of the legislature be reviewed by the courts. Cases may easily be imagined where the action of that body would be so gross a violation of the Constitution that it could be seen that it had been entirely lost sight of and an intentional disregard of its commands both in the letter and in the spirit had been indulged in."

Judge Gray said (at pp. 511–513): "It was apparent that greater or less inequalities must arise in an apportionment and that, after each county had received its full number of assemblymen, according to the ratio of apportionment established, there would remain some members to be distributed among those counties having excesses of population over the ratio. The contention of counsel is that that distribution must be in the order of the highest excesses, or remainders over, and any discretion in the matter is denied. In the present case, for instance, there were eleven members of assembly to be so distributed among counties having fractional excesses, and the showing is that three were apportioned out of the strict order in which those excesses stood. It may be remarked, in passing, that in an apportionment of one hundred and twenty-eight members among the counties, this showing evidences no glaring departure from strict equality, nor any scheme to defraud the people in the matter of representation. It is the general rule of law that the courts have no concern with the motives of the legislative body in passing an act. If they find the power conferred to so enact, they may not intervene to prevent the execution; and at all times they should be slow to interfere with the legislative department of power.

had not validated the same.[12] Inequality in apportionments is

[12] Giddings v. Blacker, 93 Mich., 1.

If there were here a flagrant disregard and an unmistakable violation of the constitutional injunction that the apportionment should be 'as nearly as may be' according to the number of citizens, the courts might feel justified in declaring the act void for unconstitutionality. But we have no reason to impute any fraudulent motives, and the showing of three instances of departure from a methodical apportionment is not enough to evidence any deliberate violation of the constitutional requirement. The legal presumption is in favor of the constitutionality of every act of the legislature, and that presumption is not overcome in this instance, where the legislative act simply evidences the exercise of discretion in performing a political duty. We may concede that adherence to a simply mathematical system of distribution of members among the counties, in the order of their excesses, of population over the ratio, is the better rule; but deviations may be demanded by public exigencies. Some consideration must be had of the difficulties which environ the passage of an act of apportionment, in the conflicting claims and demands of representatives; some latitude of action must be permitted in considerations which pertain to the geographical situation and necessities of counties, and some allowance must be made for active opposition engendered by political feeling. As the bill was reported, an exact and mathematical apportionment appeared, but to secure the passage of the act some changes were made by the legislature. I do not think that the legislature is to act as a mechanical contrivance for the mathematical distribution of members of assembly. The Constitution does not say so in unmistakable terms, and, if it does not, courts should hesitate to assert it. Something is confided to the wisdom and judgment of the legislative body in performing this constitutional duty, and if in the execution of the duty the result is not perfect, the courts should presume that the legislature endeavored to accomplish it as nearly as might be. I think, according to a logical and candid view of the constitutional requirement, it might be impracticable, unless there was some discretion vested in the legislature with respect to carrying it into effect. There has been no abuse of this discretion and for us to adjudge the act unconstitutional and to declare it void, would be, in my judgment, a most unwise construction, and would be to arrogate a power of interference, as dangerous in the precedent as it seems unwarranted in the law."

Both of these judges belonged to the same party as the majority of the legislature which had passed the act in question. In the dissenting opinion Judge Andrews (with whom concurred the only other judge of the party in the minority in both the Court and the Legislature) said (at pp. 517-519): "The argument urged upon us that the words 'as nearly as may be' give a discretion to the legislature, if it means anything, as applied to the circumstances of this case, means that the legislature may disregard the plain meaning and mandate of the Constitution. I deny that the rule that apportionment must be 'as nearly as may be' according to population is, or under any circumstances can be discretionary. I can conceive that an apportionment act should not be

directed in the New York and a few other State constitutions, which ordain for the benefit of the country districts, that certain

held to be unconstitutional for every trivial departure from the rule of equality. Some mistakes will inevitably be made in the enumeration in the first instance, and afterwards by the legislature in making the apportionment although it may act under the most sincere desire to apply the rule of the Constitution. But because the apportionment cannot be exact according to population, and some inequality is unavoidable, this does not absolve the legislature from applying the rule in every case, and it cannot under the cover of the words 'as nearly as may be' disregard the rule and relegate the proceeding to the domain of discretionary powers and escape its binding obligation. When the court can see that the rule of the Constitution was not in fact applied and the circumstances for its application were clear and unequivocal, then there is nothing left to the court but to declare the apportionment void. The suggestion that the circumstances under which legislatures act in such matters give opportunity for the play of passion and prejudice, and therefore this must be considered in determining the validity of an apportionment act, seems to me to have no place in this discussion. The very object of constitutional restrictions is to establish a rule of conduct which cannot be varied according to the passion or caprice of a majority, and to fix an immutable standard applicable under all circumstances. If a departure from the fundamental law by legislatures can in one case be justified by the frailties of human nature, and the constitutionality of an act may be made to depend in one case upon such a consideration, the constitutionality of all legislation may be governed by the same rule. I have said the very object in imposing restraints in the Constitution is to protect great principles and interests against the operation of such eccentric and disturbing forces. The discretion of the legislature, if any, in apportioning members, ends where certainty begins, and that point was reached when the counties having the largest remainders were ascertained. The attempt to justify the apportionment of 1892 by the fact asserted (which seems to be true), that the apportionment of 1879 was subject to as great or greater objection on the score of inequality than the later act, fails because the fact is irrelevant. It is one thing that a legislature has disregarded its duty on a former occasion and that the people have acquiesced in the usurpation, and quite a different and much more serious thing if such a disregard of constitutional limitation should receive judicial sanction."

Judge Andrews said (at p. 521): "I shall not undertake to show that the question presented is of judicial cognizance. That it is a judicial question cannot, under the authorities, be denied. The legislature and the courts are alike bound to obey the Constitution, and if the legislature transgresses the fundamental law and oversteps in legislation the barriers of the Constitution, it is a part of the liberties of the people that the judicial department shall have and exercise the power of protecting the Constitution itself against infringement."

To a similar effect with the opinion of the majority in the above case are Prouty *v.* Stover, 11 Kansas, 235; State *v.* Campbell, 48 Ohio St., 435. In the

large cities shall receive less representatives than the number to which their population entitles them. The usual means of testing

latter case, which was an application for a mandamus to compel an alteration of an apportionment of representatives made by a State board, the court said: "It is not sufficient in this proceeding that we might be of the opinion that we could make a better apportionment than has been made by the Board. To authorize this court to interfere and command the Board to make another apportionment, the apportionment made must so far violate the rules prescribed by the Constitution as to enable us to say, that what has been done is no apportionment at all and should be wholly disregarded. If by any fair construction of the principles prescribed by the Constitution for making an apportionment the one made may be sustained, then it cannot be disregarded and a new one ordered."

In Baird *v.* Supervisors, 138 N. Y., 95, 114, the court held void an apportionment of assemblymen that gave the same representation to districts in a city with 31,000 and 102,000 inhabitants respectively, with great variations between those two extremes. But In the matter of Baird, 142 N. Y., 523, the same court refused to interfere with an apportionment in the same city which created assembly districts varying from 61,263 to 48,944, the number entitled to an assemblyman if the city were equally divided being 54,877. In matter of Whitney 142 N. Y., 531, they held that the fact that the apportionment was made with reference to the entire population inclusive of aliens who were not voters was no ground for setting it aside when it was not shown that the inclusion of the aliens materially affected the result.

In State *ex rel.* Attorney-General *v.* Cunningham, 81 Wis. 440; s. c. 51 N. W. Rep. 724; the Supreme Court of Wisconsin held unanimously that, under the provision of the Constitution of that State (article iv, § 4), that assembly districts shall be "bounded by county, precinct, town or ward lines," an act creating assembly districts which contain one county and a fraction of another county, or which contain fractions of two or more counties is void; that under the constitutional provision that an apportionment shall be "according to the number of inhabitants," an apportionment act which created senate districts varying in population from 38,690 to 68,601, and assembly districts varying in population from 6,823 to 38,801 was void; and that a bill by the State attorney-general on behalf of the State to enjoin the Secretary of State from publishing notices of election in accordance with the act should be sustained.

Judge Orton said (at p. 484): "It is proper to say that perfect exactness in the apportionment according to the number of inhabitants is neither required nor possible. But there should be as close an approximation to exactness as possible, and this is the utmost limit for the exercise of legislative discretion. If, as in this case, there is such a wide and bold departure from this constitutional rule that it cannot possibly be justified by the exercise of any judgment or discretion, and that evinces an intention on the part of the legislature to utterly ignore and disregard the rule of the Constitution in order to promote some other object than a constitutional apportionment, then the conclusion is inevitable that the legislature did not use any judgment or discretion whatever. The above disparity in the number of inhabitants in the legislative districts is so great that it cannot be overlooked as mere careless discrepancies or slight errors in calculation. The differences are too material, great and glaring,

the constitutionality of an apportionment before the courts is by an

and deprive too many of the people of the State of all representation in the legislature to be allowed to pass as mere errors of judgment. They bear upon their face the intrinsic evidence that no judgment or discretion was exercised, and that they were made intentionally and wilfully for some improper purpose or for some private end foreign to constitutional duty and obligation. It is not an 'apportionment' in any sense of the word."

The Constitution of Michigan provides that "every county except Mackinaw and Chippewa, entitled to a representative in the legislature at the time of the adoption of this Constitution, shall continue to be so entitled under this Constitution." "Each county having a ratio of representation and a fraction over equal to a moiety of said ratio, shall be entitled to two representatives, and so on above that number, giving one additional member for each additional ratio" (Schedule 22).

In Board of Supervisors of the County of Houghton, 92 Mich., 638; s. c. 52 N.W. Rep. 961; it was held unanimously by a court of divided political opinion: that the Apportionment Act of 1891, which divided Houghton County so as to create one district of certain townships therein and another district of the remaining townships and two other counties, was void, since it deprived Houghton County of the two representatives to which its population entitled it; that the Apportionment Act of 1885, which in providing for the representation of fractions of the ratio gave a representation to fractions in counties which though more than a half were less than fractions in other counties left unrepresented, was also void; and that unless before the election a new and valid apportionment should be made a mandamus must issue directing the Secretary of State to give notice of an election under the Act of 1881.

Chief Justice Morse said (pp. 651-654): "It is also claimed that the Constitution, in relation to the apportionment of Representatives, cannot always be carried out in detail without violating some of its provisions. This is no doubt true, but it affords no argument in favor of the division of counties except in the cases provided by the Constitution. If one county can be dismembered, all of them can; and we might have, under the exercise of the legislative discretion, a representation ignoring counties altogether, and based solely upon the idea of equality of population. The schedule to the Constitution expressly provides that "every county, except Mackinaw and Chippewa, entitled to a Representative in the Legislature" at the time of its adoption, shall continue to be so entitled. When it is attempted to carry out this provision and to give each county organized since the Constitution was adopted one Representative for a moiety of the ratio, and also every county a member for each ratio and an additional member for a moiety of a ratio, and then limit the number of Representatives to 100, or any number which shall be the quotient of the division of the whole of the population of the State by the ratio, it will be found that it cannot always be done without denying to some county its constitutional right of representation. For instance, the ratio of representation at 100 members, under the census of 1890, is 20,938. Under this census and ratio, if the Constitution be followed in all of its provisions, the counties entitled to one or more Representatives under the moiety system use up 97 out of the 100 members, and there are still left 29 counties in the northern part of the State, with a population in round numbers of 137,000, out of which to carve three districts, each with a population of over 45,000 — more than double the ratio; so that two men would not have the representation in these districts that

application for a mandamus to require a public officer to issue elec-

one would have in the others. So far as I have examined, there has never been an apportionment but this difficulty has been encountered; and it has been a subject of much perplexity and vexation in the Legislature. It has resulted always in the necessary denial to some county or counties of their full representation under the moiety system. This Court could not be called upon to enforce a constitutional provision incapable of enforcement. In case of making as equitable a division as possible under the Constitution,—and that is all that can be required,—it must be within the discretion of the Legislature to deprive some of the counties of their representation or additional representation upon the moiety plan; for two ratios cannot always be given three Representatives, and at the same time limit the number of the whole to one for each ratio. But in such discretion the counties having the least number of inhabitants above the ratio or the moiety of the ratio should be the ones to suffer this deprivation. For instance, in the present apportionment Houghton County, with a population of 35,389, was entitled, under the moiety plan, to two Representatives, as were also Sanilac, Tuscola, Menominee, Macomb, and Montcalm. These counties, in population, under the census of 1890, were as follows: Menominee, 33,639, Montcalm, 32,637, Sanilac, 32,589, Tuscola, 32,508, Macomb, 31,813. Of these six counties, if three were to be left out, Houghton, Menominee, and Montcalm were entitled to two members each, and Sanilac, Tuscola, and Macomb to one each. But the Legislature gives two each to the last three, and only one to each of the first three above named, thus reversing the constitutional order of preference. Under the Constitution all of them are entitled to two, if the various provisions of the Constitution can be so worked out as to give each of them two. If they cannot, then the one or more left out should be those having the least population. There can be no legislative discretion, under the Constitution, to give a county of less population than another a greater representation. Such action would be arbitrary and capricious, and against the vital principle of equality in our government, and it is not intended or permitted by the Constitution; nor could such action lead to any good result. There can be found no excuse for it. The relator prays that the Secretary of State deliver a notice to the sheriff of Houghton County that two Representatives are to be chosen in said county at the next election, and for such other and further relief as to the Court may seem proper in the premises. The special prayer cannot be granted. The board of supervisors have no power to divide Houghton County into two districts, unless so authorized by the Legislature. Their action in this respect is null and void. But the people of the county are entitled to vote together for a Representative. No portion of them can be detached and joined to another county. The Apportionment Act of 1891 is void, because it undertook to dismember Houghton County, and because the Constitution was also violated in giving counties two Representatives having a less population than counties which were accorded but one.

"The law of 1885 is also unconstitutional, for the reason that the counties, or some of them, were given representation in defiance of the Constitution, and without the discretion of which I have spoken. Bay County, with a population of 51,221, was given but two Representatives, while Lenawee County, with a less population, to wit, 49,584, was given three. This was not the exercise of constitutional discretion, but an arbitrary determination for some reasons other than a desire to conform to the Constitution. Under the moiety

tion notices under the former, or for an injunction to prevent him

clause, Bay, Lenawee, and St. Clair were entitled, in 1885, in the order named to three Representatives. If only one could be given this number, the Constitution required it should be Bay; if two, Bay and Lenawee.

"An examination of the Apportionment Act of 1881 shows it to have been within the constitutional discretion of the Legislature, and therefore the Secretary of State must give his notices under the law, unless a new and valid apportionment shall be made by the Legislature." The same court held unanimously in Giddings v. Blacker, Secretary of State, 93 Mich. 1; s. c., 52 N. W. Rep., 944; under a constitutional provision that the legislature should after each census rearrange the Senate districts according to the number of white inhabitants, and civilized persons of Indian descent not members of any tribe (Michigan Constitution, Art. IV, Sec. 3); and that "no county shall be divided in the formation of Senate districts, except such county shall be equitably entitled to two or more Senators" (Michigan Constitution, Art. IV, Sec. 2); that the Apportionment Act of 1891, which under a ratio of 65,434 created senatorial districts of such diverse population that the largest had 97,330 and the smallest 39,727 inhabitants, that eight senators would represent districts with a population of 695,717, and eight other senators districts with a population of 349,156, was void; that the Apportionment Act of 1885, which gave eight districts containing a population of 316,778 the same number of senators as eight other districts with a population of 532,222 was also void; that the acquiescence in and use by the people of the system created by the Act of 1885 did not cure its unconstitutionality; and that a private citizen was entitled to a mandamus compelling the issue of election notices under the Act of 1881.

The court intimated in its opinion that the rule suggested by Webster was the only correct one (pp. 7–8). Chief Justice Morse said (at pp. 10–13): "It is evidently contemplated by the Constitution that the county shall be the essential factor in the formation of senatorial districts. 'No county shall be divided in the formation of Senate districts, except such county shall be equitably entitled to two or more senators,' is the prevailing idea of the organic provision. It is further contemplated that such districts shall be arranged according to the 'number of white inhabitants, and civilized persons of Indian descent not members of any tribe.' This equality of representation, however, is secondary to and hampered by the fact that no county can be divided, and a part of it attached to another county, or the part of another county, in order to make the districts equal, or nearly so, in population. This express inhibition against the division of a county gives, necessarily, great latitude to the legislative discretion, and the senatorial districts must of necessity not be as equally divided as to population as might be done if county lines could be disregarded. The Legislature undoubtedly could take a partisan advantage by making choice of different counties, and joining them together in one senatorial district, when such counties are contiguous, so that one Legislature of one political complexion, might put, for instance, Macomb and St. Clair in one district, while another of a different political complexion might join Macomb with Lapeer, and St. Clair with some other adjoining county, and not violate any constitutional rights of the electors of such districts. But, as shown by Mr. Justice Grant, the Legislature in the senatorial apportionment of 1891 went far beyond any legitimate discretion and violated the rules of equity, when it was not

from issuing election notices or filing returns under the new

necessary, or even proper, to do so, because of the fact that a county could not be divided. The twenty-seventh and twenty-ninth districts lie contiguous to each other, so that there was no excuse for putting 97,330 people in one and only 40,033 in the other.

"The senatorial apportionments of 1891 and 1885, which are before us, so that we are compelled to examine them, were neither of them arranged in view of the Constitution or the rights of the electors of this State. While it is true that the motive of an act need not be inquired into to test its constitutionality. I believe that the time for plain speaking has arrived in relation to the outrageous practice of gerrymandering, which has become so common, and has so long been indulged in, without rebuke, that it threatens not only the peace of the people, but the permanency of our free institutions. The courts alone, in this respect, can save the rights of the people, and give to them a fair count and equality in representation. It has been demonstrated that the people themselves cannot right this wrong. They may change the political majority in the Legislature, as they have often done, but the new majority proceeds at once to make an apportionment in the interest of its party, as unequal and politically vicious as the one that it repeals. There is not an intelligent school boy but knows what is the motive of these legislative apportionments, and it is idle for the courts to excuse the action upon other grounds, or to keep silent as to the real reason, which is nothing more nor less than partisan advantage taken in defiance of the Constitution, and in utter disregard of the rights of the citizen. Take our own State for example. In the election of 1884, the Republican candidate for Secretary of State had a plurality of 4,383 out of a total vote of 401,003. The Republican majority in the Legislature of 1885 arranged the senatorial districts so that, upon the vote of 1884, 21 were Republican and 11 were Democratic. In eight districts a population of 316,578 are given the same representation in the Senate as are 532,222 people in eight other districts. The Upper Peninsula, with Emmet and Mackinac Counties added, is given three Senators, when it is only entitled to two; the population of the three districts — thirtieth, thirty-first and thirty-second — combined being 124,580, and the ratio 61,125. In 1890, the Democratic candidate for Secretary of State received a plurality of 2,706 over the Republican candidate in a total vote of 398,611, and the Democratic majority in the Legislature of 1891 apportioned the senatorial districts so that, on the basis of the vote of 1890, 21 were Democratic and 11 Republican. As shown by Mr. Justice Grant, three districts were so divided that in eight of them a population of 349,156 have the same representation as 695,717 in eight other districts, and, in order to aid this inequality, the county of Saginaw is divided into two districts, when it is only entitled to one under the Constitution. It will thus be seen that, upon a plurality of less than 5,000 in a total vote of about 400,000, each of these political parties has so gerrymandered these senatorial districts that each has 21 senatorial districts to 11 of the other. If permitted to continue in this kind of business, the next Legislature to apportion Senators, if its political complexion should be different from the last, following in the footsteps of its predecessors, will easily change the figures about again, and give its party the 21 senators and the other the 11. It is time to stop it. And the citizen has the right to appeal to the Court in defense of his most sacred rights under the Constitution. He cannot be obliged to wait for prosecuting attorneys or the Attorney-General. It is as well a pri-

law.[13] It has been held that a private citizen, who is a resident of a locality unconstitutionally deprived of its due proportion of representation by the apportionment, can obtain such a mandamus.[14]

Where so much of the apportionment act as legally passed the

vate as a public grievance; and the individual elector can invoke the aid of the Court in his own behalf, and call attention also to the existence of a great public wrong.

"There is no higher privilege granted to the citizen of a free country than the right of equal suffrage, and thereby to an equal representation in the making and administration of the laws of the land. Under our State Constitution the right of the elector is fixed. To him equal representation is a right as well as a privilege, of which the Legislature cannot deprive him. These wrongs have been committed for partisan purposes. Their object and effect have been to deprive the majority of the people of their will in the administration of the government. The greatest danger to our free institutions lies today in this direction. By this system of gerrymandering, if permitted, a political party may control for years the government, against the wishes, protests, and votes of a majority of the people of the State, each Legislature, chosen by such means, perpetuating its political power by the like legislation from one apportionment to another.

"We have been obliged, under the issue here made, to investigate but two apportionments, — those of 1891 and 1885. Both are tarred with the same stick. We do not care to go further, since there is a remedy in the hands of the Executive and Legislature. The consequences of this decision are not for us. It is our duty to declare the law, to point out the invasion of the Constitution, and to forbid it."

In North Carolina *v.* Van Bokelen, 73 N. C., 198; an act amending a city charter was held invalid because of an unfair apportionment of aldermen therein contained. The court said: "So much of said act as gives to each of the first and second wards, with 400 votes each a representative of three aldermen, and to the third ward with 2,800 votes, also a like representative of three aldermen, violates the fundamental principles of our Constitution and is therefore void."

In Parker *v.* State, *ex rel.* Powell, 133 Indiana, 178; s. c. 32 N. E. Rep., 836; s. c., on motion for rehearing 133 Indiana, 212; 33 N. E. Rep., 119; the Indiana apportionments of 1879, 1885 and 1891 were held unconstitutional; but since the relator sought on account of the unconstitutionality of the last two to have the election held under the first, which was also void, his application was denied. The Act of 1891 provided for 50 senators. As the voters were 551,048, an equal apportionment gave one senator to each 11,020 voters. 40 counties were formed into 22 senatorial districts. 11 of those districts contained 23 counties and 148,496 voters. The other 11 contained 20 counties and 99,609 voters. Each of them had the same number of senators, one to each district. The apportionment was held unconstitutional.

[13] State *ex rel.* Attorney-General *v.* Cunningham, 81 Wis., 440; Board of Supervisors of the County of Houghton, 92 Mich., 638; s. c. 52 N. W. Rep., 951; Giddings *v.* Blacker, Secretary of State, 93 Mich., 1; s. c. 52 N. W. Rep., 944; People *ex rel.* Carter *v.* Rice, 135 N. Y., 473.

[14] Giddings *v.* Blacker, Secretary of State, 93 Mich., 1; Nebraska *v.* Singleton, 24 Nebraska, 586; see also People *ex rel.* Daley *v.* Rice, 129 N. Y., 449.

legislature omitted any grant of representation to the inhabitants of a particular county, the court held that that county should retain the representation which it held under the preceding apportionment; and that so much of the act as had legally passed and provided for representation to the remainder of the State, should be enforced.[15] As a general rule, the State constitutions provide for a periodical apportionment after each new enumeration of their respective inhabitants. It has been held that in the intervening time no new apportionment can be made, either directly or by such a change in the boundaries of a political subdivision of the State as to change the different assembly or senatorial districts;[16] or to deprive part of the State of representation;[17] but in one case an act was sustained, which, after the new enumeration, but before the new apportionment, enlarged the boundaries of a city so as to include territory in one district which formerly belonged to another.[18] Whether the courts should respect the acts passed by the votes of representatives from districts not entitled to them by a constitutional apportionment, is a doubtful question.[19]

§ 67. The Census.

The Constitution directs that —

"the actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct."[1]

The first reported census was that by the emperor Yee in China, 2043 B. C.;[2] unless that of the Hebrews made by Moses in the wilderness and described in the book of Numbers was earlier. In Rome, for the purpose of the division of the citizens into classes and centuries, an enumeration was taken every five years and followed by a sacrifice of purification or lustration, from which the

[15] Nebraska v. Singleton, 24 Neb., 586. But see Ballentine v. Willey, 2 Idaho, 1208; s. c. 31 Pac. Rep., 944.

[16] Kinney v. Syracuse, 30 Barbour (N. Y.), 349; Opinion of Judges, 33 Maine, 587.

[17] Warren v. Mayor, 2 Gray (Mass.), 84. Murphy v. Ehey (Maryland), 2 Atl. Rep., 993; McPherson v. Bartlett, 65 Cal., 577; s. c. 4 Pac. Rep., 582. But see People v. Pendegast, 96 Cal., 289; s. c. 31 Pac. Rep., 103; People v. Markham, 96 Cal., 262; s. c. 31 Pac. Rep., 102.

[18] Attorney-General v. Bradley, 36 Mich., 447.

[19] Compare State v. Francis, 26 Kansas, 724; and 10 Gray, 613; with Baird v. Supervisors, 138 N.Y., 95, 111.

§ 67. [1] Article I, Section 2.

[2] Appleton's Encyclopædia.

period derived the name of a lustrum. The name of census was derived from the officer in charge, an estimator or censor. In continental Europe, for the purpose of administration and police, such enumerations were taken irregularly or at stated intervals. During the eighteenth century[3] none was taken in England, however; and the first English census seems to have been that of 1801.[4]

The committee on revenue under the Articles of Confederation recommended an amendment to provide for a triennial numbering of the inhabitants for the purpose of the apportionment of taxation.[5] In the Federal Convention various propositions concerning the time of the census were submitted. That of fifteen years was first adopted.[6] A term of twenty years was then suggested, but the proposition was rejected; and ten years chosen by the votes of eight States to two.[7]

The direct and declared object of the census is to furnish a standard by which representatives and direct taxes may be apportioned among the several States which may be included in the Union;[8] but its functions have been extended so that the government now collects at the same time statistics of all kinds. Under similar provisions in different State constitutions general statistics have also been usually collected. Governor David B. Hill of New York in 1885 vetoed a bill for a State census upon the ground that it provided for the collection of other statistics besides an enumeration of the inhabitants of the State.[9]

A Federal district judge dismissed as not supported by the acts of Congress, an indictment against an officer of a lumber company for his refusal to answer questions concerning its capital and business asked by officers taking the census of 1890. He said: —

"It may not be amiss to suggest that there may be a limit to the power of congress to compel a citizen to disclose information concerning his business undertakings, and the manner in which they are carried on. This limit must relate, not only to the kind of information he may properly refuse to disclose, because it may be equivalent to the appro-

[3] Ibid.

[4] Encyclopædia Britannica.

[5] Elliot's Debates, 2d ed., vol. v, p. 64. See *supra*, § 64, over note 13.

[6] Ibid., p. 301.

[7] Ibid., p. 305.

[8] Chief Justice Marshall in Loughborough *v.* Blake, 5 Wheaton, 317, 321.

[9] Veto message of May 27, 1885. State Papers of Governor Hill for 1885, p. 154.

priation of private property for public use without just compensation, but also to the extent of the information required, as well as to the time within which it shall be given. Certain kinds of information valuable to the public and useful to the legislative branches of the government as the basis for proper laws have heretofore been voluntarily given, and may properly be required from the citizen, when it is not of property value, or when the collection, compilation, and preparation thereof does not impose great expense and labor for which compensation is not provided. It is not infrequent, however, that answers to questions propounded in some schedules, if fully and properly prepared, involve the collection and compilation of facts that require the labor of a large force of clerks for days and weeks, entailing great expense and embarrassment to the ordinary business of the citizen. Is it within the power of congress to make such answers compulsory, and require the citizen to neglect his usual business, with loss, and to prepare this information at a great personal expense, without proper compensation? Or if a citizen, by his long experience in a special line of business, and by his superior organizing and adminstrative ability, has so systematized it that he can carry it on at a much less expense and with greater facility than others, is it right to compel him to disclose the information so acquired, and thereby open to his rivals in trade the methods by which he has been able to outstrip them in the sharp competition for business? Is not the system so established, and the knowledge so acquired, as much a property right to him as the land and shop in which he conducts his business? and can he be compelled to part with the former without due compensation more justly than with the latter? The zeal with which such information is sometimes solicited to maintain favorite theories of public officials, or to afford the basis for discussing economical questions, often leads to excesses, and imposes upon the citizen duties for which no just compensation is afforded, either in money, or in his proportion of the reward of the good results to follow to the public. As before stated, when such information is required as the basis for proper legislation or the just enforcement of the public laws, the power to compel its disclosure may exist, and, if unusual expense attends its preparation, proper remuneration to the citizen can be made; but the suggestion that information having a property value may be demanded, which the citizen may not be obliged to impart without due compensation, so earnestly impressed by the learned counsel in this case, still remains undisposed of, and a proper subject for consideration by congress in the future legislation that may be needed to enforce such demands by the census bureau. Of course, these suggestions are not in-

tended to apply to the power of congress to compel answers to questions, propounded to the officers of railroads, telegraph, and insurance companies, corporations of a public character, over the business methods of which the legislative power may be asserted. As to such corporations, the public good requires that wholesome and strict supervision should be exercised, and all the information needed as the basis for such regulation and control should be produced when required." [10]

§ 68. History of the Apportionment of Direct Taxes under the Constitution.

The only direct taxes which Congress has apportioned have been taxes on lands, houses and slaves. The first was suggested by a report of Secretary Wolcott on direct taxes in December, 1796.[1] That apportioned the sum of two millions of dollars among the states which were subdivided for that purpose, and the collection of each division was placed under the control of a commissioner, with assistant assessors, collectors, supervisors, and inspectors to assist him. The quota of every State was assessed upon houses, lands, dwelling-houses, and slaves. Houses were assessed according to a classified valuation at rates uniform throughout the entire country; and slaves between twelve and fifty years of age at fifty cents per head. So much of the quota of any State as was not covered by the levy upon houses and slaves was assessed upon lands and improvements at such rates as might be required to make up the deficiency. The tax was a lien upon the real estate and slaves of the person assessed for two years from the date when it became payable, and collection was enforced by the distraint and sale of personal property.[2] Some provisions of the act were taken from the English land tax under William III.[3] The next direct tax was under the Acts of July 22, 1813,[4] and August 2, 1813,[5] of which the former provided for the assessment and collection, and the latter for the apportionment. Under these acts, taxes of three millions of dollars were apportioned among the counties in each State, with a provision that the State legislature might vary the county

[10] Judge Ricks, in United States *v.* Mitchell, 58 Fed. R., 973, pp. 999–1000.

§ 68. [1] State Papers on Finance, vol. i, 414.

[2] Act of July 14, 1798, ch. 75, 1 St. at L., 53.

[3] 10 William III, ch. 9; 4 George III, ch. 2, §§ 3, 4.

[4] 3 St. at L., 22. [5] Ibid., 53.

quotas, provided such alterations were duly certified to the Secretary of the Treasury; but that the levy according to such alterations should be made by virtue of the act of Congress, and not under the act of the State legislature.[6] The tax was levied on the value of lands, houses, and slaves, "at the rate each of them is worth in money." The act provided that any State "may pay its quota into the Treasury of the United States," and thus secure a deduction of fifteen per cent by paying before February 10, 1814, or of ten per cent by paying before May 1, 1814; "and no further proceedings shall thereafter be had under this act in such state." Seven States under the act assumed the payment of their quotas, in the other eleven the tax was collected by Federal officers like the tax of 1798.[7] In 1815, an act was passed providing for an annual direct tax of six millions of dollars to be collected substantially in the same manner as the direct tax of 1813.[8] In 1816, the provision for an annual tax was repealed, and a tax of three millions of dollars imposed for the current year.[9] In 1815 and 1816, four States assumed the payment of their quotas, and the collection was made by the United States in the other fourteen States.[10]

The last direct tax was levied during the Civil War. Under the Act of August 5th, 1861, a direct tax of twenty millions of dollars was imposed for the expense of the Civil War, which was to be collected in the same manner as the direct tax of 1813.[11] All of the Northern States, except Delaware and Colorado, assumed the payment of their quotas, largely by credits upon their accounts against the Government for military services and equipments. In

[6] Act of August 2, 1813, § 63, St. at L., 71. For an account of the attempt of the Committee of Ways and Means to arrive at such a county apportionment, see their report, State Papers on Finance, ii, 628.

[7] State Papers on Finance, ii, 860. Dunbar on the Direct Tax of 1861, Quarterly Journal of Economics, vol. iii, 436–443.

[8] Act of January 9, 1815, ch. 21, 3 St. at L., 164. The Act of January 9, 1815, ch. 21, 3 St. at L., 216, applied to the District of Columbia the provisions of the Act of January 9, 1815.

[9] Act of March 5, 1816, ch. 24, 3 St. at L., 265.

[10] Dunbar on The Direct Tax of 1861, Quarterly Journal of Economics, vol. iii, 436–444.

[11] Act of August 5, ch. 45, 12 St. at L., 294, the Act of June 7, 1862, ch. 98, 12 St. at L., 422, and the Act of February 6, 1863, ch. 21, 12 St. at L., 640, provided for the collection of this tax in the insurrectionary districts.

Delaware and Colorado, the tax was collected with other internal revenue of the United States after some delay. In the eleven insurrectionary States and the Territory of Utah, the Government was unable to collect more than a small portion of the tax, which was done through sales of lands.[12] The attempt to collect the balance was finally abandoned; and in 1891, an act was passed which provided for the repayment to the different States of the amount thus advanced by them, with a provision that when any part of the tax had been collected from an individual tax-payer, the State of which he was a citizen should hold in trust for his benefit the same amount of the money returned.[13]

The United States has the power to impose a direct tax upon the inhabitants of the District of Columbia or the territories, or to relieve the inhabitants thereof, or a part of the same, from direct taxation without regard to their population.[14]

The direct tax has never been a tax upon a State, but merely a tax upon the individuals in a State, which in certain cases the State had the right to assume.[15] Congress has no power to impose a direct tax upon a State.

§ 69. Direct Taxes.

The term, direct taxes, when used by modern economists, usually denotes taxes of which the burden falls solely upon the tax-payer, such as a poll-tax or a sumptuary tax. All taxes, the burden of which may be shifted by the tax-payer upon another, are called by them indirect.[1] They differ, however, in the appli-

[12] Dunbar on The Direct Tax of 1861, Quarterly Journal of Economics, vol. iii, 444-461.

[13] 26 St. at L., ch. 496, p. 822.

[14] Loughborough *v.* Blake, 5 Wheaton, 317.

[15] U. S. *v.* Louisiana, 123 U. S., 32, 38.

§ 69. [1] The British North America Act (20 and 31 Vic., ch. 3, § 92) provides that "in each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say:" . . . "2d. Direct Taxation within the Province in order to the raising of a Revenue for Provincial purposes." It has been held that the term is used with the sense given to it by modern economists such as Mill. (Bank of Toronto *v.* Lambe, L. R. 6 P. C. 272; 12 Appeal Cases, 515; Attorney-General (Quebec) *v.* Reed, 10 Appeal Cases, 141); that a stamp act on policies of insurance companies was an indirect tax (Attorney-General *v.* Queen Insurance Co., 3 Appeal Cases, 1090; Attorney-General (Quebec) *v.* Reed, 10 Appeal Cases, 141); but that

cation of this classification, and the subject is between them in great confusion.[2] This is not the distinction intended by the Constitution. The subject in our constitutional law is one "exclusively in American jurisprudence."[3] In the Federal Convention, when "Mr. King asked what was the precise meaning of direct taxation, no one answered."[4] And it is as hard to give the answer now as then. "Attempts to answer it by reference to the definitions of political economists have been frequently made, but without satisfactory results. The enumeration of the different kinds of taxes which Congress was authorized to impose was probably made with very little reference to their speculations."[5] At that time, the Manchester School, although founded by Adam Smith, had not obtained authority. Smith was never mentioned in the Convention.[6] And he nowhere clearly applies these definitions to the terms. The French economists had more influence upon the leaders of American thought. Their doctrine, which is the butt of Voltaire's wit in "L'Homme à quarante Écus," seems to have been taken from the writings of John Locke.[7] They taught that agriculture is the only productive employment; and that the net product from land, which is found in the hands of the land-owner, is the only fund from which taxation can draw without impoverishing society. Taxes were classified by them as direct when laid immediately upon the land-owner, and as indirect when laid upon some one else, since, according to their doctrine, destined to be borne ultimately by the land-owner. Taxes upon land, or its returns, they called direct taxes. Taxes upon commodities, or consumption, indirect. They disagreed upon the question whether taxes upon persons were direct or indirect.[8]

a tax on banks, proportioned to the amount of their paid-up capital and the number of their officers is a direct tax (Bank of Toronto *v.* Lambe, L. R. 6 P. C., 272). See Clement's Canadian Constitution, pp. 424–435; Doutre's British North America Act.

[2] See an article by Prof. E. R. A. Seligman on the Income Tax in the Forum for March 5, 1891, vol. xix, p. 48.

[3] Mr. Justice Swayne in Springer *v.* U. S., 102 U. S., 586, 602.

[4] Madison Papers, Elliot's Debates, 2d ed., vol. v, p. 451.

[5] Chief Justice Chase in Veazie Bank *v.* Fenno, 8 Wall., 533, 541–542.

[6] *Supra*, § 6, note 1. See, however, Gallatin's suggestion, that the term, "capitation tax," was taken from Adam Smith, in Gallatin's Writings, Adams' ed., vol. iii, pp. 74, 75.

[7] Dowell's History of Taxation, vol. ii, p. 124.

[8] L'Ordre Naturel des Sociétés Politiques, in Daire's Physiocrates, 474.

Turgot, however, classified taxes upon persons as direct.[9]

The apportionment of taxes upon real estate had been previously applied in England as well as France. The English land tax, since the reign of William III, had been apportioned among the counties and other local subdivisions, leaving the rate for each locality to be settled at the point necessary to give the due quota.[10] The French *taille réelle*, a tax on the value of the use of real property, was laid by apportionment among the provinces, each of which determined the manner in which its quota should be collected; and its substitute, the *impôt foncier*, since 1790, has been similarly collected. The French capitation tax, before the Revolution, was also thus collected.[11] It is not unlikely that the French definitions were in the mind of Gouverneur Morris when he introduced the term direct taxes into the Constitution.[12]

The same uncertainty as to the meaning of the term prevailed in the State conventions. In that of New York, Chancellor Livingston said that direct taxes were "taxes on land and specific duties" as distinguished from an impost or tariff on imports.[13] Jay concurred in this view, saying: "Direct taxes were of two kinds, general and specific." The national government would, without doubt, usually embrace those objects which were uniform throughout the States, for the usual specific articles of luxury.[14] In that of Virginia, John Marshall said: —

For Quesnay's use of the terms in question, see Daire, vol. i, pp. 83, 127; and for Dupont de Nemours', ibid., vol. ii, pp. 354–358. Cited from Thayer's Constitutional Cases, p. 1326.

[9] In his plan he thus classifies taxes: "Il n'y en a que trois possibles: — La directe sur les fonds. La directe sur les personnes, qui devient un impôt sur l'exploitation. L'imposition indirecte, ou sur les consommations." See also to the same effect 4 Geo. III, ch. 2; his "Comparaison de l'Impôt sur le Revenu des Propriétaires et de l'Impôt sur les Consommations," which was a memoir prepared for the use of Franklin. Daire, Physiocrates, i, 394, 396, 409. Cited from Thayer's Constitutional Cases, p. 1326.

[10] 10 William III, ch. 9. See Dowell's History of Taxation and Taxes in England, vol. iii, pp. 94–97.

[11] Pizard, La France, en 1789, 257; De Parieu, Traité de l'Impôt, vol. i, pp. 153, 224. Cited from Thayer's Constitutional Cases, p. 1326.

[12] This origin of the phrase "direct taxation" was first suggested in Hamilton's brief in the Carriage Tax Case (Hamilton's Works, vol. vii, p. 845), and was demonstrated in a valuable paper by Professor Charles F. Dunbar, on the Direct Tax of 1861, Quart. Journal Econ., vol. iii, p. 436 (A. D. 1889). *Supra*, § 6, notes 1 and 2.

[13] Elliot's Debates, 2d ed., vol. ii, p. 341.

[14] Ibid., p. 381.

"The objects of direct taxes are well understood. They are but few. What are they? Lands, slaves, stock of all kinds, and a few other articles of domestic property." [15]

In 1794 Congress imposed a tax upon carriages, to be paid by the owners wherever they might be, without any apportionment amongst the several States. It was opposed, before its passage, as an unapportioned direct tax, and consequently unconstitutional. Madison wrote to Jefferson, May 7th, 1794: —

"The tax on carriages succeeded in spite of the Constitution by a majority of twenty, the advocates of the principle being re-enforced by the adversaries to luxuries." "Some of the motives which they decoyed to their support ought to premonish them of the danger. By breaking down the barriers of the Constitution, and giving sanction to the ides of sumptuary regulations, wealth may find a precarious defense in the shield of justice. If luxury, as such, is to be taxed, the greatest of all luxuries, says Paine, is a great estate." [16]

The danger which he foresaw, at the end of a hundred years became manifest to all. In a subsequent letter, February 7th, 1796, he said of the case which upheld the tax: "There never was a question on which my mind was better satisfied, and yet I have little expectation that it will be viewed in the same light by the court that it is by me." [17] On the argument of the question before the Supreme Court of the United States, in what appears to have been a moot case,[18] Alexander Hamilton was selected to represent the government.[19] He showed the injustice of the apportionment of a tax of this character, and suggested that a boundary line between direct and indirect taxes be settled by "a species of arbitration," and that direct taxes be considered only "capitation or poll-taxes, and taxes on lands and buildings and general assessments, whether on the whole property of individuals, or on their whole real or personal estate. All else must, of necessity, be considered as indirect taxes." His views prevailed. The Court

[15] Ibid., vol. iii, p. 229.

[16] Madison's Writings (Congressional ed.), vol. ii, p. 14.

[17] Ibid., p. 77.

[18] It is hard to believe that Hylton, the defendant in the Circuit Court, had, as stated in the report, one hundred and twenty-five chariots, "kept exclusively for the defendant's own private use and not to be let out for hire or for the conveyance of persons for hire."

[19] His brief on the "carriage tax" is still in existence, and may be found

held that a tax on pleasure-carriages was not a direct tax.[20] The main ground of the judgment was thus stated by Mr. Justice Chase: "It appears to me that a tax on carriages cannot be laid by the rule of apportionment without very great inequality and injustice. For example, suppose two states equal in census to pay eighty thousand dollars each by a tax on carriages of eight dollars on every carriage; and in one State there are one hundred carriages and in the other one thousand. The owners of carriages in one State would pay ten times the tax of owners in the other. A in one State would pay for his carriage eight dollars; but B in the other State would pay for his carriage eighty dollars."[21]

Judge Paterson said: —

"Whether direct taxes in the sense of the Constitution comprehend any other tax than a capitation tax and a tax on land is a questionable point. If Congress, for instance, should tax in the aggregate or mass things that were generally approved by the States in the Union, then, perhaps, the rule of apportionment would be the most proper, especially if an assessment were to intervene. This appears from the practice of some of the States to have been considered a direct taxation. Whether it be so, under the Constitution of the United States, is a matter of some difficulty; but as it is not before the court it would be improper to give any decisive opinion upon it. I never entertained a doubt that the principal — I will not say the only — objects that the framers of the Constitution contemplated as falling within the rule of apportionment were a capitation tax and a tax on land. It is not necessary to determine whether a tax on the product of land be a direct or indirect tax. Perhaps the immediate product of land, in its original and crude state, ought to be considered as the land itself; it makes part of it, or else the provision made against taxing exports would be easily eluded. Land independently of its produce is of no value. All taxes on expenses or consumption are indirect taxes."[22]

For one hundred years this decision was treated as a final set-

in Hamilton's Works, 1st ed., vol. ix, p. 848; and 2d ed., vol. vii, p. 845. According to Judge Tucker, John Marshall took part in the argument at Washington and was "supposed to have defended his own private opinion." (Tucker's Blackstone, vol. i, Appendix, part 1, p. 294.) There is no record of his appearance in the suit. (Pollock v. Farmer's Loan and Trust Co., 158 U. S., 601, 626.)

[20] Hylton v. U. S., 3 Dallas, 171.

[21] Ibid., p. 174.

[22] Ibid., p. 177.

tlement of the question. In his "Sketch of the Finances of the United States," published in November, 1796, Albert Gallatin said: —

"The most generally received opinion, however, is that, by direct taxes in the Constitution, those are meant which are raised on the capital or revenue of the people, by indirect means, such as are raised on their expense." "That opinion is in itself rational, and conformable to the decision which has taken place on the subject of the carriage tax." [23]

Five times has Congress imposed direct taxes which were apportioned among the States, and in each case land and slaves, who by the laws of some States were real estate, alone were included.[24] Congress acted upon this rule, with the approval of Madison, by the imposition of taxation without apportionment upon specific articles of personal property within the United States, such as the tax on domestic manufactures,[25] and upon "all household furniture kept for use," and gold and silver watches.[26] The exigencies of the Civil War strained the resources of both parties to the utmost. The Confederate authorities had more hesitation over constitutional scruples than those of the United States, and the fall of their government was hastened by their inability to raise funds through direct taxation, an apportionment being impossible without danger of jealousies and consequent disruption.[27] The United States imposed a tax upon successions to real and personal property, taxes upon the gross receipts and profits of corporations, a tax upon notes issued by banks, a tax upon unmanufactured cotton, and a tax upon all incomes above moderate amounts.[28] All of these were held constitutional; [29] the cotton tax, which was attacked as both a direct tax and a tax upon exports, by a divided court.[30]

[23] Gallatin's Writings, Adams' ed., vol. iii, p. 74.

[24] *Supra*, § 68.

[25] Act of Jan. 18, 1815, 3 St. at L., p. 180.

[26] Ibid., p. 186.

[27] *Supra*, § 37, note 56.

[28] All of these acts, except those imposing the succession and the cotton tax, are reprinted in the Appendix to Foster and Abbot on the Income Tax of 1894.

[29] Pacific Insurance Co. *v.* Soule, 7 Wall., 433; Veazie Bank *v.* Fenno, 8 Wall., 533, 546; Scholey *v.* Rew, 23 Wall., 331; Springer *v.* U. S., 102 U. S., 586.

[30] *Supra*, § 38, note 117.

In the case which held that the general tax upon incomes was not a direct tax, Mr. Justice Swayne said: —

"Our conclusions are that direct taxes within the meaning of the Constitution are only capitation taxes as expressed in that instrument, and taxes on real estate." [31]

After the income tax had been collected for more than six years and some of the decisions which sustained it had been made, the section of the Constitution relating to the apportionment of representatives and direct taxes was amended by the Fourteenth Amendment so as to change the rule as to representation; but that as regards taxation was left unaltered, it being the general understanding that it did not apply to taxes upon income.[32]

In 1894, in reliance upon this construction of the Constitution, in which all three of the departments of the government and the States had acquiesced, an attempt was made by its aid to accomplish that which the section had been adopted to prevent. The representatives of the new States in the West against whose action Gouverneur Morris had warned the other members of the Convention, combined with those of the South to oppress the States upon the North Atlantic coast. An unapportioned income-tax was imposed upon the revenues of individuals exceeding four thousand dollars, and on corporate incomes of all amounts, with the exemption, however, of some of the richest in the country, such as mutual insurance companies and ecclesiastical corporations; of which at least four-fifths,[33] and probably a much larger proportion, was payable by four States,— New York, New Jersey, Pennsylvania and Massachusetts, — while in a number of the States that voted for it the incidence of the tax did not affect more than a very few individuals. The constitutionality of this proceeding, by the consent of the Attorney-General, who waived all questions of jurisdiction, was brought before the Supreme Court before the tax was payable. In their first decision the court held unanimously that so much of the tax as applied to the income from municipal bonds was void, since those securities could not be taxed by the United States; and by a majority of four to two, that

[31] Springer v. U. S., 102 U. S. 586, 602.

[32] See the dissent of Mr. Justice White in Pollock v. Farmer's Loan and Trust Co., 158 U. S., 601, 715.

[33] Mr. Choate's Argument in Pol-

so much as applied to rents was also void, as a tax upon real estate, and consequently a direct tax which must be apportioned. They divided equally on the questions whether the invalidity of this part destroyed the rest; and whether the tax on the general income from personal property was also void as a direct tax.[34] A reargument was ordered, which Mr. Justice Jackson, whose illness had prevented his previous presence, left his death-bed to attend. He voted to sustain all of the act that did not apply to municipal bonds; but Mr. Justice Shiras, who on the first decision had voted to sustain so much as did not apply to rents, changed his mind; and by a majority of five to four the whole income-tax was held to be void, as a direct tax which had not been apportioned.[35] In consequence of this decision the only definition of direct taxes that can be formulated with any assurance is as follows: Direct taxes are taxes on land, poll-taxes, and, as long as a majority of the Supreme Court are of the same mind, taxes on rents and general taxes upon personal property and incomes which are not confined to a special class, although with large classes of exemptions.[36]

The arguments on either side of this great case are so masterly presented in the opinions and the briefs of counsel, that a summary would be not only inadequate but superfluous. Now that the dust has not yet gathered upon the papers, it seems impossible

lock *v.* Farmer's Loan and Trust Co., 157 U. S., 429, 533; David A. Wells in The Forum for March, 1894, vol. xvii, p. 1.

[34] Pollock *v.* Farmer's Loan and Trust Co., 157 U. S., 429.

[35] Pollock *v.* Farmer's Loan and Trust Co., 158 U. S., 601.

[36] The Constitution of Massachusetts (Part II, Ch. I, Art. IV) gives to the General Court power "to impose and levy proportional and reasonable assessments, rates and taxes upon all the inhabitants and persons resident and estates lying within the said Commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandises and commodities whatever, brought into, produced, manufactured or being within the same." It has been held that taxes upon occupations (Portland Bank *v.* Apthorp, 12 Mass., 252, 256), successions of every character (Minot *v.* Winthrop, 162 Mass., 113), and corporate franchises (Commonwealth *v.* Hamilton Manufacturing Co., 12 Allen (Mass.), 298, 307; s. c. as Hamilton Company *v.* Massachusetts, 6 Wall., 632; Commonwealth *v.* Provident Institution, 12 Allen, 312; s. c. as Provident Institution *v.* Massachusetts, 6 Wall., 611; Commonwealth *v.* Lancaster Savings Bank, 123 Mass., 493. Connecticut Insurance Co. *v.* Commonwealth, 133 Mass., 16), are "excises upon commodities."

for a commentator to discuss the question without bias, even were he so rash as to attempt to add to what was said by the eminent men who were engaged.

The reasons assigned by the majority were chiefly historical, designed to show that when the Constitution was adopted such a tax would have been considered as direct, and necessarily apportioned. In this it seems that they were successful. The chief reliance of the minority was on the principle *stare decisis*. They contended that the court ought not to overturn a construction of the Constitution settled by repeated decisions of their predecessors in the judiciary as well as acts of the other two departments of the government, which they contended had been undisturbed for over one hundred years. They argued, moreover, that the impossibility of the just apportionment of such a tax proved that it could not be within the intention of the Constitution; that the decision crippled the United States by depriving them of a power which might be indispensable to the successful conduct of a foreign war, when their ports were blockaded and so little revenue could be derived from a tariff; that it perpetuated a system of taxation unfair to the poor; and finally that it prevented the government from imposing upon the rich their just share of the public burdens.

One effect of the decision has been salutary. It has defeated an odious scheme of class-legislation. If upheld it will be a safeguard to property from any spoliation under the guise of Federal taxation, give encouragement to a new doctrine of State rights that may be of other assistance in the future,[37] and afford a check to waste of the national treasury. Upon the other hand it has raised an obstacle against the further reduction of an oppressive tariff. It has shorn the United States of a power that might be essential to their preservation in case of war. And it has given a blow to settled principles of constitutional construction which makes no decision of the past seem any longer secure.[38]

[37] See *supra*, § 41.

[38] In the last volume the writer will discuss the rules for the construction of the Constitution.

APPENDIX TO CHAPTER VIII.

JEFFERSON'S OPINION ON THE APPORTIONMENT OF 1792.

"The Constitution has declared that representatives and direct taxes shall be apportioned among the several States according to their respective numbers; that the number of representatives shall not exceed one for every 30,000, but each State shall have, at least, one representative; and, until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts, &c.

"The bill for apportioning representatives among the several States, without explaining any principle at all which may show its conformity with the Constitution or guide future apportionments, says, that New Hampshire shall have three members, Massachusetts sixteen, &c. We are, therefore, to find by experiment what has been the principle of the bill; to do which, it is proper to state the Federal or representable numbers of each State, and the members allotted to them by the bill. They are as follows: —

"Vermont	85,532	3
New Hampshire	141,823	5
Massachusetts	475,327	16
Rhode Island	68,444	2
Connecticut	235,941	8
New York	352,915	11
New Jersey	179,556	6
Pennsylvania	432,880	14
Delaware	55,538	2
Maryland	278,513	9
Virginia	630,558	21
Kentucky	68,705	2
North Carolina	353,521	11
South Carolina	206,236	7
Georgia	70,843	2
	3,636,312	120

"It happens that this representation, whether tried as between great and small States, or as between North and South, yields, in the present instance, a tolerably just result, and consequently could not be objected to on that ground, if it were obtained by the process prescribed in the

Constitution; but, if obtained, by any process out of that, it becomes inadmissible.

"The first member of the clause of the Constitution above cited is express, — that representatives shall be apportioned among the several States according to their *respective numbers;* that is to say, they shall be apportioned by some common ratio, for *proportion* and *ratio* are equivalent words; and it is the definition of *proportion among numbers*, that they have a *ratio common to all*, or, in other words, a *common divisor*. Now, trial will show that there is no *common ratio* or *divisor* which, applied to the numbers of each State, will give to them the number of representatives allotted in this bill; for, trying the several ratios of 29, 30, 31, 32, 33, the allottments would be as follows: —

	29	30	31	32	33	The Bill.
"Vermont	2	2	2	2	2	3
New Hampshire	4	4	4	4	4	5
Massachusetts	16	15	15	14	14	16
Rhode Island	2	2	2	2	2	2
Connecticut	8	7	7	7	7	8
New York	12	11	11	11	10	11
New Jersey	6	5	5	5	5	6
Pennsylvania	14	14	13	13	13	14
Delaware	1	1	1	1	1	2
Maryland	9	9	8	8	8	9
Virginia	21	21	20	19	19	21
Kentucky	2	2	2	2	2	2
North Carolina	12	11	11	11	10	12
South Carolina	7	6	6	6	6	7
Georgia	2	2	2	2	2	2
	118	112	109	107	105	120

"Then the bill reverses the constitutional precept; because, by it, representatives are *not* apportioned among the several States according to their respective numbers.

"It will be said, that, though for *taxes* there may always be found a divisor which will apportion them among the States according to numbers exactly, without leaving any remainder; yet for *representatives* there can be no such common ratio, or divisor, which, applied to the several numbers, will divide them exactly, without a remainder or fraction. I answer, then, that *taxes* must be divided *exactly*, and *representatives* as *nearly* as the *nearest ratio* will admit, and the fractions must be neglected; because the Constitution wills, absolutely, that there be an *apportionment or common ratio;* and if any fractions result from the operation, it has left them unprovided for. In fact, it could not but foresee that such fractions would result, and it meant to submit to them. It knew they would be in favor of one part of the Union at one

time and of another part of it at another, so as, in the end, to balance occasional inequalities. But, instead of such a *single* common ratio or uniform divisor, as prescribed by the Constitution, the bill has applied *two ratios* at least to the different States, to wit, that of 30,026 to the seven following. Rhode Island, New York, Pennsylvania, Maryland, Virginia, Kentucky, and Georgia; and that of 27,770 to the eight others; namely, Vermont, New Hampshire, Massachusetts, Connecticut, New Jersey, Delaware, North Carolina, and South Carolina. As follows: —

		Divided by 30,026 give		and		Divided by 27,770 give	
Rhode Island,	68,444		2	Vermont,	85,532		3
New York,	352,915		11	New Hampshire,	141,823		5
Pennsylvania,	432,880		14	Massachusetts,	475,327		16
Maryland,	278,513		9	Connecticut,	235,941		8
Virginia,	630,558		21	New Jersey,	179,556		6
Kentucky,	68,705		2	Delaware,	55,538		2
Georgia,	70,843		2	North Carolina,	353,521		13
				South Carolina,	206,236		7

"And if *two* ratios may be applied, then *fifteen* may, and the distribution become arbitrary, instead of being apportioned to numbers.

"Another member of the clause of the Constitution, which has been cited says 'the number of representatives shall not exceed one for every 30,000, but each State shall have at least one representative.' This last phrase proves that it had in contemplation, that all fractions, or *numbers below the common ratio*, were to be unrepresented; and it provides specially that, in the case of a State whose whole number shall be below the common ratio, one representative shall be given to it. This is the single instance where it allows a representation to any smaller number than the common ratio, and by providing specially for it in this, shows it was understood that, without special provision, the smaller number would, in this case, be involved in the general principle.

"The first phrase of the above citation, that 'the number of representatives shall not exceed one for every 30,000,' is violated by this bill, which has given to eight States a number exceeding one for every 30,000, to wit, one for every 27,770.

"In answer to this, it is said that this phrase may mean either the thirty thousands *in each State*, or the thirty thousands *in the whole Union;* and that, in the latter case, it serves only to find the amount of the whole representation, which, in the present state of population, is one hundred and twenty members. Suppose the phrase might bear both meanings, which will common sense apply to it? Which did the universal understanding of our country apply to it? Which did the Senate and Representatives apply to it during the pendency of the first bill,

and even till an advanced stage of this second bill, when an ingenious gentleman found out the doctrine of fractions, — a doctrine so difficult and inobvious as to be rejected at first sight by the very persons who afterwards became its most zealous advocates? The phrase stands in the midst of a number of others, every one of which relates to States in their separate capacity. Will not plain common sense then, understand it, like the rest of its context, to relate to States in their separate capacities?

"But if the phrase of one for 30,000 is only meant to give the aggregate of representatives, and not at all to influence their apportionment among the States, then the one hundred and twenty being once found, in order to apportion them we must recur to the former rule, which does it *according to the numbers of the respective States:* and we must take the *nearest common divisor* as the ratio of distribution, that is to say, that divisor which, applied to every State, gives to them such numbers as, added together, come nearest to 120. This nearest common ratio will be found to be 28,858, and will distribute 119 of the 120 members, leaving only a single residuary one. It will be found, too, to place 96,648 fractional numbers in the eight northernmost States, and 105,582 in the southernmost. The following table shows it: —

		Ratio of 28,858.	Fractions.	
"Vermont	85,532	2	27,186	
New Hampshire	141,823	4	26,391	
Massachusetts	475,327	16	13,599	
Rhode Island	68,444	2	10,728	
Connecticut	235,941	8	5,077	
New York	352,915	12	6,619	
New Jersey	179,556	6	6,408	
Pennsylvania	432,880	15	10	
				96,648
Delaware	55,538	1	26,680	
Maryland	278,513	9	18,791	
Virginia	630,558	21	24,540	
Kentucky	68,705	2	10,989	
North Carolina	353,521	12	7,225	
South Carolina	206,236	7	4,230	
Georgia	70,843	2	13,127	
				105,582
	3,636,312	119	202,230	202,230

"Whatever may have been the intention, the effect of rejecting the nearest divisor (which leaves but one residuary member), and adopting a distant one (which leaves eight), is merely to take a member from New York and Pennsylvania each, and give them to Vermont and New Hampshire. But it will be said 'This is giving more than one for

30,000.' True; but has it not been just said, that the one for 30,000 is prescribed only to fix the aggregate number, and that we are not to mind it when we come to apportion them among the States; that for this we must recur to the former rule, which distributes them according to the numbers in each State? Besides, does not the bill itself apportion among seven of the States by the ratio of 27,770, which is much more than one for 30,000?

"Where a phrase is susceptible of two meanings, we ought certainly to adopt that which will bring upon us the fewest inconveniences. Let us weigh those resulting from both constructions.

"From that giving to each State a member for every 30,000 in that State, results the single inconvenience, that there may be large fractions unrepresented. But it being a mere hazard on which States this will fall, hazard will equalize it in the long run.

"From the other results exactly the same inconvenience. A thousand cases may be imagined to prove it. Take one: suppose eight of the States had 45,000 inhabitants each, and the other seven 44,999 each, that is to say, each one less than each of the others, the aggregate would be 674,993, and the number of representatives, at one for 30,000 of the aggregate, would be 22. Then, after giving one member to each State, distribute the seven residuary members among the seven highest fractions; and though the difference of population be only an unit, the representation would be the double. Here a single inhabitant the more would count as 30,000. Nor is this case imaginable only; it will resemble the real one, whenever the fractions happen to be pretty equal through the whole States. The numbers of our census happen, by accident, to give the fractions all very small or very great, so as to produce the strongest case of inequality that could possibly have occurred, and which may never occur again. The probability is, that the fractions will generally descend gradually from 39,999 to 1. The inconvenience then, of large unrepresented fractions attends both constructions; and, while the most obvious construction is liable to no other, that of the bill incurs many and grievous ones.

			FRACTIONS.
1st	45,000	2	15,000
2d	45,000	2	15,000
3d	45,000	2	15,000
4th	45,000	2	15,000
5th	45,000	2	15,000
6th	45,000	2	15,000
7th	45,000	2	15,000
8th	45,000	2	15,000
9th	44,999	1	14,999
10th	44,999	1	14,999

11th	44,999	1	14,999
12th	44,999	1	14,999
13th	44,999	1	14,999
14th	44,999	1	14,999
15th	44,999	1	14,999
	674,993		

"1. If you permit the large fraction in one State to choose a representative for one of the small fractions in another State, you take from the latter its election, which constitutes real representation, and substitute a virtual representation of the disfranchised fractions; and the tendency of the doctrine of virtual representation has been too well discussed and appreciated by reasoning and resistance, on a former great occasion, to need development now.

"2. The bill does not say that it has given the residuary representatives to *the greatest fractions;* though, in fact, it has done so. It seems to have avoided establishing that into a rule, lest it might not suit on another occasion. Perhaps it may be found the next time more convenient to distribute them *among the smaller States;* at another time *among the larger States;* at other times according to any other crotchet which ingenuity may invent, and the combination of the day give strength to carry; or they may do it arbitrarily, by open bargain and cabal. In short, this construction introduces into Congress a scramble or a vendue for the surplus members. It generates waste of time, hot blood, and may at some time, when the passions are high, extend a disagreement between the two houses, to the perpetual loss of the thing, as happens now in Pennsylvania assembly; whereas the other construction reduces the apportionment always to an arithmetical operation, about which no two men can possibly differ.

"3. It leaves in full force the violation of the precept which declares that representatives shall be *apportioned* among the States according to their numbers, that is, by some common ratio.

"Viewing this bill either as a *violation of the Constitution* or as giving an inconvenient *exposition to its words*, is it a case wherein the President ought to interpose his negative? I think it is.

"1. The non-user of his negative begins already to excite a belief that no President will ever venture to use it; and, consequently, has begotten a desire to raise up barriers in the State legislatures against Congress throwing off the control of the Constitution.

"2. It can never be used more pleasingly to the public than in the protection of the Constitution.

"3. No invasions of the Constitution are so fundamentally danger-

ous as the tricks played on their own numbers, apportionment, and other circumstances respecting themselves, and affecting their legal qualifications to legislate for the Union.

"4. The majorities by which this bill has been carried (to wit, one in the Senate and two in the House of Representatives) show how divided the opinions were there.

"5. The whole of both houses admit the Constitution will bear the other exposition; whereas the minorities in both deny it will bear that of the bill.

"6. The application of any one ratio is intelligible to the people, and will, therefore, be approved; whereas the complex operations of this bill will never be comprehended by them; and, though they may acquiesce, they cannot approve what they do not understand." [1]

WEBSTER'S REPORT TO THE SENATE ON THE APPORTIONMENT OF 1832.

"This bill, like all laws on the same subject, must be regarded as of an interesting and delicate nature. It respects the distribution of political power among the States of the Union. It is to determine the number of voices which, for ten years to come, each State is to possess in the popular branch of the legislature. In the opinion of the committee, there can be few or no questions which it is more desirable should be settled on just, fair, and satisfactory principles than this; and, availing themselves of the benefit of the discussion which the bill has already undergone in the Senate, they have given to it a renewed and anxious consideration. The result is, that, in their opinion, the bill ought to be amended. Seeing the difficulties which belong to the whole subject, they are fully convinced that the bill has been framed and passed in the other house, with the sincerest desire to overcome those difficulties, and to enact a law which should do as much justice as possible to all the States. But the committee are constrained to say that the object appears to them not to have been attained. The unequal operation of the bill on some of the States, should it become a law, seems to the committee most manifest; and they cannot but express a doubt, whether its actual apportionment of the representative power among the several States can be considered as conformable to the spirit of the Constitution. The bill provides that, from and after the 3d of March, 1833, the House of Representatives shall be composed of members, elected agreeably to a ratio of one representative for every

[1] Jefferson's Works, 1st ed., vol. vii, p. 594.

forty-seven thousand and seven hundred persons in each State, computed according to the rule prescribed by the Constitution. The addition of the seven hundred to the forty-seven thousand, in the composition of this ratio, produces no effect whatever in regard to the constitution of the House. It neither adds to, nor takes from, the number of members assigned to any State. Its only effect is a reduction of the apparent amount of the fractions, as they are usually called, or residuary members, after the application of the ratio. For all other purposes, the result is precisely the same as if the ratio had been 47,000.

"As it seems generally admitted that inequalities do exist in this bill, and that injurious consequences will arise from its operation which it would be desirable to avert, if any proper means of averting them without producing others equally injurious could be found, the committee do not think it necessary to go into a full and particular statement of these consequences. They will content themselves with presenting a few examples only of these results, and such as they find it most difficult to reconcile with justice and the spirit of the Constitution.

"In exhibiting these examples, the committee must necessarily speak of particular States; but it is hardly necessary to say, that they speak of them as examples only, and with the most perfect respect, not only for the States themselves, but for all those who represent them here.

"Although the bill does not commence by fixing the whole number of the proposed House of Representatives, yet the process adopted by it brings out the number of two hundred and forty members. Of these two hundred and forty members forty are assigned to the State of New York, that is to say, precisely one-sixth of the whole. This assignment would seem to require that New York should contain one-sixth part of the whole population of the United States, and would be bound to pay one-sixth part of all her direct taxes. Yet neither of these is the case. The whole representative population of the United States is 11,929,005, that of New York is 1,918,623, which is less than one-sixth of the whole by nearly 70,000. Of a direct tax of two hundred and forty thousand dollars, New York would pay only $38,590. But if, instead of comparing the numbers assigned to New York with the whole numbers of the house, we compare her with other States, the inequality is still more evident and striking.

"To the State of Vermont the bill assigns five members. It gives, therefore, eight times as many representatives to New York as to Vermont; but the population of New York is not equal to eight times the population of Vermont by more than three hundred thousand. Vermont has five members only for 280,657 persons. If the same proportion

were to be applied to New York, it would reduce the number of her members from forty to *thirty-four*, making a difference more than equal to the whole representation of Vermont, and more than sufficient to overcome her whole power in the House of Representatives.

"A disproportion almost equally striking is manifested, if we compare New York with Alabama. The population of Alabama is 262,208; for this, she is allowed five members. The rule of proportion which gives to her but five members for her number would give to New York but thirty-six for her number. Yet New York receives forty. As compared with Alabama, then, New York has an excess of representation equal to four-fifths of the whole representation of Alabama; and this excess itself will give her, of course, as much weight in the House as the whole delegation of Alabama, within a single vote. Can it be said, then, that representatives are apportioned to these States *according to their respective numbers?*

"The ratio assumed by the bill, it will be perceived, leaves large fractions, so called, or residuary numbers, in several of the small States, to the manifest loss of a part of their just proportion of representative power. Such is the operation of the ratio in this respect, that New York, with a population less than that of New England by thirty or thirty-five thousand, has yet two more members than all the New England States; and there are seven States in the Union whose members amount to the number of 123, being a clear majority of the whole House, whose aggregate fractions altogether amount only to fifty-three thousand; while Vermont and New Jersey, having together but eleven members, have a joint fraction of seventy-five thousand.

"Pennsylvania by the bill will have, as it happens, just as many members as Vermont, New Hampshire, Massachusetts and New Jersey; but her population is not equal to theirs by a hundred and thirty thousand; and the reason of this advantage, derived to her from the provisions of the bill, is, that her fraction, or residuum, is twelve thousand only, while theirs is one hundred and forty-four.

"But the subject is capable of being presented in a more exact and mathematical form. The House is to consist of two hundred and forty members. Now, the precise proportion of power, out of the whole mass represented by the numbers two hundred and forty, which New York would be entitled to according to her population, is 38.59; that is to say, she would be entitled to thirty-eight members, and would have a residuum, or fraction; and, even if a member were given her for that fraction, she would still have but thirty-nine; but the bill gives her forty.

"These are a part, and but a part, of those results produced by the bill in its present form, which the committee cannot bring themselves to approve. While it is not to be denied that, under any rule of apportionment, some degree of relative inequality must always exist, the committee cannot believe that the Senate will sanction inequality and injustice to the extent in which they exist in this bill, if they can be avoided. But recollecting the opinions which had been expressed in the discussions of the Senate, the committee have diligently sought to learn whether there was not some other number which might be taken for a ratio, the application of which would work out more justice and equality. In this pursuit the committee have not been successful. There are, it is true, other numbers, the adoption of which would relieve many of the States which suffer under the present; but this relief would be obtained only by shifting the pressure on to the other States, thus creating new grounds of complaint in other quarters. The number forty-four thousand has been generally spoken of as the most acceptable substitute for forty-seven thousand seven hundred; but, should this be adopted, great relative inequality would fall on several States, and, among them, on some of the new and growing States, whose relative disproportion, thus already great, would be constantly increasing. The committee, therefore, are of opinion that the bill should be altered in the mode of apportionment. They think that the process which begins by assuming a ratio should be abandoned, and that the bill ought to be framed on the principle of the amendment, which has been the main subject of discussion before the Senate. The fairness of the principle of this amendment, and the general equity of its results, compared with those which flow from the other process, seem plain and undeniable. The main question has been, whether the principle itself be constitutional; and this question the committee proceeded to examine, respectfully asking of those who have doubted its constitutional propriety, to deem the question of so much importance as to justify a second reflection.

"The words of the Constitution are, 'representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not

exceed one for every thirty thousand, but each State shall have at least one representative.'

"There would seem to be little difficulty in understanding these provisions. The terms used are designed, doubtless, to be received in no peculiar or technical sense, but according to their common and popular acceptation. To *apportion* is to distribute by right measure, to set off in just parts, to assign in due and proper proportion. These clauses of the Constitution respect not only the portions of power, but the portions of the public burden, also, which should fall to the several States; and the same language is applied to both. Representatives are to be apportioned among the States according to their respective numbers; and direct taxes are to be apportioned by the same rule. The end aimed at is, that representation and taxation should go hand in hand; that each State should be represented in the same extent to which it is made subject to the public charges by direct taxation. But between the apportionment of representatives and the apportionment of taxes there necessarily exists one essential difference. Representation, founded on numbers, must have some limit; and, being from its nature a thing not capable of indefinite subdivision, it cannot be made precisely equal. A tax, indeed, cannot always or often be apportioned with perfect exactness; as, in other matters of account, there will be fractional parts of the smallest coins and the smallest denomination of money of account, yet, by the usual subdivisions of the coin and of the denomination of money, the apportionment of taxes is capable of being made so exact that the inequality becomes minute and invisible. But representation cannot be thus divided. Of representation, there can be nothing less than one representative; nor, by our Constitution, more representatives than one for every thirty thousand. It is quite obvious, therefore, that the apportionment of representative power can never be precise and perfect. There must always exist some degree of inequality. Those who framed and those who adopted the Constitution were, of course, fully acquainted with this necessary operation of the provision. In the Senate, the States are entitled to a fixed number of senators; and, therefore, in regard to their representation in that body there is no consequential or incidental inequality arising. But, being represented in the House of Representatives according to their respective numbers of people, it is unavoidable that, in assigning to each State its number of members, the exact proportion of each, out of a given number, cannot always or often be expressed in whole numbers; that is to say, it will not often be found that there belongs to a State exactly one-tenth or one-twentieth or one-thirtieth of the whole House; and, therefore, no

number of representatives will exactly correspond with the right of such State, or the precise share of representation which belongs to it, according to its population.

"The Constitution, therefore, must be understood, not as enjoining an absolute relative equality, — because that would be demanding an impossibility,— but as requiring of Congress to make the apportionment of representatives among the several States according to their respective numbers, *as near as may be.* That which cannot be done perfectly must be done in a manner as near perfection as can be. If exactness cannot, from the nature of things, be attained, then the greatest practicable approach to exactness ought to be made.

"Congress is not absolved from all rule, merely because the rule of perfect justice cannot be applied. In such a case, approximation becomes a rule; it takes the place of that other rule, which would be preferable, but which is found inapplicable, and becomes, itself, an obligation of binding force. The nearest approximation to exact truth or exact right, when that exact truth or that exact right cannot itself be reached, prevails in other cases, not as a matter of discretion, but as an intelligible and definite rule, dictated by justice, and conforming to the common sense of mankind; a rule of no less binding force in cases to which it is applicable, and no more to be departed from, than any other rule or obligation.

"The committee understand the Constitution as they would have understood it, if it had said, in so many words, that representatives should be apportioned among the States, according to their respective numbers, *as near as may be.* If this be not its true meaning, then it has either given, on this most delicate and important subject, a rule which is always impracticable, or else it has given no rule at all; because, if the rule be that representatives shall be apportioned *exactly* according to numbers, it is impracticable in every case; and if, for this reason, that cannot be the rule, then there is no rule whatever, unless the rule be that they shall be apportioned *as near as may be.*

"This construction, indeed, which the committee adopt, has not, in their knowledge, been denied; and they proceed in the discussion of the question before the Senate, taking for granted that such is the true and undeniable meaning of the Constitution.

"The next thing to be observed is, that the Constitution prescribes no particular process by which this apportionment is to be wrought out. It has plainly described the end to be accomplished, namely, the nearest approach to relative equality of representation among the States; and whatever accomplishes this end, and nothing else, is the true process.

In truth, if without any process whatever, whether elaborate or easy, Congress could perceive the exact proportion of representative power rightfully belonging to each State, it would perfectly fulfil its duty by conferring that portion on each, without reference to any process whatever. It would be enough, that the proper end had been attained. And it is to be remarked further, that, whether this end be attained best by one process or by another, becomes, when each process has been carried through, not matter of opinion, but matter of mathematical certainty. If the whole population of the United States, the population of each State, and the proposed number of the House of Representatives be all given, then, between two bills apportioning the members among the several States, it can be told, with absolute certainty, which bill assigns to any and every State the number nearest to the exact proportion of that State; in other words, which of the two bills, if either, apportions the representatives according to the numbers in the States, respectively, *as near as may be*. If, therefore, a particular process of apportionment be adopted, and objection be made to the injustice or inequality of its result, it is, surely, no answer to such objection to say that the inequality necessarily results from the nature of the process. Before such answer could avail, it would be necessary to show, either that the Constitution prescribes such process, and makes it necessary, or that there is no other mode of proceeding which would produce less inequality and less injustice. If inequality which might have otherwise been avoided be produced by a given process, then that process is a wrong one. It is not suited to the case, and should be rejected.

"Nor do the committee perceive how it can be matter of constitutional propriety or validity, or in any way a constitutional question, whether the process which may be applied to the case be simple or compound, one process or many processes; since, in the end, it may always be seen whether the result be that which has been aimed at, namely, the nearest practicable approach to precise justice and relative equality. The committee, indeed, are of opinion, in this case, that the simplest and most obvious way of proceeding is also the true and constitutional way. To them, it appears, that, in carrying into effect this part of the Constitution, the first thing naturally to be done is, to decide on the whole number of which the House is to be composed; as when, under the same clause of the Constitution, a tax is to be apportioned among the States, the amount of the whole tax is, in the first place, to be settled.

"When the whole number of the proposed House is thus ascertained and fixed, it becomes the entire representative power of all the people

in the Union. It is then a very simple matter to ascertain how much of this representative power each State is entitled to by its numbers. If, for example, the House is to contain two hundred and forty members, then the number two hundred and forty expresses the representative power of all the States; and a plain calculation readily shows how much of this power belongs to each State. This portion, it is true, will not always, or often, be expressed in whole numbers, but it may always be precisely exhibited by a decimal form of expression. If the portion of any State be seldom, or never, one exact tenth, one exact fifteenth, or one exact twentieth, it will still always be capable of precise decimal expression, as one-tenth and two-hundredths, one-twelfth and four-hundredths, one fifteenth and six-hundredths, and so on; and the exact portion of the State, being thus decimally expressed, will always show, to mathematical certainty, what integral number comes nearest to such exact portion. For example, in a House consisting of two hundred and forty members, the exact mathematical proportion to which her numbers entitle the State of New York is 38.59; it is certain, therefore, that thirty-nine is the integral or whole number nearest to her exact proportion of the representative power of the Union. Why, then, should she not have thirty-nine? and why should she have forty? She is not quite entitled to thirty-nine; that number is something more than her right. But allowing her thirty-nine, from the necessity of giving her whole numbers, and because that is the nearest whole number, is not the Constitution fully obeyed, when she has received the thirty-ninth number? Is not her proper number of representatives then apportioned to her, as near as may be? And is not the Constitution disregarded when the bill goes further? and gives her a fortieth member? For what is such a fortieth member given? Not for her absolute numbers; for her absolute numbers do not entitle her to thirty-nine. Not for the sake of apportioning her members to her numbers, as near as may be; because thirty-nine is a nearer apportionment of members than forty. But it is given, say the advocates of the bill, because the *process* which has been adopted gives it. The answer is, no such process is enjoined by the Constitution.

"The case of New York may be compared or contrasted with that of Missouri. The exact proportion of Missouri, in a general representation of two hundred and forty, is two and six-tenths; that is to say, it comes nearer to three members than to two, yet it is confined to two. But why is not Missouri entitled to that number of representatives which comes nearest to her exact proportion? Is the Constitution fulfilled as to her, while that number is withheld, and while at the same time in

another State, not only is that nearest number given, but an additional member given also? Is it an answer with which the people of Missouri ought to be satisfied, when it is said that this obvious injustice is the necessary result of the process adopted by the bill? May they not say with propriety that, since three is the nearest whole number to their exact right, to that number they are entitled, and the process which deprives them of it must be a wrong process? A similar comparison might be made between New York and Vermont. The exact proportion to which Vermont is entitled, in a representation of two hundred and forty, is 5.646. Her nearest whole number, therefore, would be six. Now, two things are undeniably true: first that to take away the fortieth member from New York would bring her representation nearer to her exact proportion than it stands by leaving her that fortieth member. Secondly, that giving the member thus taken from New York to Vermont would bring her representation nearer to her exact right than it is by the bill. And both these propositions are equally true of a transfer of the twenty-eighth member assigned by the bill to Pennsylvania, to Delaware, and of the thirteenth member assigned to Kentucky, to Missouri; in other words, Vermont has, by her numbers, more right to six members than New York has to forty. Delaware, by her numbers, has more right to two members than Pennsylvania has to twenty-eight; and Missouri, by her numbers, has more right to three members than Kentucky has to thirteen. Without disturbing the proposed number of the House, the mere changing of these three members, from and to the six States respectively, would bring the representation of the whole six nearer to their due proportion according to their respective numbers than the bill, in its present form, makes it. In the face of this indisputable truth, how can it be said that the bill apportions members of Congress among those States, according to their respective number, *as near as may be?*

"The principle on which the proposed amendment is founded is an effectual corrective for these and all other equally great inequalities. It may be applied at all times and in all cases, and its results will always be the nearest approach to perfect justice. It is equally simple and impartial. As a rule of apportionment, it is little other than a transcript of the words of the Constitution, and its results are mathematically certain. The Constitution, as the committee understand it, says, representatives shall be apportioned among the States, according to their respective numbers of people, as near as may be. The rule adopted by the committee says, out of the whole number of the House, that number shall be apportioned to each State which comes nearest to its exact right, according to its number of people.

"Where is the repugnancy between the Constitution and the rule? The arguments against the rule seem to assume that there is a necessity of instituting some process, adopting some number as the ratio, or as that number of people which each member shall be understood to represent; but the committee see no occasion for any other process whatever than simply the ascertainment of that *quantum* out of the whole mass of the representative power, which each State may claim.

"But it is said, that although a State may receive a number of representatives which is something less than its exact proportion of representation, yet that it can in no case constitutionally receive more. How is this proposition proved? How is it shown that the Constitution is less perfectly fulfilled by allowing a State a small excess than by subjecting her to a large deficiency? What the Constitution requires, is the nearest practicable approach to precise justice. The rule is approximation; and we ought to approach, therefore, on whichever side we can approach nearest.

"But there is still a more conclusive answer to be given to this suggestion. The whole number of representatives of which the House is to be composed is, of necessity, limited. This number, whatever it is, is that which is to be apportioned, and nothing else can be apportioned. This is the whole sum to be distributed. If, therefore, in making the apportionment, some States receive less than their just share, it must necessarily follow that some other States have received more than their just share. If there be one State in the Union with less than its right, some other State has more than its right, so that the argument, whatever be its force, applies to the bill in its present form as strongly as it can ever apply to any bill.

"But the objection most usually urged against the principle of the proposed amendment is, that it provides for the representation of fractions. Let this objection be examined and considered. Let it be ascertained, in the first place, what these fractions, or fractional numbers, or residuary numbers really are, which, it is said, will be represented should the amendment prevail.

"A fraction is the broken part of some integral number. It is, therefore, a relative or derivative idea. It implies the previous existence of some fixed number of which it is but a part or remainder. If there be no necessity for fixing or establishing such previous number, then the fraction resulting from it is itself not matter of necessity but matter of choice or accident. Now, the argument which considers the plan proposed in the amendment as a representation of fractions, and therefore unconstitutional, assumes as its basis that, according to

the Constitution, every member of the House of Representatives represents, or ought to represent, the same, or nearly the same number of constituents; that this number is to be regarded as an integer; and anything else than this is, therefore, called a fraction or residuum, and cannot be entitled to a representative. But nothing of this is prescribed by the Constitution of the United States. That Constitution contemplates no integer or any common number for the constituents of a member of the House of Representatives. It goes not at all into these subdivisions of the population of the State. It provides for the apportionment of representatives *among the several States*, according to their respective numbers, and stops there. It makes no provision for the representation of districts, of States, or for the representation of any portion of the people of a State, less than the whole. It says nothing of ratios or of constituent numbers. All these things it leaves to State legislation. The right which each State possesses to its own due portion of the representative power is a State right, strictly; it belongs to the State, as a State, and it is to be used and exercised as the State may see fit, subject only to the constitutional qualifications of electors. In fact, the States do make, and always have made, different provisions for the exercise of this power. In some, a single member is chosen for a certain defined district, in others two or three members are chosen for the same district, and in some, again, as New Hampshire, Rhode Island, Connecticut, New Jersey, and Georgia, the entire representation of the State is a joint, undivided representation. In these last mentioned States, every member of the House of Representatives has for his constituents all the people of the State; and all the people of those States are consequently represented in that branch of Congress. If the bill before the Senate should pass into a law, in its present form, whatever injustice it might do to any of those States, it would not be correct to say of them, nevertheless, that any portion of their people was unrepresented. The well founded objection would be, as to some of them at least, that they were not adequately, competently, fairly represented; that they had not as many voices and as many votes in the House of Representatives as they were entitled to. This would be the objection. There would be no unrepresented fractions; but the State, as a State, as a whole, would be deprived of some part of its just rights.

"On the other hand, if the bill should pass, as it is now proposed to be amended, there would be no representation of fractions in any State; for a fraction supposes a division and a remainder. All that could justly be said would be that some of these States, as States, possessed a portion of legislative power, a little larger than their exact right; as

it must be admitted that, should the bill pass unamended, they would possess of that power much less than that exact right. The same remarks are substantially true, if applied to those States which adopt the district system, as most of them do. In Missouri, for example, there will be no fraction unrepresented, should the bill become a law in its present form; nor any member for a fraction, should the amendment prevail; because the mode of apportionment, which assigns to each State that number which is nearest to its exact right, applies no assumed ratios, makes no subdivisions, and, of course, produces no fractions. In the one case or in the other, the State, as a State, will have something more or something less than its exact proportion of representative power; but she will part out this power among her own people, in either case, in such mode as she may choose, or exercise it altogether as an entire representation of the people of the State.

"Whether the subdivision of the representative power within any State, if there be a subdivision, be equal or unequal, or fairly or unfairly made, Congress cannot know, and has no authority to inquire. It is enough that the State presents her own representation on the floor of Congress in the mode she chooses to present it. If a State were to give one portion of her territory a representative for every twenty-five thousand persons, and to the rest a representative only for every fifty thousand, it would be an act of unjust legislation, doubtless, but it would be wholly beyond redress by any power in Congress; because the Constitution has left all this to the State itself.

"These considerations, it is thought, may show that the Constitution has not, by any implication or necessary construction, enjoined that which it certainly has not ordained in terms, viz., that every member of the House shall be supposed to represent the same number of constituents; and therefore, that the assumption of a ratio, as representing the common number of constituents, is not called for by the Constitution. All that Congress is at liberty to do, as it would seem, is to divide the whole representative power of the Union into twenty-four parts, assigning one part to each State, as near as practicable according to its right, and leaving all subsequent arrangement and all subdivisions to the State itself.

"If the view thus taken of the rights of the States and the duties of Congress be the correct view, then the plan proposed in the amendment is in no just sense a representation of fractions. But suppose it was otherwise; suppose a direct division were made for allowing a representative to every State, in whose population, it being first divided by a common ratio, there should be found a fraction exceeding half the

amount of that ratio, what constitutional objection could be fairly urged against such a provision? Let it be always remembered that the case here supposed provides only for a fraction exceeding the moiety of the ratio; for the committee admit at once that the representation of fractions, less than a moiety, is unconstitutional; because, should a member be allowed to a State for such a fraction, it would be certain that her representation would not be so near her exact right as it was before. But the allowance of a member for a major fraction is a direct approximation towards justice and equality. There appears to the Committee to be nothing, either in the letter or in the spirit of the Constitution, opposed to such a mode of Apportionment. On the contrary it seems entirely consistent with the very object which the Constitution contemplated, and well calculated to accomplish it. The argument commonly urged against it is, that it is necessary to apply some one common divisor, and to abide by its results.

"If by this it be meant that there must be some common rule, or common measure, applicable, and applied impartially to all the States, it is quite true. But, if that which is intended be, that the population of each State must be divided by a fixed ratio, and all resulting fractions, great or small, disregarded, this is but to take for granted the very thing in controversy. The question is, whether it be unconstitutional to make approximation to equality by allowing representatives for major fractions. The affirmative of this question is indeed denied; but it is not disproved by saying that we must abide by the operation of divisions, by an assumed ratio, and disregard fractions. The question still remains as it was before; and it is still to be shown what there is in the Constitution which rejects approximation as the rule of apportionment. But suppose it be necessary to find a divisor, and to abide its results. What is a divisor? Not necessarily a simple number. It may be composed of a whole number and a fraction; it may itself be the result of a previous process; it may be anything, in short, which produces accurate and uniform division; whatever does this is a common rule, a common standard, or, if the word be important, a common divisor. The committee refer, on this part of the case, to some observations by Professor Dean, with a table, both of which accompany this report.

"As it is not improbable that opinion has been a good deal influenced on this subject by what took place on the passing of the first act making an apportionment of representatives among the States, the committee have examined and considered that precedent. If it be in point to the present case, it is certainly entitled to very great weight; but if it be

of questionable application, the text of the Constitution, even if it were doubtful, could not be explained by a doubtful commentary. In the opinion of the committee, it is only necessary that what was said on that occasion should be understood in connection with the subject-matter then under consideration; and in order to see what that subject-matter really was, the committee think it necessary to state, shortly, the case.

"The two Houses of Congress passed a bill, after the first enumeration of the people, providing for a House of Representatives which should consist of one hundred and twenty members. The bill expressed no rule or principle by which these members were assigned to the several States. It merely said, that New Hampshire should have five members, Massachusetts ten, and so on; going through all the States, and assigning the whole number of one hundred and twenty. Now, by the census, then recently taken, it appears that the whole representative population of the United States was 3,615,920; and it was evidently the wish of Congress to make the House as numerous as the Constitution would allow. But the Constitution has said that there should not be more than one member for every thirty thousand persons. This prohibition was, of course, to be obeyed; but did the Constitution mean that no States should have more than one member for every thirty thousand persons? or did it only mean that the whole House, as compared with the whole population of the United States, should not contain more than one member for every thirty thousand persons? If this last were the true construction then it was wrong; because so many members could not be assigned to the States without giving to some of them more members than one for every thirty thousand. In fact, the bill did propose to do this in regard to several States.

"President Washington adopted that construction of the Constitution which applied its prohibition to each State individually. He thought that no State could, constitutionally, receive more than one member for every thirty thousand of her own population. On this, therefore, his main objection to the bill was founded. That objection he states in these words: —

"'The Constitution has also provided that the number of representatives shall not exceed one for every thirty thousand; which restriction is, by the context, and by fair and obvious construction, to be applied to the separate and respective numbers of the States; and the bill has alloted to eight of the States more than one for every thirty thousand.'

"It is now necessary to see what there was further objectionable in this bill. The number of one hundred and twelve members was all that

could be divided among the States without giving to some of them more than one member for thirty thousand inhabitants. Therefore, having allotted those one hundred and twelve, there still remained eight of the one hundred and twenty to be assigned; and these eight the bill assigned to the States having the largest fractions. Some of these fractions were large, and some were small. No regard was paid to fractions over a moiety of the ratio, any more than to fractions under it. There was no rule laid down, stating what fractions should entitle the States, to whom they might happen to fall, or in whose population they might happen to fall, or in whose population they might happen to be found, to a representative therefor. The assignment was not made on the principle that each State should have a member for a fraction greater than half the ratio; or that all the States should have a member for a fraction, in all cases where the allowance of such member would bring her representation nearer to its exact proportion than its disallowance. There was no common measure or common rule adopted, but the assignment was matter of arbitrary discretion. A member was allowed to New Hampshire for example, for a fraction of less than one half the ratio, thus placing her representation further from her exact proportion than it was without such additional member; while a member was refused to Georgia whose case closely resembled that of New Hampshire, both having what were thought large fractions, but both still under a moiety of the ratio, and distinguished from each other only by a very slight difference of absolute numbers. The committee have already fully expressed their opinion on such a mode of apportionment.

"In regard to this character of the bill, President Washington said: 'The Constitution has prescribed that representatives shall be apportioned among the several States according to their respective numbers; and there is no one proportion, or divisor, which, applied to the respective numbers of the States, will yield the number and allotment of representatives proposed by the bill.'

"This was all undoubtedly true, and was, in the judgment of the committee, a decisive objection against the bill. It is nevertheless to be observed, that the other objection completely covered the whole ground. There could, in that bill, be no allowance for a fraction, great or small; because Congress had taken for the ratio the lowest number allowed by the Constitution, viz., thirty thousand. Whatever fraction a State might have less than that ratio, no member could be allowed for it. It is scarcely necessary to observe that no such objection applies to the amendment now proposed. No State, should the amendment prevail, will have a greater number of members than one for every thirty

thousand; nor is it likely that the objection will ever again occur. The whole force of the precedent, whatever it be, in its application to the present case, is drawn from the other objection. And what is the true import of that objection? Does it mean anything more than that the apportionment was not made on a common rule or principle, applicable and applied alike to all the States?

"President Washington's words are, 'There is no one proportion or divisor, which, applied to the respective numbers of the States, will yield the number and allotment of representatives proposed by the bill.'

"If, then, he could have found a common proportion, it would have removed this objection. He required a proportion, or divisor. These words he evidently uses as explanatory of each other. He meant by *divisor*, therefore, no more than by *proportion*. What he sought was, some common and equal rule by which the allottment had been made among the several States; he did not find such common rule; and on that ground he thought the bill objectionable.

"In the opinion of the committee, no such objection applies to the amendment recommended by them. That amendment gives a rule, plain, simple, just, uniform, and of universal application. The rule has been frequently stated. It may be clearly expressed in either of two ways. Let the rule be, that the whole number of the proposed House shall be apportioned among the several States according to their respective numbers, giving to each State that number of members which comes nearest to her exact mathematical part, or proportion; or, let the rule be, that the population of each State shall be divided by a common divisor, and that, in addition to the number of members resulting from such division, a member shall be allowed to each State whose fraction exceeds a moiety of the divisor.

"Either of these is, it seems to the committee, a fair and just rule, capable of uniform application, and operating with entire impartiality. There is no want of a common proportion or a common divisor; there is nothing left to arbitrary discretion. If the rule, in either of these forms, be adopted, it can never be doubtful how every member of any proposed number for a House of Representatives ought to be assigned. Nothing will be left in the discretion of Congress; the right of each State will be a mathematical right, easily ascertained, about which there can be neither doubt nor difficulty; and, in the application of the rule, there will be no room for preference, partiality, or injustice. In any case, in all time to come it will do all that human means can do, to allot to every State in the Union its proper and just proportion of rep-

resentative power. And it is because of this, its capability of constant application, as well as because of its impartiality and justice, that the committee are earnest in recommending its adoption to Congress. If it shall be adopted, they believe it will remove a cause of uneasiness and dissatisfaction recurring, or liable to recur, with every new census, and place the rights of the States, in this respect, on a fixed basis, of which none can with reason complain. It is true, that there may be some numbers assumed for the composition of the House of Representatives, to which, if the rule were applied, the result might give a member to the House more than was proposed. But it will be always easy to correct this, by altering the proposed number by adding one to it or taking one from it; so that this can be considered no objection to the rule.

"The committee, in conclusion, cannot admit that it is sufficient reason for rejecting this mode of apportionment, that a different process has heretofore prevailed. The truth is, the errors and inequalities of that process were at first not obvious and startling. But they have gone on increasing; they are greatly augmented and accumulated every new census; and it is of the very nature of the process itself that its unjust results must grow greater and greater in proportion as the population of the country enlarges. What was objectionable, though tolerable yesterday, becomes intolerable to-morrow. A change, the committee are persuaded, must come, or the whole just balance and proportion of representative power among the States will be disturbed and broken up."[2]

[2] Story on the Constitution, 5th ed., vol. i, pp. 495, 512. See Senate Documents, 22d Cong., 1st Session, vol. ii, No. 93; ibid., No. 94; ibid., vol. iii, No. 126; ibid., vol. iv, No. 463.

CHAPTER IX.

VACANCIES IN THE HOUSE OF REPRESENTATIVES AND RESIGNATIONS FROM CONGRESS.

§ 70. Vacancies in the House of Representatives.

THE next clause is: —

"When Vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies."[1]

This was inserted by the committee of detail and adopted unanimously upon the consideration of their report.[2] "The propriety of adopting this clause does not seem to have furnished any matter of discussion, either in or out of the convention. It was obvious that the power ought to rest somewhere; and must be exercised either by the State or national government, or by some department thereof. The friends of State powers would naturally rest satisfied with leaving it with the State executive; and the friends of the national government would acquiesce in that arrangement, if other constitutional provisions existed sufficient to preserve its due execution. The provision, as it stands, has the strong recommendation of public convenience, and facile adaptation to the particular local circumstances of each State. Any general regulation would have worked with some inequality."[3]

An interesting question arose in 1837. The law of Mississippi fixed the time for the election of representatives in November. The President having called a special session of Congress to meet in September, the governor of Mississippi, on the 13th of June, issued writs for an election in July for two representatives to Congress to fill the vacancies caused by the expiration of the terms

§ 70. [1] Article I, Section 2.

[2] Madison Papers, Elliot's Debates, 2d. ed., vol. v, pp. 377, 395.

[3] Story on the Constitution, 5th ed., § 685, pp. 495–499.

of the members of the preceding House until superseded by those to be elected at the next regular election in November. At this July election, Gohlson and Claiborne were elected and claimed the seats. Their claim was referred to a committee, of which Andrew Buchanan was chairman, who reported in favor of their right to seats for the full term. The report said: "The Constitution authorizes the executive power of the States respectively to order the filling of all vacancies which have actually happened, in the mode therein pointed out, no matter how the vacancy may have happened, whether by death, resignation, or expiration of the term of members previous to the election of their successors." In the debate, John Quincy Adams said he believed, in relation to offices, that every one happens to be vacant which is not full; and that, he believed, was the meaning and sense of the Constitution, whether the vacancy occurred from casualty, the regular course of events, expiration of term, or other cause. The claimants were admitted to their seats. In November following, Prentiss and Wood were elected for the same term. At the December session, the resolution declaring Gholson and Claiborne elected was rescinded, but a resolution was also adopted, by the casting vote of Speaker James K. Polk, that Prentiss and Wood were not members.[4] When Congress sets aside an election without seating the contestant, a vacancy happens within the meaning of the Constitution.[5]

Vacancies may also happen by death, expulsion, or resignation. The proceedings upon vacancies by death need no explanation beyond the language of the Constitution. Expulsions will be subsequently considered. Vacancies by resignation come next in order.

§ 71. Resignations from Congress.

A member of neither house of Parliament can resign his seat. Death, an act of Parliament, and a conviction of an offense which

[4] Minority report in Bell's case, presented by Senator George F. Hoar of Massachusetts and adopted by the Senate; Taft's Senate Election Cases, continued by Furber, pp. 32-33. See also 1 Bart., p. 9, and *infra*, § 77.

[5] *In re* The Representative Vacancy, 15 R. I., 621; cf. *In re* The Congressional Election, 15 R. I., 624.

operates as a corruption of the blood are the only means by which the seat of a member of the House of Lords can be vacated.

A member of the House of Commons has no power to resign. By statute, however, a seat is vacated by the acceptance of civil office.[1] It is the custom, consequently, for a member of either party who wishes to retire to apply to the ministry for the appointment to an office with nominal emoluments, the stewardship of the Chiltern Hundreds, whose duty formerly was to restrain the robbers in the beech-woods on the Chiltern Hills in Buckinghamshire. On his receipt of this, his seat is vacated by operation of law. The appointment is not, however, a matter of course, but lies in the discretion of the ministry; and the application is refused whenever it is considered proper to punish a member by expulsion.[2]

A different rule prevails in the parliamentary law of the United States. A member of either house of Congress may resign his seat at any time by a letter addressed to the governor of the State which he represents.[3] Neither the State executive [4] nor the house [5] from which he retires has the right to refuse to accept his resignation even though proceedings for his expulsion are pending.[6] The resignation should be addressed to the State executive.[7] It

§ 71. [1] 4 Anne, c. 8; 6 Anne, c. 7.

[2] The refusal in 1842 to a member, against whom charges of corrupt conduct in an election were pending, was said to be unprecedented. (Cooley's note to Blackstone, vol. i, p. 176.)

[3] The right of a senator to resign is recognized in the Constitution, Article I, Section 3. The right of a representative to resign was settled in William Pinckney's Case in 1791. Benton's Abridgment, vol. i, pp. 328–330. See also McCrary on Elections, 2d ed., § 600; Bledsoe's Case, Taft's Senate Election Cases, continued by Furber, p. 79; s. c. Cl. & Hall, 869; Mercer's Case, Cl. & Hall, p. 44; Edwards' Case, ibid., p. 46.

[4] Bledsoe's Case, Taft's Senate Election Cases, continued by Furber, p. 79; Dixon's Case, ibid., p. 13.

[5] Mercer's Case, Cl. & Hall, p. 44; Edwards' Case, ibid., p. 66; Congressional Globe, 2d Session, 41st Congress, p. 1547.

[6] See Matteson's Case in the Thirty-fifth Congress, 1st Session, House Reports, No. 179; McCrary on Elections, 3d ed., § 600; and authorities cited *supra*. July 21, 1866, notwithstanding his letter of resignation addressed to the governor of his State, of which he had notified the House, Lovell H. Rousseau of Kentucky was reprimanded by the Speaker for his resignation, in pursuance of a resolution passed before, on account of an assault made by him upon a fellow member, Josiah B. Grinnell of Iowa. (Congressional Globe, 1st Session, 37th Cong., Part V, pp. 4009–4017.)

[7] McCrary on Elections, 3d ed., § 600.

is neither necessary nor proper to address it to the House or Senate.[8] It is customary for a senator or representative to address his resignation to his governor, and also to address a letter to the presiding officer of the house from which he resigns, notifying him and the house of the fact of the resignation.[9] Such a communication is considered by the house as sufficient evidence of the resignation[10]; and until written notice is received from either the member or the governor, the member's name remains upon the roll.[11] It has been said that a resignation cannot be withdrawn.[12]

The resignation of a member of either house may be prospective, and take effect upon a future day, when, if the State law permits, the vacancy may be filled by election during the meantime.[13]

Whether a senator can resign his seat before the commencement of the term for which he was elected has been considered doubtful.

[8] McCrary on Elections, 3d ed., § 600.

[9] Ibid., § 327.

[10] Journal, 2d Session, 41st Congress, p. 373.

[11] Report No. 2679, House Judiciary Committee, 2d Session, 48th Congress.

[12] Opinions of Justices, 70 Maine, 588, 597.

[13] Archibald Dixon's Case, Taft's Senate Election Cases, continued by Furber, p. 13.

CHAPTER X.

SPEAKER AND OTHER OFFICERS OF THE HOUSE OF REPRESENTATIVES.

§ 72. The Speaker of the House.

THE power to choose its presiding and other officers has been considered an attribute essential to the independence of every popular assembly. The former, by his power to preserve order, to put the question, and in England and the United States to determine who shall speak, can control the proceedings; while without the control of the latter the house is unable to see that its proceedings are correctly recorded or to protect itself from those assaults from without which have frequently intimidated and more than once dissolved representative bodies.

For this reason the Constitution next provides, "The House of Representatives shall chuse their Speaker and other Officers, and shall have the sole Power of Impeachment."[1] This clause, which was contained in most of the State constitutions, first appeared in the report of the committee of detail to the convention, and was adopted without discussion or dissent.[2] The subject of impeachments will be examined in a subsequent chapter, in connection with that part of the Constitution which provides for their mode of trial.[3]

The speaker, as his name denotes, is the spokesman of the House, and represents it in its transactions with the Senate and the Executive. His name and duties are taken from those of the speaker of the House of Commons, who is elected by his fellow-members, subject to the approval of the Crown. Although this approval is now a matter of course, as late as the reigns of the early

§ 72. [1] Constitution, Article I, Section 2.

[2] Madison Papers, Elliot's Debates, 2d ed., vol. v, pp. 377, 395.

[3] *Infra*, Chapter XIII.

Stuarts, the Crown's part in the selection was controlling, and it was the custom of the king to signify in advance the person whom he wished to have elected. As the strength of the Commons grew, they gradually insisted upon the free choice of their speaker, which has been conceded to them since the reign of Charles II.[4] A similar power of approval was claimed by the colonial governors appointed by the Crown. It was disputed by the colonial assemblies, but their power to withhold appropriations usually made them successful in any contest upon the subject which arose.[5] In the sham representative institutions set up by Napoleon I and III, the executive had the right to name the president of the lower legislative house.[6]

In the absence of a rule upon the subject, the speaker must be elected by a majority vote. In two cases, however, speakers have been elected by a plurality, after the adoption by a majority of a rule providing that a plurality might elect.[7] The speaker cannot be impeached;[8] but he may be removed and another chosen in his place at the will of the majority of a quorum at any time.[9] He has "the right to name any member to perform the duties of the chair, but such substitution must not extend beyond an adjournment; provided, however, that in case of his illness he may make such appointment for a period not exceeding ten days with the approval of the House at the time the same is made; and in his absence and omission to make such appointment, the House shall proceed to elect a speaker to act in his absence."[10]

[4] The only case of the election of a speaker whom the Crown refused to approve was that of Sir Edward Seymour, in 1678, unless that of Sir John Popham, in 1450, was such a one. Hatsell's Precedents, 3d ed., vol. ii, pp. 202, 204, 211; Burnet, History of My Own Time, vol. i, p. 53; Blackstone's Commentaries, vol. i, p. 181.

[5] In 1720 the Massachusetts Assembly was dissolved because they claimed the right to choose their speaker without the governer's approval. (Palfrey, History of New England, 1689-1727, pp. 273-274, 377-379; Chalmers, Introduction to the History of the Revolt of the American Colonies, Book VIII, ch. ii.)

[6] Hélie, Les Constitutions de la France, pp. 708, 868, 1170.

[7] Journal, 1st Sess. 31st Congress, pp. 156, 163; Journal, 1st Sess. 34th Congress, pp. 429, 430, 444.

[8] *In re* Speakership of House of Representatives, 15 Colorado, 520; s. c. 25 Pac. Rep., 707; Blount's Impeachment Trial, Wharton's State Trials, p. 200; *infra*, § 91.

[9] 2 Grey, 186; 5 Grey, 134, Jefferson's Manual, Sec. IX; *In re* Speakership of House of Representatives, 15 Colorado, 520; s. c. 25 Pac. Rep., 707.

[10] Rule I.

It is a part of the speaker's functions to authenticate by his signature all bills and resolutions passed by the House and all communications made by it to other branches of the government.[11] His more important duties are, however, to preside and preserve order during the proceedings. "It is the duty of the presiding officer: To call the assembly to order at the time appointed for the meeting. To ascertain the presence of a quorum. To cause the journal or minutes of the preceding meeting to be read and passed upon by the assembly. To lay before the assembly its business in the order indicated by the rules. To receive any propositions made by the members and put them to the assembly. To divide the assembly on questions submitted by him and to announce the result. To decide all questions of order, subject to an appeal to the assembly.[12] To preserve order and decorum in debate and at all other times. To enforce such of the rules of the assembly as are not placed in charge of other officers, or of which the enforcement is not reserved by the assembly. To answer all parliamentary inquiries and give information as to the parliamentary effect of proposed acts of the assembly. To present to the assembly all messages from co-ordinate branches, and all proper communications. To sign and authenticate all the acts of the assembly, all its resolves and votes. To name a member to take his place until adjournment of the meeting. And in general: To act as the organ of the assembly, and as its representative, subject always to its will." [13] In the House of Representatives, the speaker has the further power to appoint all standing committees, unless otherwise specially ordered by the House.[14] The powers of recognition and of the appointment of committees which are vested in the speaker give him almost absolute control of the business transacted; and it is the custom in the House of Representatives of the United States, and also in the lower houses of the State legislatures, for him to exercise these for partisan purposes, and

[11] Field v. Clark, 143 U. S., 649, 671; Carr v. Coke (S.C.), 22 S. E. Rep., 16; Wyatt v. Wheeler (S.C.), 22 S. E. Rep., 120. The effect of his signature will be considered later.

[12] There is no appeal from such a decision by the speaker of the House of Commons (Reed's Parliamentary Rules, p. 37, note).

[13] Ibid., § 34, pp. 36-38; see also House Rules I and X of 53d Congress.

[14] Rule X of 53d Congress.

to act as the leader of the majority, with the assistance of a member who is chosen by a caucus or assumes by common consent the position of leader on the floor. He thus is responsible for the action of the House, and discharges in this respect many of the legislative functions of the prime minister under a system of cabinet government. He has not, however, like the latter, any control over the executive; and his power and that of the majority behind him are subject to the checks of the President and the courts, as well as of the upper house. In the House of Commons, on the other hand, the speaker, during the past century, has maintained a dignified impartiality.

The speaker, being a member of the House, does not lose the right to vote upon every question which is vested in him on behalf of the constituency which he represents.[15] The rules provide that "he shall not be required to vote in ordinary legislative proceedings, except when his vote would be decisive, or where the house is engaged in voting by ballot; and in all cases of a tie vote the question shall be lost."[16] Since a proposition is defeated by a tie vote as well as by a majority of one against it, it has been said that the speaker under this rule is never required to vote except in case of a ballot.[17]

In the United States the speaker is liable to suit in the courts for a trespass that he has committed under the order of the House.[18] The rule is otherwise in Great Britain, where each House of Parliament is still treated as a court, the decisions of which are respected by other judges even though they believe them to be erroneous.[19]

[15] The right of the speaker to vote when there is no tie was established in 1803 upon the adoption of the Twelfth Amendment to the Constitution. Nathaniel Macon of Virginia, who was then Speaker, made up by his vote the necessary two-thirds in favor of the amendment, thus disregarding as unconstitutional the House rule then in force which forbade him to vote except in case of a tie. (Benton, Thirty Years' View, vol. i, p. 118.) Henry Clay, when speaker in 1817, voted in favor of an internal improvement bill which Madison had vetoed.

[16] Rule I of 53d Congress, which was originally adopted April 7th, 1789.

[17] Crutchfield, Digest and Manual of the Rules and Practice of the House of Representatives (1893), p. 534.

[18] Kilbourn *v.* Thompson, 103 U. S., 168; Kielley *v.* Carson, 4 Moore, P. C., 63.

[19] Burdett *v.* Abbott, 14 East, 1; Bradlaugh *v.* Gossett, 12 Q. B. D., 271.

§ 73. Other Officers of the House.

The other officers of the House of Representatives are similar in name and functions to those in the House of Commons and the State legislatures, the clerk, sergeant-at-arms, doorkeeper, postmaster and chaplain, all of whom are elected by the House from persons not members, and appoint their subordinates.[1] They hold office after the expiration of the Congress at which they were chosen and until their successors are chosen and qualified.[2] The chief duty of the clerk is to keep the records of the House and to make the preliminary entries in the journal subject to correction by the speaker and the House.[3] He has also, by rule and statute, the important duty to call the preliminary roll of members upon the organization of each Congress, and to preserve order and decide all questions of order subject to appeal until the House has elected a permanent or temporary speaker.[4] This gives him an enormous power, which might be used to pack the House with members not elected, since it is the practice to refuse to entertain motions to amend the preliminary roll and to entertain no appeals from such decisions.[5]

The sergeant-at-arms, as his name denotes, is the military officer of the House. His duties are to preserve order, to execute the commands of the speaker against members and strangers, and thus to protect the House from attacks from within and without.[6] In conjunction with the sergeant-at-arms of the Senate he appoints the capitol police;[7] and he is also the disbursing officer of the House.[8]

The duties of the doorkeeper, postmaster and chaplain sufficiently appear from their respective names.[9]

All these officers are, in the United States, although not in Great Britain,[10] responsible to the courts for trespasses committed

§ 73. [1] Rule II of 53d Congress.

[2] Ibid.

[3] Rules I, III.

[4] U. S. Rev. St., § 31; Rule III. See *supra*, § 38, over note 87; *infra*, Ch. XVI.

[5] See proceedings at the organization of the 41st Congress and subsequently referred to by Crutchfield, Digest and Manual, ed. of 1893, p. 302.

[6] 26 St. at L., p. 645; Rule IV.

[7] U. S. Rev. St., § 1821.

[8] 26 St. at L., p. 645.

[9] Rules V, VI, VII.

[10] Burdett *v.* Abbott, 14 East, 1;

in obedience to the orders of the House.[11] Private citizens whom they have thus unlawfully arrested may be taken from their custody by the writ of habeas corpus;[12] but it has been held that no court has power to control the action of the clerk of a legislative house in making up its preliminary roll.[13]

Brádlaugh *v.* Gossett, 12 Q. B. D., 271; *Supra*, § 72 and *infra*.

[11] Kilbourn *v.* Thompson, 103 U. S., 168; *supra*, § 74 and *infra*.

[12] In the Matter of Kilbourn, S. C. D. C., by Carter, C. J., cited by Cooley, Constitutional Limitations, 6th ed., p. 1618; *In re* Gunn, 50 Kansas, 155; s. c. 32 Pac. Rep., 948. But see Frazier's Impeachment Trial, *infra*, § 94, and Appendix to this volume.

[13] Bingham *v.* Jewett (N. H.), 29 Atl. Rep., 694; *infra*, Ch. XVI.

CHAPTER XI.

THE SENATE.

§ 74. The Constitutional Provisions Concerning the Senate.

THE Senate of the United States is the only upper legislative chamber in the world that has the strength to resist the will of the electorate for a considerable period of time. It represents the Federal principle in the government, and besides its legislative has important executive functions.

The constitutional provisions concerning the Senate are as follows: —

"The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

"Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the expiration of the second Year, of the second Class at the expiration of the fourth Year, and of the third Class at the expiration of the sixth Year, so that one-third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

"No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

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

"The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice-President, or when he shall exercise the Office of President of the United States.

"The Senate shall have the sole Power to try all Impeachments.

When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: and no Person shall be convicted without the concurrence of two-thirds of the Members present.

"Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to law."[1]

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, and he shall nominate and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law."[2]

"If no person have a majority of the electoral votes for Vice-President, then from the two highest members on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary for a choice."[3]

These last powers will be discussed subsequently under the head of the executive. The remaining parts of the Constitution which refer to the Senate do so in connection with the House of Representatives and will be considered in their consecutive order.[4]

§ 74. [1] Constitution, Article I, Section 3.

[2] Ibid., Article II, Section 2; *infra*.

[3] Ibid., Twelfth Amendment; *infra*.

[4] The functions of the Senate of the Republic of Mexico, besides those which are legislative, are thus defined in the Constitution (Art. 72, B): —

"The exclusive powers of the Senate are: —

"*a*. To approve the treaties and diplomatic conventions which the Executive may make with foreign powers.

"*b*. To ratify the appointments which the President of the Republic may make of ministers, diplomatic agents, consuls-general, superior employés of the Treasury, colonels and other superior officers of the national army and navy, on the terms which the law shall provide.

"*c*. To authorize the Executive to permit the departure of national troops beyond the limits of the Republic, the passage of foreign troops through the national territory, the station of squadrons of other powers for more than a month in the waters of the Republic.

"*d*. To give its consent in order that the Executive may dispose of the national guard outside of their respective States or Territories, determining the necessary force.

§ 75. Origin of the Senate.

The name of Senate is taken from the body which ruled ancient Rome; and its prototype was the body of senior warriors with

"*e.* To declare, when the constitutional legislative and executive powers of a State shall have disappeared, that the case has arrived for appointing to it a provisional Governor, who shall call elections in conformity with the Constitutional laws of the said State. The appointment of Governor shall be made by the Federal Executive with the approval of the Senate, and in its recesses with the approval of the Permanent Commission. Said functionary shall not be elected Constitutional Governor at the elections which are had in virtue of the summons which he shall issue.

"*f.* To decide political questions which may arise between the powers of a State, when any of them may appear with this purpose in the Senate, or when on account of said questions constitutional order shall have been interrupted during a conflict of arms. In this case the Senate shall dictate its resolution, being subject to the general Constitution of the Republic and to that of the State.

"The law shall regulate the exercise of this power and that of the preceding.

"*g.* To constitute itself a jury of judgment in accordance with Art. 105 of this Constitution."

"Art. 105. The houses shall take cognizance of official crimes, the House of Deputies as a jury of accusation, the Senators as a jury of judgment.

"The jury of accusation shall have for its object to declare, by an absolute majority of votes, whether the accused is or is not culpable. If the declaration should be absolutory, the functionary shall continue in the exercise of his office; if it should be condemnatory, he shall be immediately deprived of his office, and shall be placed at the disposal of the Senate. The latter, formed into a jury of judgment, and, with the presence of the criminal and of the accuser, if there should be one, shall proceed to apply, by an absolute majority of votes, the punishment which the law designates."

Those of the Senate of the Republic of Colombia:—

"Art. 98. The Senate shall also be invested with the following powers:

I. To reinstate those who have forfeited their citizenship. This act of clemency, according to the case and circumstances of him who solicits it, shall have reference only to electoral rights, or also to the capacity to fill determined public offices, or jointly to the exercise of all political rights.

II. To appoint two members of the Council of State.

III. To accept or decline the resignations of the president or vice-president or the designato.

IV. To confirm or reject nominations made by the President of the Republic of judges of the Supreme Court.

V. To confirm or reject the military appointments made by the Government, from the rank of lieutenant-colonel to that of the highest offices in the army and navy.

VI. To grant leave to the President of the Republic to be temporarily absent from the capital for other cause than sickness, or to exercise his functions outside of the capital.

VII. To permit the passage of

whom the king or chieftain held his councils of war; but in its legislative functions it resembles the Roman tribunate more closely than its name father,[1] and its immediate model was the House of Lords.

foreign troops through the territory of the Republic.

VIII. To appoint the commissioners referred to in Article 4 (surveyors of boundary lines).

IX. To authorize the Government to declare war against another nation."

Those of the Senate of the Republic of Ecuador:—

"Art. 45. The exclusive powers of the Senate are:

1. To take cognizance of and try, upon articles formulated by the Chamber of Deputies, cases of impeachment against the public functionaries spoken of in article 50.

2. To restore citizenship to any person who may have lost the same for whatever reason, except treason to the benefit of a hostile State or foreign invaders.

3. To restore, upon proof of innocence, the good name of those unjustly condemned."

Those of the Senate of the Argentine Republic:—

"Art. LI. The Senate shall have the sole power to try in public the officials impeached by the Chamber of Deputies, and Senators, when sitting for that purpose, shall be sworn. When the impeached official is President of the nation the Chief-Justice of the Supreme Court shall preside in the Senate. No person shall be convicted without the concurrence of two-thirds of the members present.

"Art. LII. Judgment in cases of impeachment shall not extend further than to removal from office, or disqualification to hold and enjoy any office of honor, trust, or profit under the Nation; but the party convicted shall nevertheless be liable and subject to indictment, trial, and punishment, according to law, in and by the ordinary courts.

"Art. LIII. It is also incumbent upon the Senate to authorize the President of the nation to declare a state of siege at one or more points in the national territory, in case of foreign aggression."

In the Republic of France, by the law of February 24, 1875, Article 9:—

"The Senate may be constituted a Court of Justice to judge either the President of the Republic or the ministers, and to take cognizance of attacks made upon the safety of the State." For an account of the French Senate, see The Present Constitution of France, by R. Saleilles, Annals of American Association of Political and Social Science, vol. vi, p. 37.

In the Republics of Venezuela, Chili and Brazil the Senate also tries impeachments. In Belgium impeachments are instituted by the lower house and tried before a Court of Appeal which consists of a joint meeting of both houses (Art. 90). In Brazil and Chili, the appointments of judges and diplomatic officers must be made with the advice and consent of the Senate. In Chili, certain officers cannot be removed without the consent of the Senate when it is in session; and the President must "command in person the inland and naval forces, *in accord with* the Senate, and during its recess, with the Standing Committee" (Art. 82. See Hancock, History of Chili, pp. 425–455).

§ 75. [1] The duties of the Roman Senate were chiefly executive (Maine, Popular Government, Essay IV).

The bicameral system of legislation was due to a happy accident, the preference of the English clergy to vote their supplies in convocation rather than in Parliament.[2] The three or four estates which gained the right to assemble on the continent of Europe were more subject to division and less capable of co-operation than the Lords and Commons, and so were unable to maintain their position against the court. The gentlemen of England in both houses usually stood together as long as the aggression of the king was to be feared;[3] and their success made that legislative form the admiration of the philosophers of the eighteenth century.

The colonial governors were aided by appointed councils, or in a few cases by a body of elected assistants,[4] who reviewed the measures passed by the assemblies. They at first sat together, but a dispute over the ownership of a pig caused in Massachusetts a separation in 1644 which was imitated by the other colonies; and the lower houses used their studies of English history to assert that they were entitled to all the privileges of the House of Commons, including the control of bills of supply, and to insist that the councils had in that respect and as regards impeachments the same powers as the House of Lords.[5] At the formation of the first State constitutions, the natural course was usually adopted: a continuance in imitation of the practice in the mother country and the colonies.[6] The praise by Montesquieu of this part of the British Constitution and the recollection of the conduct of the Long Parliament during the suppression of the House of Lords, made the division of the legislative power popular.[7]

[2] *Supra*, § 47.

[3] See May, Constitutional History of England (Am. ed.), vol. i; ch. v.

[4] *Supra*, § 47.

[5] Moran, Rise and Development of the Bicameral System in America, Johns Hopkins University Studies, vol. xiii, pp. 211, 216. Chalmers, Introduction to the History of the Revolt of the American Colonies; *supra*, § 47, over note 27.

[6] Poore's Charters and Constitutions.

[7] "Several States, since the war, have experienced the necessity of a division of the legislature. Maryland was saved from a most pernicious measure by her Senate. A rage for paper money, bordering on madness, prevailed in their House of Delegates — an emission of £500,000 was proposed; a sum equal to the circulating medium of the State. Had the sum been emitted, every shilling of specie would have been driven from circulation, and most of it from the State.

Pennsylvania, Georgia and Vermont were the only States to establish legislatures with single chambers; and the action of the former was due to the personal preference and influence of Franklin. His remark that a legislature with two branches was like a wagon driven by a horse before and a horse behind, in opposite directions, is said to have carried the measure through the constitutional convention.[8] The subsequent repetition by the French

Such a loss would not have been repaired in seven years — not to mention the whole catalogue of frauds which would have followed the measure. The Senate, like honest, judicious men, and the protectors of the interests of the State, firmly resisted the rage, and gave the people time to cool and to think. Their resistance was effectual — the people acquiesced, and the honor and interest of the State were secured.

"The house of representatives in Connecticut, soon after the war, had taken offence at a certain act of Congress. The upper house, who understood the necessity and expediency of the measure better than the people, refused to concur in a remonstrance to Congress. Several other circumstances gave umbrage to the lower house; and to weaken or destroy the influence of the Senate, the representatives, among other violent proceedings, resolved not merely to remove the seat of government, but to make every county town in the State the seat of government, by rotation. This foolish resolution would have disgraced school-boys — the Senate saved the honor of the State by rejecting it with disdain — and within two months every representative was ashamed of the conduct of the house. All public bodies have these fits of passion, when their conduct seems to be perfectly boyish; and in these paroxysms, a check is highly necessary.

"Pennsylvania exhibits many instances of this hasty conduct. At one session of the legislature, an armed force is ordered, by a precipitate resolution, to expel the settlers at Wyoming from their possessions — at a succeeding session, the same people are confirmed in their possessions. At one session, a charter is wrested from a corporation — at another, restored. The whole State is split into parties — everything is decided by party — any proposition from one side of the house is sure to be damned by the other — and when one party perceives the other has the advantage, they play truant — and an officer or a mob hunt the absconding members in all the streets and alleys in town. Such farces have been repeated in Philadelphia — and *there alone*. Had the legislature been framed with some check upon rash proceedings, the honor of the State would have been saved — the party spirit would have died with the measures proposed in the legislature. But now, any measure may be carried by party in the house; it then becomes a law, and sows the seeds of dissension throughout the state." (An examination into the leading principles of the Federal Constitution proposed by the late Convention held at Philadelphia, with answers to the people's objections that have been raised against the system. By a Citizen of America [by Noah Webster], pp. 11–12; Ford's Pamphlets on the Constitution, pp. 33–34.)

[8] Adams, Defence of American Constitutions, vol. I, pp. 105–106; Story on the Constitution, § 537.

National Convention of the abuses of the Long Parliament, combined with far greater excesses, so deeply impressed mankind with the need of some check upon a popular assembly that the bicameral system is now almost universal.[9]

As the nineteenth century approaches its close, we see criticisms of second chambers similar to those which were rife at the end of the eighteenth century.[10] "If a second chamber," said Siéyès, "dissents from the first, it is mischievous; if it agrees, it is superfluous."[11] The two principal advantages of such a system are the prevention of tyranny and self-seeking by a single house, and the check to rash, ill-considered measures which may be demanded by the people.[12] The former, men have now learned to prevent by

[9] The only single legislative chambers now in existence which the researches of the writer have been able to discover are in Servia, Bulgaria, Greece, the Orange Free State, San Domingo, Salvador, Honduras, Guatemala and the Colony of British Columbia; and the history of most of them has not tended to commend the institution. The councils of Montenegro and Andorra seem to belong to the earlier type, where the voters have an immediate share in legislation. In Finland representatives of the four estates are still occasionally convoked.

[10] Milton, in his Ready and Easy Way to Establishe a Free Commonwealth, Sir James Mackintosh, in Vindiciae Gallicae (§ iv), and Franklin in the first Pennsylvania Convention (*supra*, over note 8), all men of deep learning and broad political experience, were believers in the advantages of a single legislative chamber. So also were Turgot (letter to Dr. Price on the American Revolution) and the leaders of the French Revolution. John Stuart Mill expressed a preference for a single chamber with minority representation (Representative Government, ch. xiii). See also the remarks of Goldwin Smith in the Bystander for May, 1880, quoted by Doutre, Constitution of Canada, p. 66; *infra*, note 11; and the debates in the committee on the French Constitution of 1848, Souvenirs d'Alexis de Tocqueville, Paris, 1893, p. 368.

[11] See Maine's criticism of this epigram in Popular Government, p. 178. "Nominated Senates are nullities with a latent possibility for mischief," said Goldwin Smith in the Bystander (Toronto, May, 1880, quoted by Doutre, Canadian Constitution, p. 67).

[12] "I attach little weight to the argument oftenest urged for having two Chambers — to prevent precipitancy, and compel a second deliberation; for it must be a very ill-constituted representative assembly in which the established forms of business do not require many more than two deliberations. The consideration which tells most to my judgment, in favor of two Chambers (and this I do regard as of some moment), is the evil effect produced upon the mind of any holder of power, whether an individual or an assembly, by the consciousness of having only themselves to consult. It is important that no set of persons should be able, even temporarily, to make their *sic volo* prevail

means of the powers vested by written constitutions in the executive and the courts. The latter has seemed less important to those who have been accustomed for more than a century to see the people govern themselves without resulting injury; and the stubborn opposition of the House of Lords to almost every salutary measure of reform, whether social, religious or political, has aroused storms of public indignation which have destroyed its influence and greatly weakened its powers. It is now usually conceded to be a rule of the Constitution in Great Britain and its colonies where the Crown has the power to appoint members of the upper chamber, that the House of Lords, Senate or Council, must pass a bill which it has once rejected, if in the meantime the leaders of the lower branch have appealed to the people by a dissolution, and a new house of representatives has been elected and passed the same measure a second time.[13] In case of a refusal the Crown, at the request of the leaders of the elective assembly, will appoint enough members to overcome the opposition.[14] The elective upper chambers in other countries have little hold on popular respect; and on any difference of importance with the lower houses they are nearly always brought to terms by a threat to cut off the supplies, which they know will produce a crisis wherein the people will take sides with their more immediate representatives. The bicameral system was at one time in favor for cities in the United States, but is now generally abandoned there. It persists in full vigor in the State legislatures, but few if any instances have

without asking any one else for his consent. A majority in a single assembly, when it has assumed a permanent character — when composed of the same persons habitually acting together, and always assured of victory in their own House — easily becomes despotic and overweening if released from the necessity of considering whether its acts will be concurred in by another constituted authority" (Mill, Representative Government, ch. xiii).

[13] See Lord Salisbury's Speech on the Irish Church Bill, cited by Maine, Popular Government, p. 117.

[14] Such an appointment of twelve peers was made once in Great Britain, by Queen Anne in 1712, in order to create a Tory majority in the House of Lords; but the threat of a similar proceeding secured the passage of the Reform Bill by the peers in 1832, and has undoubtedly prevented the defeat of other salutary measures. In May, 1894, a similar threat secured the passage of the Civil Marriage bill by the Hungarian House of Magnates, which had previously rejected it. (New York Sun, Oct. 6, 1895.)

occurred in recent years where State senates have withstood strong currents of public opinion;[15] while since they are smaller they are usually more easily purchased than the houses of assembly. The Senate of the United States alone preserves the public respect, and has in numerous cases done public service by its defeat of mischievous measures, pushed through the House of Representatives by waves of popular excitement, which have subsequently subsided, leaving the bills without further support,[16] while until recent years at least the confidence in the beneficial effects of the institution has not been shaken.[17] The reason for this lies in the fact that the Senate represents the Federal system in the Constitution, and that faith in such a representation has been a habit of the people since the opening of the Revolution, so that the custom is so strong that it would require a great shock for its destruction.[18]

[15] The earlier State Senates usually represented property, more especially than the lower houses.

[16] See *infra*, § 80.

[17] See *infra*, § 80.

[18] See Maine, Popular Government, Essay III; and again Essay IV, p. 229: "Nothing but an historical principle can be successfully opposed to the principle of making all public powers and all parliamentary assemblies the mere reflection of the average opinion of the multitude."

In Great Britain, Portugal, Prussia, Bavaria, Hungary, Saxony, Baden and Wurtemberg, the upper chambers are composed chiefly of hereditary members or those appointed for life or elected to represent an hereditary class; although in Portugal and Hungary a few members seem to be chosen by a method of election which indirectly represents the people. In Germany members of the upper house are appointed for each session by the governments of the members of the empire. In most of the other countries and the British colonies members of the upper chambers are appointed for life or elected for a term longer than the assembly, either immediately or indirectly by the people; within some countries the requirement of a property qualification. In Italy the senators have a limited choice of new members. The practice in New Zealand and Japan also presents some peculiarities. (See The Parliaments of the World, Nineteenth Century for 1894, p. 708.) John Stuart Mill was in favor of a single chamber with minority representation; but considered that the best second chamber would be a body of men who had held important offices, or employments, legal, political, military or naval: —

"Of all principles on which a wisely conservative body, destined to moderate and regulate democratic ascendency, could possibly be constructed, the best seems to be that exemplified in the Roman Senate, itself the most consistently prudent and sagacious body that ever administered public affairs. The deficiencies of a democratic assembly, which represents the general public, are the deficiencies of the public itself, want of special train-

§ 76. Proceedings in the Federal Convention Concerning the Composition of the Senate.

Nearly all the members of the Federal Convention were firmly convinced of the necessity of two legislative houses, if a national

ing and knowledge. The appropriate corrective is to associate with it a body of which special training and knowledge should be the characteristics. If one House represents popular feeling, the other should represent personal merit, tested and guaranteed by actual public service, and fortified by actual experience. If one is the People's Chamber, the other should be the Chamber of Statesmen — a council composed of all living public men who have passed through any important political office or employment. Such a chamber would be fitted for much more than to be a merely moderating body. It would not be exclusively a check, but also an impelling force. In its hands, the power of holding the people back would be vested in those most competent, and who would then be most inclined to lead them forward in any right course. The council to whom the task would be intrusted of rectifying the people's mistakes would not represent a class believed to be opposed to their interests, but would consist of their own natural leaders in the path of progress. No mode of composition could approach to this in giving weight and efficiency to their function of moderators. It would be impossible to cry down a body always foremost in promoting improvements as a mere obstructive body, whatever amount of mischief it might obstruct.

"Were the place vacant in England for such a Senate (I need scarcely say that this is a mere hypothesis), it might be composed of some such elements as the following: All who were or had been members of the Legislative Commission described in a former chapter, and which I regard as an indispensable ingredient in a well constituted popular government. All who were or had been chief justices, or heads of any of the superior courts of law or equity. All who had for five years filled the office of puisne judge. All who had held for two years any cabinet office; but these should also be eligible to the House of Commons, and, if elected members of it, their peerage or senatorial office should be held in suspense. The condition of time is introduced to prevent persons from being named cabinet ministers merely to give them a seat in the Senate; and the period of two years is suggested, that the same term which qualifies them for a pension might entitle them to a senatorship. All who had filled the office of commander-in-chief; and all who, having commanded an army or a fleet, had been thanked by Parliament for military or naval successes. All governors-general of India or British America, and all who had held for ten years any colonial governorships. The permanent civil service should also be represented; all should be senators who had filled, during ten years, the important offices of under-secretary to the Treasury, permanent under-secretary of State, or any others equally high and responsible. The functions conferring the senatorial dignity should be limited to those of a legal, political, or military or naval character. Scientific and literary emi-

government was to be established. On the third active day of their session the resolution, —

"'that the national legislature ought to consist of two branches,' was agreed to without debate or dissent, except that of Pennsylvania, given probably out of complaisance to Dr. Franklin, who was understood to be partial to a single house of legislation." [1]

Upon a subsequent vote, New York, New Jersey and Delaware voted against the proposition; Pennsylvania joined the majority of seven States, and Maryland was divided; [2] but the real dispute at that time was whether the United States should continue as a confederacy or be made a nation; and the minority were influenced by the desire of accomplishing the former rather than by a conviction of the advantages of a single chamber in a national government. Randolph's resolutions proposed also that the second branch be elected by the first out of nominations by the State

nence are too indefinite and disputable: they imply a power of selection, whereas the other qualifications speak for themselves; if the writings by which reputation has been gained are unconnected with politics, they are no evidence of the special qualities required, while if political they would allow successive ministries to deluge the House with party tools." (Representative Government, ch. xiii.) It may be doubted, whether a body composed of aged and gouty men on the retired list which would be used as a shelf upon which to lay politicians who had outlived their usefulness or had temporarily lost their seats in the lower house, could be expected to favor any novel measures of reform or to have any effect not of a reactionary character. See Woolsey, Political Science, vol. ii, p. 315.

"We may imagine very easily in a moment's reflection what would have been the condition of this country at this moment had the Senate of the United States been constituted on a different principle. If the size and populations of the several States had been the test of representation in the Senate of the United States, I think it is not too much to say in sober minded truth that this Republic would not have endured until now. Many and many have been the times when, if the right of the Senators of each State to resist and defeat the current of popular passion and prejudice which arises sometimes in the action of the popular body, the House of Representatives, had failed to exert itself as it would have failed if the Senate had been constituted as the national House of Representatives, discord and revolution would almost certainly have caused the dismemberment of the Union." Senator George F. Edmunds, in reply to the toast, "The United States Senators of Vermont," at the reunion of the survivors of the members of the Vermont Legislatures at Montpelier, Vermont, reprinted in The New York Times.

§ 76. [1] Madison Papers, Elliot's Debates, 2d ed., vol. v, p. 135.

[2] Ibid., p. 223.

legislatures, but this was defeated by the votes of seven States to three.[3] In the debate upon the question whether the lower house should be elected by the State legislatures, —

"Mr. Dickinson considered it essential that one branch of the legislature should be drawn immediately from the people, and expedient that the other should be chosen by the legislatures of the States. This combination of the State governments with the national government was as politic as it was unavoidable. In the formation of the Senate, we ought to carry it through such a refining process as will assimilate it, as nearly as may be, to the House of Lords in England."[4]

After the defeat of the motion for an election of the lower house by the State legislatures, in which he voted with the majority, he moved,[5] —

"that the members of the second branch ought to be chosen by the individual legislatures."[6]

"Mr. Dickinson had two reasons for his motion, — first, because the sense of the States would be more easily collected through their governments than from the people at large; secondly, because he wished the Senate to consist of the most distinguished characters, distinguished for their rank in life and their weight of property, and bearing as strong a likeness to the British House of Lords as possible; and he thought such characters more likely to be selected by the State legislatures than in any other mode."[7]

Roger Sherman seconded the motion that, it seems not unlikely, was an entering wedge for the compromise that he subsequently suggested.[8] The only strong opposition was from Wilson, who proposed instead, —

"an election by the people, in large districts, which would be most likely to obtain men of intelligence and uprightness; subdividing the districts only for the accommodation of voters."[9]

"Mr. Gerry insisted that the commercial and moneyed interest would be more secure in the hands of the State legislatures than of the people at large."[10]

[3] Ibid., p. 139.
[4] Ibid., p. 163.
[5] Ibid., p. 164. *Supra*, § 51.
[6] Ibid., p. 166.
[7] Ibid.
[8] See ibid., p. 240, note.
[9] Ibid., p. 169. Madison supported Wilson, but would not carry the delegation of his State. Ibid., pp. 169–170.
[10] Ibid., p. 169.

All the States but Pennsylvania, however, voted against the postponement of Dickinson's motion to take up that of Wilson; and the former was then unanimously adopted.[11] Upon a subsequent vote it was again carried by nine States against two, Pennsylvania and Virginia being in the minority.[12]

"Mr. Read proposed, 'that the Senate should be appointed by the executive magistrate, out of a proper number of persons to be nominated by the individual legislatures.' His proposition was not seconded, nor supported."[13]

The length of the term of the Senate was designed to give an opportunity for deliberation in legislation to protect the people against themselves.[14] Some of the State senates sat for two, others

[11] Ibid., p. 170.

[12] Ibid., p. 240.

[13] Ibid., p. 167. Gouverneur Morris also wished to have the senators appointed by the executive. Ibid., p. 272.

[14] "Mr. Madison. In order to judge of the form to be given to this institution, it will be proper to take a view of the ends to be served by it. These were — first, to protect the people against their rulers; secondly, to protect the people against the transient impressions into which they themselves might be led. A people deliberating in a temperate moment, and with the experience of other nations before them, on the plan of government likely to secure their happiness, would first be aware, that those charged with the public happiness might betray their trust. An obvious precaution against this danger would be, to divide the trust between different bodies of men, who might watch and check each other. In this they would be governed by the same prudence which has prevailed in organizing the subordinate departments of government, where all business liable to abuses is made to pass through separate hands, the one being a check on the other. It would next occur to such a people, that they themselves were liable to temporary errors, through want of information as to their true interests; and that men chosen for a short term, and employed but a small portion of that in public affairs, might err from the same cause. This reflection would naturally suggest, that the government be so constituted as that one of its branches might have an opportunity of acquiring a competent knowledge of the public interests. Another reflection equally becoming a people on such an occasion, would be, that they themselves, as well as a numerous body of representatives, were liable to err, also, from fickleness and passion. A necessary fence against this danger would be, to select a portion of enlightened citizens, whose limited number, and firmness, might seasonably interpose against impetuous counsels. It ought, finally, to occur to a people deliberating on a government for themselves, that, as different interests necessarily result from the liberty meant to be secured, the major interest might, under sudden impulses, be tempted to commit injustice on the minority. In all civilized countries the people fall into different classes, having a real or supposed difference of interests. There will be

for three, others again four, and that of Maryland for five years.[15] The last had the right to fill vacancies in its own body.[16] The term of six years was chosen as a compromise between nine and four. There was a tie vote upon the question to agree to five.[17] Four members, one of whom was Alexander Hamilton, proposed that the senators should hold their offices for life, unless removed by impeachment.[18]

creditors and debtors; farmers, merchants, and manufacturers. There will be, particularly, the distinction of rich and poor. It was true, as had been observed (by Mr. Pinckney), we had not among us those hereditary distinctions of rank which were a great source of the contests in the ancient governments, as well as the modern states, of Europe; nor those extremes of wealth or poverty which characterize the latter. We cannot, however, be regarded, even at this time, as one homogeneous mass, in which everything that affects a part will affect in the same manner the whole. In framing a system which we wish to last for ages, we should not lose sight of the changes which age will produce. An increase of population will of necessity increase the proportion of those who will labor under all the hardships of life, and secretly sigh for a more equal distribution of its blessings. These may in time outnumber those who are placed above the feelings of indigence. According to the equal laws of suffrage, the power will slide into the hands of the former. No agrarian attempts have yet been made in this country; but symptoms of a levelling spirit, as we have understood, have sufficiently appeared, in a certain quarter, to give notice of the future danger. How is this danger to be guarded against, on the republican principles; how is the danger, in all cases of interested coalitions, to oppress the minority, to be guarded against? Among other means, by the establishment of a body, in the government, sufficiently respectable for its wisdom and virtue to aid, on such emergencies, the preponderance of justice, by throwing its weight into that scale. Such being the objects of the second branch in the proposed government, he thought a considerable duration ought to be given to it. He did not conceive that the term of nine years could threaten any real danger; but, in pursuing his particular ideas on the subject, he should require that the long term allowed to the second branch should not commence till such a period of life as would render a perpetual disqualification to the re-elected, little inconvenient, either in public or private view. He observed, that, as it was more than probable we were now digesting a plan which, in its operation, would decide forever the fate of republican government, we ought, not only to provide every guard to liberty that its preservation could require, but be equally careful to supply the defects which our own experience had particularly pointed out." (Madison Papers, Elliot's Debates, 2d ed., vol. v, pp. 242–243.) See *supra*, § 75.

[15] The Federalist, numbers xxxix, lxiii.

[16] Ibid.

[17] Madison Papers, Elliot's Debates, 2d ed., vol. v, pp. 241–245.

[18] The others were Read, Robert Morris, and Gouverneur Morris (ibid., pp. 241, 271, 585).

The provision for the election of members by rotation was adopted unanimously at the suggestion of Gorham and Randolph.[19] Penn's Frame of Government for Pennsylvania had provided that in the Council one-third of the members should be elected every year, and at the time of the Convention the upper houses of New York, Virginia and Delaware as well as of the first named State were filled in a similar manner.[20] The idea is said to have been borrowed from the senates of the cities in the Netherlands,[21] who had taken it from Venice. The grant to each State of an equal right of suffrage in the Senate was the result of the controversy between the large and small States, which nearly disrupted the Convention and finally resulted in the Connecticut compromise, suggested by Roger Sherman, as previously described.[22]

Luther Martin of Maryland wished that the Senate should vote by States, and Gouverneur Morris of Pennsylvania that the number from each State should be three; but neither was able to carry more than the members of his own delegation in favor of his views.[23] The provision for the temporary supply of vacancies in the Senate by the State executives was inserted by the Committee of Detail in the following form: —

"Vacancies may be supplied by the executive until the next meeting of the legislature."[24]

Upon the consideration of their report, —

"Mr. Madison, in order to prevent doubts whether resignations could be made by senators, or whether they could refuse to accept, moved to strike out the words after 'vacancies,' and insert the words 'happening by refusals to accept, resignations, or otherwise, may be supplied by the legislature of the State in the representation of which such vacancies shall happen, or by the executive thereof until the next meeting of the legislature.' Mr. Gouverneur Morris. This is absolutely necessary; otherwise, as members chosen into the Senate are disqualified from be-

[19] Ibid., p. 241.

[20] Poore's Charters and Constitutions, vol. ii, pp. 1520, 1334, 1910; vol. i, p. 274; Stevens, Sources of the Constitution, p. 78; *supra*, § 49, note 9.

[21] Campbell, The Puritan in Holland, England and America, vol. ii, p. 423; Stevens, Sources of the Constitution, p. 78.

[22] *Supra*, §§ 48, 64.

[23] Madison Papers, Elliot's Debates, 2d ed., vol. v, pp. 356–357.

[24] Ibid., p. 377.

ing appointed to any office, by Section 9, of this article, it will be in the power of the legislature, by appointing a man a Senator against his consent, to deprive the United States of his services.

"The motion of Mr. Madison was agreed to *nem. con.*" [25]

The other words of this clause seem to have been inserted by the Committee of Style without discussion. The Convention considered and disapproved suggestions that senators must have a property qualification,[26] that like members of the House of Lords they should have the right to enter their dissents, in all cases, upon the journal,[27] that they should choose the President in case of a failure of a choice by the electors,[28] that their consent should be required to pardons,[29] and that they should have the power to declare war [30] and decide controversies between the States.[31] The proceedings as to the presidency of the Senate, impeachments, and the power of that body to concur in treaties and approve appointments will be described later.[32] The latter were suggested by the powers of the colonial councils.[33]

§ 77. Senatorial Elections.

The Constitution simply directs that the senators from each State shall be "chosen by the Legislature thereof," [1] without prescribing the manner of the choice. A subsequent provision is that —

"The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." [2]

For nearly one hundred years after the adoption of the Constitution Congress left the matter to the regulation of the several States. It was settled by uniform acquiescence that the governor of a State, although by the Constitution his assent was necessary

[25] Ibid., p. 396.
[26] Ibid., p. 247. *Supra*, § 61.
[27] Ibid., pp. 407–408; see *infra*.
[28] Ibid., pp. 507–513.
[29] Ibid., p. 480.
[30] Ibid., pp. 131, 438.
[31] Ibid., p. 379.
[32] See *infra*, §§ 82, 88, and under the head of the executive power.
[33] *Infra*, § 80.

§ 77. [1] Constitution, Article I, Section 3.
[2] Constitution, Article I, Section 4, see *infra*, Ch. XIV.

to the enactment of laws, was not a part of the legislature thereof when a senator was to be chosen.[3] It was decided by the Senate that the two houses of the legislature might, by a joint resolution or rule adopted by both of them, without the consent of the governor, provide for the manner in which a senatorial election should take place; and that the State constitution cannot limit the powers of the legislature in that respect.[4] It seems to have been the prevailing opinion shortly after the adoption of the Constitution that a senatorial election must take place by the joint action of both houses of the legislature acting separately.[5] The inconveniences of this method were, however, soon obvious, and the practice was adopted in several States of electing senators in joint convention of the two legislative houses in case the houses acting separately had failed to make a choice.[6] This method was

[3] Story on the Constitution, 5th ed., § 705.

[4] Yulee *v.* Mallory, Taft's Senate Election Cases, continued by Furber, pp. 127, 129. In that case the report of the Committee on Privileges and Elections, which was presented by Mr. Bright, said, at p. 129: "The next objection is that it has not the forms of law usual in legislation, because it is not signed by the officers of each house or approved by the governor. It is a sufficient reply to state that the Constitution does not require the legislature to regulate the manner of election by *law*; it may be by resolution, either joint or several, or in any other method which commands the agreement of both houses of the legislature. The form of action being discretionary and the substance right, the objection becomes immaterial. The will of the two houses, when ascertained by vote in their respective chambers, is for this purpose a sufficient law, because they alone are empowered to prescribe the manner of choosing in such mode or by such means as they please. On this point a State Constitution can neither control nor modify that of the United States, for the latter is the supreme law." See also Lucas *v.* Faulkner, ibid., p. 626, *infra*, note 11, and Opinions of Justices, 45 N. H., 595; Opinions of Judges, 37 Vt., 665. *Supra*, § 55, over note 6.

[5] Kent's Commentaries, vol. i, p. 226; The Federal Farmer, Letter 12. This was the contention of the Federalists of New York at the first senatorial election in that State, when they had a majority in the State senate, and their political opponents a majority in the lower house and in the joint assembly. They refused consequently to agree to an election by a joint assembly after a disagreement between the two houses, and proposed that each house should then be required to choose one of the two candidates previously chosen by the other. The assembly refused to agree to this, and consequently New York was not represented in the Senate at the first session of the First Congress (McMaster, The Political Depravity of the Fathers. Atlantic Monthly, vol. lxv, pp. 628–629).

[6] Kent's Commentaries, vol. i, pp. 226; Story on the Constitution, 5th ed., § 705.

approved by the Senate, which recognized an election by a majority of the members of both houses in joint convention as sufficient, although there was no concurrent majority by each house in favor of the successful candidate.[7] It was, however, held that it was necessary that a quorum of each house should be present when the candidate was elected; since otherwise it could not be said that he was elected by the legislature.[8] The matter was settled by Congress in 1866, by the passage of an act for the regulation of senatorial elections as follows: —

"The legislature of each State which is chosen next preceding the expiration of the time for which any Senator was elected to represent such State in Congress shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator in Congress. Such election shall be conducted in the following manner: Each house shall openly, by a viva-voce vote of each member present, name one person or Senator in Congress from such State, and the name of the person voted for, who receives a majority of the whole number of votes cast in each house, shall be entered on the journal of that house by the clerk

[7] Simon Cameron's Case, Taft's Senate Election Cases, continued by Furber, p. 168.

[8] Case of James Harlan, 1857, Taft's Senate Election Cases, continued by Furber, p. 139; but see the case of Fitch and Bright, 1857, ibid., p. 148. In Harlan's case, Senator Bayard of Delaware said: "On this state of facts, the question which I suppose to arise is, whether 'the legislature' of a State, under the language of the Federal Constitution delegating to the legislature the right to elect Senators of the United States, is to be taken to mean the individual members of the legislature or the body or bodies of which the legislature is composed. I suppose the term as used in the Constitution means the bodies of which the legislature is composed. The honorable Senator from Georgia, if I appreciate his argument, insists that the power being delegated to the legislature is vested in the members of the legislature, and that whenever a majority of the members of the whole legislature under a law such as that existing in Iowa vote for a man he is elected, though one of the co-ordinate branches of that legislature may not vote for him, and may, as a body, refuse to go into an election. Sir, I hold it to be a principle of law which has, I think, no exception, that where two integral bodies are authorized to do an act, it cannot be done without the consent of those two integral bodies. They must both be present and act in the matter or there can be no validity in the act done. This is a universal law. I can call to mind no case where a contrary principle prevails, whether relating to legislative action or corporate action. Indeed, in reference to corporations, it has been decided over and over again that where there are two integral bodies who must concur in an act they must both be present and act upon the matter as bodies, not as individuals."

or secretary thereof; or if either house fails to give such majority to any person on that day, the fact shall be entered on the journal. At twelve o'clock meridian of the day following that on which proceedings are required to take place as aforesaid, the members of the two houses shall convene in joint assembly, and the journal of each house shall then be read, and if the same person has received a majority of all the votes in each house, he shall be declared duly elected Senator. But if the same person has not received a majority of the votes in each house, or if either house has failed to take proceedings as required by this section, the joint assembly shall then proceed to choose, by a viva-voce vote of each member present, a person for Senator, and the person who receives a majority of all the votes of the joint assembly, a majority of all the members elected to both houses being present and voting, shall be declared duly elected. If no person receives such majority on the first day, the joint assembly shall meet at twelve o'clock meridian of each succeeding day during the session of the legislature, and shall take at least one vote, until a Senator is elected. Whenever on the meeting of the legislature of any State a vacancy exists in the representation of such State in the Senate, the legislature shall proceed, on the second Tuesday after meeting and organization, to elect a person to fill such vacancy, in the manner prescribed in the preceding section for the election of a Senator for a full term. Whenever during the session of the legislature of any State a vacancy occurs in the representation of such State in the Senate, similar proceedings to fill such vacancy shall be had on the second Tuesday after the legislature has organized and has notice of such vacancy. It shall be the duty of the executive of the State from which any Senator has been chosen to certify his election, under the seal of the State, to the President of the Senate of the United States. The certificate mentioned in the preceding section shall be countersigned by the secretary of state of the State."[9]

Under this statute, the Senate has held that an election is valid when made in a joint convention by a majority of the members of both houses, in the absence of a quorum of one of them.[10]

[9] U. S. R. S., §§ 14–19. The immediate cause of this legislation was John P. Stockton's Case, Taft's Senate Election Cases, continued by Furber, p. 226; where the Senate divided almost evenly upon the question whether a plurality of the joint assembly could elect.

[10] Case of James B. Eustis, ibid., p. 464; Davidson *v.* Call, ibid., pp. 710–712. The last case overruled a decision on the subject by the State court; State *ex rel.* Fleming *v.* Crawford, 28 Fla., 441. See Spofford *v.* Kellogg; Taft's Senate Election Cases, continued by Furber, p. 471. It was the

Where the Constitution provided that the legislature in extraordinary session should enter upon no business, except that stated in the proclamation by which it was called together; the Senate held that such a legislature might elect a senator and fill a vacancy, although that object was not stated in the proclamation.[11]

opinion of Senator Edmunds that so much of an act as declared what legislature should elect a senator and authorized the election by the legislature in joint convention was unconstitutional. "I wish to say one word, Mr. President, about what is called the act of Congress of 1866. The Constitution provides that Congress may regulate the manner by which and the time at which the legislature of a State shall elect a Senator. That is all the authority which the Constitution of the United States reposes in Congress over that subject. It says in another place, but in the same connection, that the legislature of a State shall ordinarily — I am not now on the question of filling vacancies — elect a Senator for a term of six years. It names nothing but the legislature of a State to do that. I was here when the act of 1866 passed, but I had just come into the Senate and I gave it no attention; I probably voted for it, if there was a division, it being reported by a committee. But I have been of the opinion ever since I came to examine the subject, and I am of the opinion now, as I have stated before, I think, in this body, that the act of Congress, in so far as it undertakes to declare what legislature, whether chosen before or after the expiration of a term, or how long before or how long after, shall elect a Senator, goes beyond its constitutional power. I am also of opinion, and I state it deliberately, and I believe I have stated it before, that when the Congress of the United States undertakes to create a body to elect a Senator which the Constitution of the State has not created, and which is not its legislature, it has gone beyond its power. By the constitution, I think, of every State in the Union, certainly every one that I know of, the legislative power is vested in two separate and independent bodies, each one of which acts by itself and for itself, and that is the legislature of the State of which the Constitution of the United States speaks when it says that the legislature shall elect a Senator. Therefore I am of opinion that Congress has no more power to turn the two bodies, the Senate and House of Representatives of a State, formed under its own constitution as two separate bodies of different numbers and of different constituencies, into one consolidated body voting *per capita*, than it has to declare that a town meeting in the State of Vermont may elect a Senator and call that a legislature, because it is not by the constitution of the State its legislature. But that is apart from this question, and I should not have referred to it only that the act of Congress has been spoken of." (Remarks of Senator George F. Edmunds in Blair's Case, Congressional Record, vol. xvii, Part I, p. 23. Taft's Senate Election Cases, continued by Furber, p. 44.)

[11] Lucas *v.* Faulkner, Taft's Senate Election Cases, continued by Furber, 626. The grounds of the decision are clearly stated in the following extract from the Report of the Committee on Privileges and Elections presented by Senator George F. Hoar of Massachusetts: "It is claimed by Mr. Lucas

The Senate has decided that when, at the expiration of the senatorial term, there are in existence two State legislatures, the

that, as this body was not permitted to enter upon any legislative business, except such as related to the eight matters set forth in the call, it was not a legislature, but was a body deriving its power from the will of the executive, and so was exerting a certain executive or quasi executive function, something like that which is exercised by the Senate in giving its assent to the nominations of public officers. But it seems to us that this view cannot be supported. In the first place, the body is expressly declared by the Constitution of West Virginia itself to be a legislature. In the next place, the function which it exercised in making enactments upon the eight great subjects mentioned in the call of the governor is clearly a legislative function. Among them, under Articles I and II, is the making appropriations of public money; under Article III, the regulation of procedure in criminal cases; under Articles V, VI, and VII would exist the power to declare certain high crimes and misdemeanors; and under Article VIII, to give the assent of the State to the establishment and confirmation of its boundary lines.

"It is difficult to conceive of any definition of the word 'legislature' which would not include a body capable of passing and actually passing such enactments as these. They can be binding on the people of the commonwealth only as legislation. They would be subject to be construed and enforced by the courts of that State only in their character as laws.

"But it seems to the committee that the construction of the State constitution of West Virginia, upon which the above argument is based, is one which will not bear examination. When that constitution provided that the legislature so convened in extraordinary occasions 'should enter upon no business except that stated in the proclamation by which it was called together,' the people must be presumed to have had in mind business to be transacted under authority of the State constitution, and not to have intended to prohibit the performance of duties imposed upon it by the supreme authority of the Constitution of the United States.

"If the argument be sound that a legislative body which is prohibited from entering upon certain classes of business, or which is confined to certain classes of business clearly legislative in their character, is no legislature in the constitutional sense, its logic would require us to declare that the legislature of every State whose bill of rights excludes it from large domains of legislation is no legislative body. If, under the same provision of the Constitution of the United States, the act of Congress had fixed a day for holding elections for Representatives to Congress, and the State constitution or laws should prohibit the assembling of the people for such elections on the day so fixed, it would, we suppose, be held clear that the act of the State would be void and the authority of the act of Congress would prevail.

"We cannot see any difference between such prohibition of a State constitution applicable to the constitutional electors of Senators, who are members of the State legislature, and the constitutional electors of representatives, who are a body of electors authorized to vote for members of the most numerous branch of the State legislature.

term of office of one of which has not expired and that of the other not begun; the latter, if the last elected, shall elect the senator.[12] A permanent organization of a State legislature is not essential to a senatorial election. It is enough, if a sufficient temporary organization has been made, to warrant the passage of bills, although no permanent organization has been made and the secretary *pro tempore* has not taken any oath of office.[13]

"The intention of the Congress, as is plainly evident from a consideration of the whole act, was to place it out of the power of a majority of either house to prevent a majority of the two houses acting together in joint assembly from electing a United States Senator, in a case where there had been such an organization of the legislature as will enable it to exercise the ordinary functions of a legislative body, such as enacting laws and making record thereof. This being so, is not the conclusion irresistible that whatever is a sufficient organization to enable a legislature to do the latter should be sufficient to enable it to elect a United States Senator? Any other construction would place it in the power of each house to organize so as to enable the legislature to sit its entire session of forty, sixty, or one hundred days, as the case may be, enact laws, and perform every function of its being, save and except only that of electing a United States Senator, and then adjourn, and yet would place it in the power of a *factious* majority in *either* house, the dilatory and obstructive action of which as a *minority* of a whole legislature in respect of proceeding with the necessary preliminary steps toward the election of a United States Senator is the *very* thing above all others the legislation was aimed at, to absolutely prevent the election of a Senator by refusing to make that permanent organization which the contestant insists is necessary before the legislature can elect a Senator."[14]

The word "chosen" in the statute means the same as the word "elected," and the claim that the legislature is not chosen until

"We therefore are clearly of the opinion that the election of Mr. Faulkner at the special session of the legislature of West Virginia was valid."

[12] See the report of the Committee on Privileges and Elections, which was unanimously approved by the Senate, Senate Reports, 45th Congress, 2d Session, vol. ii, No. 485; referred to in Bell's Case, Taft's Senate Election Cases, continued by Furber, p. 27.

[13] Claggett *v.* Dubois, Taft's Senate Election Cases, continued by Furber, pp. 668, 670–677.

[14] Report of the Committee on Privileges and Elections, presented by Senator Mitchell of Oregon, in

its organization is inadmissible.[15] In computing the time which must intervene between the organization of the legislature and the election of a senator, where the organization takes place on a Tuesday, the second Tuesday is two weeks from that date.[16] A member of either house of Congress has the right to resign and in his resignation to appoint a future day upon which his resignation shall take effect; and the legislature may elect his successor before the appointed time.[17] Where, when a legislature meets, it is known that a vacancy will occur before another meeting of the same or a subsequent legislature, an election should be had to fill such vacancy, although at the same session the legislature elects a senator to fill the term the expiration of which will create a vacancy.[18] The failure of the legislature to commence a senatorial election on the day directed by the statute, or the failure of a quorum of one house to be present on one of the days when the statute directs that such an election shall be held, does not invalidate a subsequent election.[19] The Senate has recognized the right of the Vice-President to give the casting vote in case of a tie on the admission of a senator.[20] After the determination of a contested election, either house has the power to reconsider the same at any time; but this power has been rarely exercised.[21]

It has been held by the Senate that to deprive a member of his

Claggett *v.* Dubois. Taft's Senate Election Cases, continued by Furber, p. 677.

[15] Norwood *v.* Blodgett, 1871, Taft's Senate Election Cases, continued by Furber, pp. 293-299.

[16] Report of the Committee on Privileges and Elections, presented by Senator Mitchell of Oregon, in Claggett *v.* Dubois. Taft's Senate Election Cases, continued by Furber, p. 691.

[17] Case of Archibald Dickson of Kentucky, in 1852, Taft's Senate Election Cases, continued by Furber, pp. 13-15. See *supra*, § 71.

[18] Report of the Committee on Privileges and Elections, presented by Senator Mitchell of Oregon, in Claggett *v.* Dubois. Taft's Senate Election Cases, continued by Furber, p. 692.

[19] Case of Elbridge G. Lapham and Warner Miller, Taft's Senate Election Cases, continued by Furber, p. 601; Hart *v.* Gilbert, ibid., p. 282.

[20] Louisiana Cases, Spofford *v.* Kellogg, Taft's Senate Election Cases, continued by Furber, pp. 471, 490; Corbin *v.* Butler, ibid., pp. 541, 543.

[21] Case of Jared W. Williams, Taft's Senate Election Cases, continued by Furber, pp. 23, 25. But see Cases of Gohlston and Claiborne and Prentice and Ward in the House of Representatives in the 25th Congress, 1 Bart., 9; *supra*, § 70; Lane and McCarty *v.* Fitch and Bright, ibid., p. 148; Spofford *v.* Kellogg, ibid., 471, 493; case of George E. Spencer, ibid., 515, 537.

seat for bribery or corruption in the course of his election, it must be shown that he was personally guilty of corrupt practices, or that the corruption took place with his sanction, or that a sufficient number of votes to affect the result was corruptly changed.[22] It was the opinion of the Senate Committee on Privileges and Elections that the payment by one candidate to another of money as a consideration for the latter's withdrawal from a contest before the legislature, is such corruption as will constitute a ground for setting aside the election.[23] Whether bribery in a party caucus is a sufficient cause for holding an election void has been the subject of discussion, but has not been decided.[24] The fact that the choice of a senator was determined in the State legislature by the vote of the successful candidate, was held not to avoid the election.[25]

Where two bodies, each of which claims to be the State legislature, elect senators, the Senate will usually recognize the elec-

[22] Case of Henry B. Payne, Taft's Senate Election Cases, continued by Furber, p. 604. See also case of Powel Clayton, ibid., p. 348; cases of Pomeroy, ibid., pp. 330 and 340; case of George E. Spencer, ibid., 515; case of La Fayette Grover, ibid., 565; case of John J. Ingalls, ibid., 596.

[23] Case of Alexander Caldwell, Taft's Senate Election Cases, continued by Furber, pp. 330, 334: "Looking at the transaction in its real character, it was a sale upon the part of Mr. Carney of the votes of his personal and political friends in the legislature, to be delivered by him to Mr. Caldwell as far as possible. If it were legitimate for Mr. Caldwell to buy off Mr. Carney as a candidate, it was equally legitimate to buy off all the other candidates and have the field to himself, by which he would exert a quasi-coercion upon the members of the legislature to vote for him, having no other candidate to vote for. It was an attempt to buy the votes of members of the legislature, not by bribing them directly, but through the manipulations of another. The purchase-money was not to go to them but to Mr. Carney, who was to sell and deliver them without their knowledge." "Buying off opposing candidates, and in that way securing the votes of all or the most of their friends, is in effect buying the office. It recognizes candidacy for office as a merchantable commodity, a thing having a money value, and is as destructive to the purity and freedom of elections as the direct bribery of members of the legislature." A minority of the Committee were of the opinion that the offense was one which should be punished by expulsion. The majority recommended the adoption of a resolution that Caldwell was not duly and legally elected. A further resolution for Caldwell's expulsion was also offered. Pending the consideration of the subject, he resigned.

[24] Case of Henry B. Payne, Taft's Senate Election Cases, continued by Furber, p. 619.

[25] Case of Ephram Bateman, ibid., p. 80.

tion by the one recognized by the other State authorities, but it has exercised the power to examine into the facts and determine which of the two contained a majority of members lawfully elected, although the other may have been organized with technical regularity. Thus, where a senator had been elected by a legislature, of which members had previously extended their own terms in alleged violation of the Constitution, there having been no election of their successors, and it appeared that bills passed by the body thus composed were recognized as laws of the State; the Senate seated a member thus elected, although a subsequent legislature had passed an act declaring the election void and chosen another.[26] Where a body claiming to be a State senate had been recognized by the governor and the lower house, the Senate of the United States refused to examine the question whether it had lawfully obtained a majority in favor of the person chosen by admitting two persons who had not, and excluding two who had been, elected members.[27] But where two bodies each claimed to constitute the legislature of the State, and each elected a senator, the Senate has examined into the question as to which of them was composed of persons duly elected to the same.[28] In one case, it refused to recognize that organized by a majority of those holding regular certificates of election, when it considered that a majority of the other had been in fact legally elected, and the latter had been subsequently recognized as the legislature by the governor.[29] The report said: —

"We are called upon to choose between the form and the substance, the fiction and the fact; and, considering the importance of the election of a Senator, in the opinion of your committee the Senate would not be justified in overriding the will of the people as expressed at the bal-

[26] Potter *v.* Robbins, Taft's Senate Election Cases, continued by Furber, p. 83. But see the strong minority report by Silas Wright; Whiteley and Farrow *v.* Hill and Miller, ibid., p. 264; Lane and McCarty *v.* Fitch and Bright, ibid., p. 148; Louisiana Cases, Spofford *v.* Kellogg, ibid., p. 471.

[27] Case of David Turpie of Indiana, A. D. 1887, ibid., p. 623. But see Corbin *v.* Butler, A. D. 1877, ibid., p. 541.

[28] Sykes *v.* Spencer, A. D. 1874, ibid., p. 515; Louisiana Cases, A.D. 1873, ibid., p. 385; Corbin *v.* Butler, A. D. 1877, ibid., p. 541; Clark and Maginnis *v.* Sanders and Power, A. D. 1890, ibid., p. 631.

[29] Sykes *v.* Spencer, A. D. 1874, ibid., p. 515.

lot box, out of deference to certificates issued erroneously to persons who were not elected." [30]

The authority of this has been shaken by a later decision.[31]

Where States were in insurrection and occupied by military force, the Senate determined that there could be no free choice, and that, consequently, the action by their respective legislatures in electing senators was void.[32] During the Reconstruction, both houses of Congress refused to admit senators from States which had been in insurrection and which had not ratified the Fourteenth Amendment.[33]

Where senators and representatives were elected before the expulsion of their predecessors,[34] before the admission of a Territory into the Union as a State, and before the readmission of a State into the Union after Reconstruction, it was held that the admission related back so as to ratify their election.[35] A senator thus elected was not, however, admitted to the Senate after the passage of an enabling act but before the admission of the State.[36] It has been held that an election of a territorial delegate before the organization of the territory is void.[37]

[30] Taft's Senate Election Cases, continued by Furber, p. 521. See a larger quotation from this report, *infra*, Ch. XVI.

[31] Clark and Maginnis *v.* Sanders and Power, A. D. 1890, ibid., p. 631, 637: "The report on Sykes *v.* Spencer, decided by the Senate in 1873, is relied upon as supporting an opinion contrary to that which we have stated. If so, we dissent from it. But it is to be remarked that in that case, which was upon an election held less than seven years after the close of the war, the doctrine of the report is not relied upon in the debate. It is further to be observed that that case is to be distinguished from this by the fact that there it was conceded that the persons who had not certificates were duly elected."

[32] Cases of Fishback, Baxter and Snow, ibid., p. 202; cases of Cutler, Smith and Hahn, ibid., p. 210; cases of Segar and Underwood, ibid., p. 214; *supra*, § 38.

[33] Jones and Garland *v.* McDonald and Rice, ibid., p. 244; Marvin *v.* Osborn, ibid., p. 245; Whiteley and Farrow *v.* Hill and Miller, ibid., p. 247; Hart *v.* Gilbert, ibid., p. 282; *supra*, § 38.

[34] Case of Willey and Carlile, A. D. 1861, ibid., p. 177.

[35] Case of Phelps and Cavanaugh of Minnesota, 1 Bart., 248; Hart *v.* Gilbert, Taft's Senate Election Cases, continued by Furber, p. 282; Reynolds *v.* Hamilton, ibid., p. 285; McCrary on Elections, 3d ed., § 210. Contra. But see case of Blount and Cocke, Taft's Senate Election Cases, continued by Furber, p. 77.

[36] Case of James Shields, Taft's Senate Election Cases, continued by Furber, p. 171.

[37] Case of J. S. Casement, 2 Bart., 516.

The ineligibility of the person who receives a majority of the votes does not give the election to the candidate with the next highest number.

§ 78. Classification of the Senate.

The Constitution directs a classification of the Senate as follows: —

"Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as nearly as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the expiration of the fourth Year, and of the third Class at the expiration of the sixth Year, so that one third may be chosen every second Year."[1]

On the original organization of the Senate, May 14th, 1789, a committee was appointed to consider and report a mode of carrying into effect this constitutional provision. In accordance with their report, the senators then sitting were arbitrarily divided into three classes, the first including six members, and the second and third, seven each. Three papers, numbered 1, 2 and 3 respectively, were rolled up and put into a box by the secretary; and then one senator from each class drew a number. The class which drew number 1 vacated their seats at the expiration of the second, the class which drew number 2 vacated their seats at the end of the fourth, and those who drew number 3 at the end of the sixth year. This plan, on account of the number then present at the Senate, left the first class, who vacated their seats at the expiration of the second year, one less in number than each of the other two. To prevent any unnecessary inequality in the classes, when the senators from New York appeared, two lots, one numbered 3, that of the small class, and one blank, were placed in the box. After each senator had drawn a lot, the one who drew number 3 was placed in the small class; and the other drew again from the box containing numbers 1 and 2, taking his place in the class whose number he drew. When the senators from North Carolina appeared, there were then two classes of equal numbers, and one with a number in excess of each. The numbers of the equal classes were put in the box. Then each senator

§ 78. [1] Constitution, Article I, Section 3. See *supra*, § 76, over notes 19–21.

drew one and was classed according to the number he drew. The classes were then equal in number. Accordingly, when the senators from Rhode Island appeared, papers numbered 1, 2, and 3 respectively, were again placed in the box from which each senator drew one. The proceedings continued according to these successive methods until the admission of the senators from Washington, North Dakota and South Dakota at the same time. The same three numbers were then placed in the box, and drawn by one senator from each of the new States. The secretary then placed in the ballot-box two papers of equal size, numbered 1 and 3 respectively. Each of the senators from the State which had thus drawn number 1 drew out a paper and was assigned in accordance with the number he drew. The secretary then placed in the ballot-box numbers 1, 2, and 3, and each of the senators from the State which had drawn number 2 drew a lot from the box. They were then assigned in accordance with the number drawn by each; and the remaining lot with a blank was again placed in the box and the senators from the remaining State drew from them. He who drew a number was assigned to the class represented by it; and he who drew a blank drew again from the box which then contained the other two numbers, and was assigned according to the number drawn. When the senators from Idaho, Montana, and Wyoming were admitted at the same time, the same proceedings took place.[2] A custom has been thus established which will be followed in the future.

§ 79. Filling Vacancies in the Senate.

The Constitution provides that "if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies."[1] The meaning of the phrase, "happen during the Recess of the Legislature," is a question which has been the subject of conflicting precedents and is not yet definitely settled. Is the expiration of the term of a senator, which is not filled by the

[2] Furber, Precedents Relating to the Privileges of the Senate, pp. 190–203.

§ 79. [1] Constitution, Article I, Section 3.

legislature, either through its failure to meet after the term expires, or by its adjournment without an election, the happening of a vacancy which authorizes an appointment by the State executive? In other words, is the word "happen" in this connection synonymous with the word "occur," or does it mean the occurrence of an event which cannot be foreseen and so provided for by the calling of the legislature in extraordinary session, if that be necessary, to fill the vacancy?

In support of the more restricted meaning of the word "happen," its advocates rely upon the ordinary meaning of the word, which, it must be admitted, suggests that the event was unexpected;[2] upon the surrounding words in that clause of the Con-

[2] "But it is said that the word 'happen' does not necessarily refer to a casualty or an unexpected event; that in our language we make use of that word indifferently for 'occur' 'or come to pass.' It is respectfully submitted that this is not true. An event that is provided for by law to take place at stated periods known to all men is not correctly spoken of by people of ordinary education as 'happening,' because there is no element of uncertainty in it. The examples given of statutes providing for certain things to be done on a certain day of a month 'if it happen not on a Sunday,' etc., will not bear out the assertion. It is true that it *might* be known to all men who are astronomers, and would sit down and make calculations that a certain date in a certain year would fall on Sunday; but the great masses of mankind do not think of it in that way. They speak as though the thing were absolutely uncertain. But we do not say, for instance, that any natural event, which all men know and look for, did 'happen' to come at the time on which it was expected; we do not say that the sun 'happened' to rise on a certain day; we do not say that water 'happens' to flow down a descent by the force of gravity. That is a known law of nature. We do not say that Christmas 'happens' to come on the 25th of December; by the universal consent of Christendom that event comes on that day without peradventure. We do not say that a note 'happens' to fall due on the day which is specified in the instrument, though it no doubt is often said that it 'happened' to fall due when the maker did not have the money to pay it. We do not say that Congress happened to meet on the first Monday in December, that is the law. We do not say that a Senator's term in this body happened to expire on the 3d day of March, for that is the law written in the Constitution. We do say, per contra, that Senator A. B. 'happened' to die before his term had expired; we do say that Senator C. D. 'happened' to resign before his term had expired; we do say that Senator E. F. 'happened' to become disqualified by accepting an incompatible office or to be expelled before his term had expired, and so on. In the common acceptation of mankind these phrases are used and understood without controversy. So obvious is their meaning that those who contend for the power of the governor to appoint

stitution, "by resignation, or otherwise," the last two words being claimed to be in accordance with a well-known maxim of interpretation of the common law, restricted in their meaning to events of a like character with resignation[3] — were they not, the words "by resignation, or otherwise," would be mere surplusage and would not have been inserted;[4] and finally by the theory of our form of government, which favors the emanation of political power, as directly as may be, from the people, and makes it seem unwise, in case of doubt, to strengthen the executive.[5]

The advocates of the view that a broader power exists in the executive, urge that the most important end required by public policy and designed by this and other provisions of the Constitution[6] is to keep the Senate always full, and to prevent any State

for any vacancy whatever occurring in the recess of the legislature of a State, are compelled to resort to the argument *ab inconvenienti*." (Minority Report in Lee Mantle's Case.)

[3] Ham *v.* Missouri, 18 Howard, 126; Tennicks *v.* Schwaltz, L. R. 3 C. P., 315; Ashbury Ry. & C. Co. *v.* Riche, L. R. 7 H. L., 653; Countess of Rothes Kirkaldy Water Works Commissioners, *v.* L. R., 7 Appeal Cases, 694, 706.

[4] "In applying these definitions and legal rules to the clause we are discussing, if the words 'or otherwise' are not limited to vacancies occurring in a manner similar to a 'resignation' of a Senator, it would seem impossible to make an idea plain by the use of language. It can not refer to a vacancy occurring by the regular expiration of a term. That suggestion is excluded by the previous mention in special words of those terms, provision in like special words being made for filling them; therefore, the next clause is independent and entirely disconnected from that preceding it inasmuch as it refers and must refer to the filling of a vacancy happening otherwise than by the expiration of a regular term. The enlarging or general words used by the authorities must relate to the same kind of things to which the special words relate; they must be *ejusdem generis*, as the law says. Now the only possible kindred between the accidental and the regular termination of senatorial seat is that they are both *vacancies*, but they are not *ejusdem generis*, in that the one is a vacancy created by law and the other is a vacancy created by accident, and are entirely different in their legal effects. The one is a basis for the exercise of executive power, the other is not." (Minority Report in Lee Mantle's Case.)

[5] "A Senator under an executive appointment, may or may not represent the political views of his State. He may be the mere personal favorite of the governor. The Senate, as far as practicable, should be made to represent its constitutional constituency, and in this respect should preserve the republican feature of our Union." (Minority Report of Committee on Privileges and Elections adopted by the Senate, in Phelps Case, Taft's Senate Election Cases, continued by Furber, p. 20.)

[6] Citing Article V, which provides that "no State, without its consent.

from being deprived at any time of its full representation in the same. They rely upon the practical construction of the subsequent similar language that

"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 the next Session." [7]

Under this, the power of the President to fill vacancies caused by the expiration of official terms during the recess of the Senate has been recognized by statute; [8] has been extended in practice, under the sanction of nine Attorneys-General,[9] including Roger B. Taney,[10] afterwards Chief-Justice of the United States, to cases where the Senate had adjourned without acting on a nomination to fill a vacancy which had occurred during its session; and is sanctioned by the decisions of the Supreme Court of Indiana under a similar constitutional provision concerning the powers of the governor.[11] It appears by the reports of the debates of the Federal Convention that the words, "by resignation, or otherwise," were not contained in the first draft of the Constitution, as reported by the Committee on Detail,[12] and were subsequently inserted upon the motion of Madison "in order to prevent doubts whether resignations could be made by senators." [13] "We hear much of the word 'otherwise.' If Mr. Madison by proposing, or the Convention by adopting, the words 'resignation, or otherwise,' had meant to classify a series of cases like resignation, why would not Mr. Madison, eminent in his knowledge of the English language and clear in its expression, have said 'likewise'?"[14] The latest precedent was the Montana case of Lee

shall be deprived of its equal Suffrage in the Senate."

[7] Constitution, Article II, Section 2.

[8] U. S. Rev. St., § 1769.

[9] Opinions of Attorneys-General, vol. ii, p. 525; ibid., vol. i, p. 631; ibid., vol. iii, p. 673; ibid., vol. iv, p. 523; ibid., vol. vii, p. 186; ibid., vol. x, p. 356; ibid., vol. xii, pp. 32, 455; ibid., vol. xvi, p. 522.

[10] Ibid., vol. ii, p. 525.

[11] State *ex rel.* Yancey *v.* Hyde, 121 Indiana, 20; State *v.* Gorby, 122 Indiana, 17. See also Gormley *v.* Taylor, 44 Ga., 76; Walsh *v.* Commonwealth, 7 Weekly Notes (Pa. S. C.), 21.

[12] Madison's Papers, Elliot's Debates, 2d ed., vol. v, p. 377.

[13] Ibid., p. 396. *Supra*, § 76, over note 25.

[14] Senator George F. Edmunds of Vermont, in the Debate on Blair's Case, Congressional Record, vol. xvi, Part I, p. 23; Taft's Senate Election Cases, continued by Furber, p. 46.

Mantle, decided August 23d, 1893, when the Senate, by a vote of thirty-five to thirty, refused to recognize an appointment by the governor, to fill a vacancy caused by the expiration of a term, made after the adjournment of the legislature, which met after the term had expired and failed to elect a senator.[15] This decision overruled the majority report of the Committee on Privileges and Elections.[16] The decisions are so conflicting that the question is still open.

[15] See the New York World of August 24, 1893. A motion to reconsider was defeated on August 28, by 28 yeas to 31 nays. This was followed in one or two other cases at the same session.

[16] At that time, the Senate was engaged in a prolonged contest over the repeal of that part of the Sherman Act which compelled monthly purchases of silver; and the persons who had been appointed senators would have added to the strength of the minority. The previous cases upon the subject were as follows: In the case of Kensey Johns of Delaware, in 1794, it was resolved by a vote of 20 to 7 that where a session of the legislature had intervened between the resignation of a senator and the appointment by the governor of Mr. Johns as his successor, the appointment was invalid (Taft's Senate Election Cases, continued by Furber, pp. 1, 2). In the case of Uriah Tracy of Connecticut, in 1801, the Senate, by a party vote of 13 to 10, admitted Tracy, who had been appointed by the governor during a recess of the legislature to fill a vacancy caused by the expiration of his own previous term (ibid., p. 3). In the case of Samuel Smith of Maryland, in 1809, Mr. Smith was admitted to the Senate under similar circumstances (ibid., p. 4). In 1809, Senator Joseph Anderson of Tennessee, and in 1817, Senator John Williams of the same State, were respectively appointed by the governor of that State before the expiration of their terms to fill the anticipated vacancies until the legislature should supply them. They took their seats without objection or discussion (ibid., p. 6). In the case of James Lanman of Connecticut, in 1825, the Senate refused to admit Mr. Lanman, who had been appointed by the governor previous to the expiration of the term of his successor to fill the vacancy thus anticipated until the legislature which met a few months later should supply it. The vote was 23 to 18 (ibid., pp. 5, 6). Whether the ground of the exclusion was that no vacancy existed, or that the executive could not supply a vacancy before it happened, has been disputed. (Compare the argument of Senator Vest of Missouri in Blair's Case, ibid., 37–39, with the argument of Senator Hoar in the same case, ibid., 41–42, and the minority report of the Committee on Privileges and Elections which was approved by the Senate in Bell's Case, ibid., pp. 31–32.) In the case of Ambrose H. Sevier of Arkansas, in 1837, the duration of the term of Sevier, after his election, had been determined by lot and expired within a less time than six years. The governor, before its expiration, appointed Sevier senator to fill the anticipated vacancy until the legislature could supply it. The Committee on Privileges and Elections approved the decision in Lanman's case, stating: "This decision

It seems that where the duration of the term of a senator is determined by lot, but is limited to a less period than six years,

seems to have been generally acquiesced in since that time; nor is it intended by the committee to call its correctness in question. The principle asserted in that case is that the legislature of a State, by making elections themselves, shall provide for all vacancies which must occur at stated and known periods; and that the expiration of a regular term of service is not such a contingency as is embraced in the second section of the first article of the Constitution. The case now under consideration is wholly different in principle. The time when Mr. Sevier was to go out of office under his election made by the legislature of Arkansas was decided by lot, agreeably to the provisions of the Constitution on that subject. After the decision thus made, the legislature of Arkansas, not being in session, could not supply the vacancy; and the case, in the opinion of the committee, comes fairly within the provision of the Constitution contained in the third section of the first article, which declares, 'and if vacancies happen by resignation or otherwise during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.' The committee are of opinion that Mr. Sevier is entitled to his seat under the executive appointment of the 17th of January, 1837." The report of the committee was sustained by a vote of 26 to 19, Webster being in the minority (ibid., pp. 7–9). In the case of Charles H. Bell of New Hampshire, in 1879, upon the expiration of the senatorial term, two legislatures had been elected. The Senate had adopted the report of the Committee on Privileges and Elections that the legislature last elected, but the term of which had not yet begun, was entitled to elect the new senator. The governor appointed Mr. Bell to fill the vacancy between the expiration of his predecessor's term and the supply of the same by the new legislature after its organization. The Senate by a vote of 35 to 28, which was not divided upon party lines, rejected the report of its Committee on Privileges and Elections and admitted Mr. Bell to the seat (ibid., pp. 26-35). In the case of Henry W. Blair of New Hampshire, in 1879, a similar ruling was made by a vote of 36 to 20 (ibid., p. 36). In the case of Horace Chilton of Texas, in 1891, the governor had appointed Mr. Chilton to fill a vacancy occasioned by the resignation of a senator before the period when the resignation took effect. The question was raised whether the governor had the power to appoint Mr. Chilton before the resignation took effect. The Senate adopted the report of the Committee on Privileges and Elections, and admitted Mr. Chilton (ibid., pp. 48–51). The report cited the case of Robert M. Charlton of Georgia, who was thus appointed by the governor. His appointment took effect from and after the date for which his predecessor had resigned (Senate Journal, 1st Session, 32d Congress, p. 468). If this point, consequently, was decided in Lanman's case, it was then formally overruled. The matter rested there until 1893, when the decision was made in the Montana case of Lee Mantle, which was followed at the same session in two other cases arising from similar appointments by the government of Washington.

its expiration is the happening of a vacancy which will authorize an appointment by the State executive.[17] It has been held by the Senate that an executive of the State may appoint a senator to fill an anticipated vacancy before it occurs.[18] The ground of the decision is stated as follows: —

"The important consideration is that it must have been the purpose of the framers of the Constitution, as it is clearly for the public interest, that the office as far as possible should always be filled. This consideration applies with peculiar force to the office of Senator. We should be very unwilling to establish a construction of the Constitution which would make it certain that in no case of the resignation of a Senator, however necessary that resignation might be, there should be a succession without a considerable interval. This would bear with peculiar hardship upon States remote from the seat of government, and might determine the policy of the country in great emergencies and in matters peculiarly affecting particular States, when such States were but partially represented, or possibly not represented at all. . . . It has been suggested that if this construction be established it will be in the power of the governor of the State to provide by appointment for the filling of future vacancies long before they occur, and, therefore, the will of the people of the State, as it exists at or near the time of filling the vacancy, fail of being carried into effect. But the instances must necessarily be very rare indeed where the vacancy can be anticipated beforehand under circumstances which will create such temptation to the executive. Against that, as against many other evils which are possible under a popular government, as under other governments, the protection in general must be in the character and integrity of the persons clothed with high public office." [19]

Where a senator has been appointed by the executive to fill a vacancy and the legislature at its next session adjourns finally without an election, his term thereupon expires.[20] The adjournment of the legislature until the date when its existence terminates is equivalent to a final adjournment within the meaning of this rule.[21] The term of an appointed senator expires upon

[17] Sevier's Case, Taft's Senate Election Cases, continued by Furber, pp. 7–9, *supra*, note 16.

[18] Case of Uriah Tracy, ibid., p. 3.

[19] Horace Chilton's Case, ibid., p. 51.

[20] Case of Samuel S. Phelps of Vermont, in 1854, Taft's Senate Election Cases, continued by Furber, pp. 16, 21; case of Jared W. Williams of New Hampshire, in 1854, ibid., pp. 23, 25.

[21] Case of Jared W. Williams of New Hampshire, in 1854, pp. 23–25.

the presentment to the Senate of the credentials of his successor, from which the latter's acceptance is implied, even though he does not attend; provided, of course, that he has not resigned or accepted a disqualifying or inconsistent office.[22]

§ 80. General Observations upon the Senate.

During its earlier years the Senate of the United States acted as if it were an executive council, a part of the members of which considered themselves to be ambassadors, rather than, as now, principally a legislative body.[1] Its membership was originally only twenty-two,[2] a number not ill-suited for such functions. It fol-

[22] Case of Robert C. Winthrop of Massachusetts, in 1851, ibid., pp. 10–12.

§ 80. [1] "At the origin of the Government, the Senate seemed to be regarded chiefly as an executive council. The President often visited the Chamber and conferred personally with this body; most of its business was transacted with closed doors and it took comparatively little part in the legislative debates. The rising and vigorous intellects of the country sought the arena of the House of Representatives as the appropriate theater for the display of their powers. Mr. Madison observed, on some occasion, that being a young man, and desiring to increase his reputation, he could not afford to enter the Senate; and it will be remembered, that, so late as 1812, the great debates which preceded the war and aroused the country to the assertion of its rights, took place in the other branch of Congress. To such an extent was the idea of seclusion carried, that, when this Chamber," the room now occupied by the Supreme Court, "was completed, no seats were prepared for the accommodation of the public; and it was not till many years afterwards that the semi-circular gallery was erected which admits the people to be witnesses of your proceedings. But now the Senate, besides its peculiar relations to the executive department of the government, assumes its full share of duty as an equal branch of the legislature; indeed from the limited number of its members, and for other obvious reasons, the most important questions, especially of foreign policy, are apt to pass first under discussion in this body, and to be a member of it is justly regarded as one of the highest honors which can be conferred on an American statesman." (Address of Vice-President Breckinridge before leaving the old Senate Chamber for the new, January 4th, 1859, Senate Journal, 35th Congress, 2d Session, p. 96; Congressional Globe, 1858–1859, Part I, p. 203; Furber, Precedents relating to Privileges of the Senate, p. 3. See also an article by James C. Welling, in the National Intelligencer, October 30, 1858, quoted in Lieber's Civil Liberty, ch. xiii, appendix; Boutmy, Études de Droit Constitutionnel, pp. 118–122. The last is a small work which shows great learning and acuteness.)

[2] Only eleven States were at first represented; North Carolina and Rhode Island ratifying subsequently (*supra*, § 29).

lowed in many respects the practice of the colonial councils. Its sessions were held in secret until February 20th, 1794, except on the discussion of the contested election of Albert Gallatin, which began nine days before;[3] and its sessions for the consideration of executive business are still secret except upon special occasions.[4] During its early sessions the President and cabinet ministers frequently consulted with it in person,[5] and the rules still provide for the case of a visit from the chief executive.[6] It created no standing committees until 1816.[7] Since then, however, its functions have been mainly legislative, although it has guarded with great jealousy its executive prerogatives.

In the discharge of these it has developed a corporate spirit which tends to make its members stand together irrespective of party lines to resist any attacks upon what are considered to be the rights of each. A practice has thus arisen which is known as senatorial courtesy, the cardinal principles of which are that no nomination shall be confirmed against the wishes of both the senators from the State where the candidate resides, provided that they are of the same political faith as the executive and that when a senator or a former senator is nominated for an office he shall be immediately confirmed without a reference to any committee. The latter rule is almost invariably observed. The former, the origin of which may be found in Washington's first administration,[8] has been the subject of many contests with the executive,

[3] Furber, Precedents relating to Privileges of the Senate, pp. 3–5.

[4] Senate Rule XXXVI.

[5] See Maclay, Sketches of Debate in the First Senate of the United States, 2d ed., p. 122; Furber, Precedents of Privileges of the Senate, p. 3. In 1813 the Senate sought to revive the practice by asking President Madison to attend and consult with them upon foreign affairs: but he declined (Wilson, Congressional Government, p. 234, note). In 1846, when President Polk asked the advice of the Senate concerning a proposed treaty with Great Britain relative to the Oregon boundary, he did so by a secret message (Benton, Thirty Years in the Senate, vol. ii, p. 675).

[6] Senate Rule XXXVI.

[7] "Before that time the custom had been to refer to select committees different parts of the President's message, and these were practically standing committees. Three committees existed before 1816: 'The Committee on Engrossed Bills, created in 1806, the Committee on Enrolled Bills, which was a joint committee, and the Committee to Audit and Control the Contingent Expenses, created in 1807" (Furber, Precedents relating to Privileges of the Senate, p. 317).

[8] The nomination of Benjamin

one of which was so bitter that it caused President Garfield to fall by the hand of an assassin; but in the main the Senate has triumphed. One part of it is firmly established. The Senate has never confirmed the nomination of a postmaster against the will of the senator who lived where the office was situated. It insists that each of its members shall select the man who delivers to him his mail.[9]

The Senate has established the position that it is a continuous body always in existence, which does not need a new organization every two years nor the recommencement then of all business, as does the House of Representatives.[10] So the two-thirds who hold over exercise the exclusive right to pass upon the credentials and qualifications and to judge of the elections of the new members, and disputes concerning what constitutes a prima facie claim to a seat are of little importance.[11] Moreover, all proceedings upon bills there introduced continue without abatement till their final disposition, and do not lapse by the expiration of a Congress.[12]

This permanency of the Senate and the length of its members' terms have given it a dignity possessed by no other legislative body now in existence. It is still able to transact business without the application of the previous question, or closure, as it is

Fishbourne to the post of naval officer of the port of Savannah was rejected at the first session of the Senate, August 4, 1789, "simply because the Georgia senators preferred another" (Benton's Abridgment, vol. i, pp. 16–17 and notes to p. 17). Washington protested in a message nominating another to the same office (ibid., p. 17).

[9] The last illustration of this practice was the concession by President Cleveland to Senator Hill of the selection of the postmaster at Albany, New York, in 1895. By insisting upon this principle Charles Sumner secured the appointment of the historian Palfrey to the Boston post-office by Lincoln.

[10] See the debate in the Senate on the Removal of the Public Printer, in 1841, especially the remarks of Senators Buchanan, Allen, Bayard and Silas Wright (Congressional Globe, vol. ix, pp. 236–256).

[11] Ibid., Taft's Senate Election Cases, continued by Furber. In Indiana, where one-half of the Senators hold over and two-thirds constitute a quorum, and New Jersey, where two-thirds hold over and the provisions of the State which affect the point are similar to those in the Federal Constitution, it seems that a different rule prevails. (See the opinion of Judge Niblack in Robertson *v.* The State *ex rel.* Smith, 109 Ind., 79, 123; State *v.* Rogers, 56 N. J. Law, 480, 529–530.)

[12] Ibid.

termed in Europe, and although since the administration of Tyler, when Clay attempted to change the rules so as to enable a majority to cut off debate,[13] numerous efforts in that direction have been made, all hitherto have failed.[14] The reports of its committees, especially those on the Judiciary and on Privileges and Elections, contain discussions of questions of constitutional, statutory and common law which are excelled only by the opinions of the Supreme Court of the United States. There is on the whole a stability and consistency in its decisions upon disputed questions involving a construction of the Constitution superior to those not only of the House but of the highest courts of almost all the States; while upon the trial of impeachments it has been proved that a controlling part of its members are able to divest themselves of partisanship and act judicially, although the political factions to which they belong have a vital interest in the result.[15]

Although there has been no need of its interposition to protect the small from any encroachment by the larger States, until the Civil War the Senate was more conspicuously the guardian of State rights in general. Their advocates maintained the position that the body was an assembly of ambassadors from sovereign States. During Washington's administration, North Carolina directed her senators to execute a deed ceding land to the United States;[16] Senator Tazewell of Virginia declined Jackson's offer of a place in the cabinet, and said: —

"Having been elected a senator, I would as soon think of taking a place under George IV if I was sent as minister to his court, as I would to take a place in the cabinet."[17]

Insistence has frequently been made upon the right of State legislatures to instruct their senators in Congress.[18] In 1808

[13] Benton, Thirty Years in the Senate, vol. ii, pp. 249–257.

[14] See Furber, Precedents Relating to Privileges of the Senate, pp. 217–230, and the proceedings in the summer of 1894.

[15] *Infra*, § 90.

[16] U. S. St. at L., vol. i, pp. 106–109.

[17] James A. Hamilton, Reminiscences, p. 90.

[18] Boutmy, Études de Droit Constitutionnel, pp. 119, 120. The belief in the right of instruction to a representative by his constituents was very common in the United States during the eighteenth century. Members of Congress under the Confederation

John Quincy Adams resigned after voting for the embargo in opposition to the wishes of his constituents. A senator in 1828, after arguing against the Tariff of Abominations, said, "as the organ of the State of Kentucky he felt himself bound to surrender his individual opinion, and express the opinion of his State." [19] John Tyler, in 1836, before he was President, resigned his place

considered themselves bound by them. The Delaware delegates to the Federal Convention were instructed on one point (Elliot's Debates, 2d ed., vol. v, p. 135). Nearly all the members of the State conventions of ratification were instructed, and the votes of some Virginians in favor of ratification and in violation of their instructions has been the cause of much complaint as a breach of faith. The Lost Principle, by Barbarossa (Scott), pp. 161–163, App. II, pp. 159–164; Libby, Geographical Distribution of Vote on the Federal Constitution, pp. 77, 87, 94. See also Worcester Magazine, vol. ii, p. 117; North American Review, vol. iv, p. 223, by J. G. Palfrey; American Quarterly Review, vol. v, p. 41; So. Lit. Mess., vol. ii, pp. 405, 530, 623, 684; vol. iii, p. 39; Niles' Reg., vol. xxviii, pp. 193, 200, 216; Democratic Review, vol. ix, p. 434. Hamilton in the New York Convention, Elliot's Debates, vol. ii, p. 252. In England the right seems to have been occasionally recognized, although it had long been disused in 1780, when Burke made his famous speech to the electors of Bristol. A paper in Shaftesbury's handwriting contains "Instructions for Members of Parliament summoned for March 21, 1681, and to be held at Oxford." It begins: "Gentlemen — We have chosen you two our knights to represent this county," etc., and proceeds to inform them that they are expected (1) to insist "to the last" upon an Exclusion Bill; (2) to demand an adjustment of the king's prerogative of calling, proroguing and dissolving Parliament with the rights of the people to have annual Parliament, and (3) to restore to the country "that liberty which we and our forefathers have enjoyed until the last forty years, of being free from guards and mercenary soldiers" (Traill's Shaftesbury, p. 173). In Europe the custom was very prevalent. "In the Dutch United Provinces the members of the States-General were mere delegates; and to such a length was the doctrine carried, that when any important question arose which had not been provided for in their instructions, they had to refer back to their constituents, exactly as an ambassador does to the government from which he is accredited" (Mill, Representative Government, ch. xii). The *cahiers* of the members of the French National Assembly are well known (see Résumé général, ou extrait des cahiers, pouvoirs, instructions, etc., remis par les divers Baillages, Sénéchausées et pays d'États du Royaume, à leurs députés à l'Assemblée des États-Généraux. Paris, 1789, vol. ii, p. 29). The Constitution established by the Spanish Cortes of 1812 recognizes the powers of attorney given to deputies by the electoral junta, and the insertion of special instructions in the same (Articles 380–382, Borgeaud, Établissement et Revision des Constitutions II, Livre II, ch. II).

[19] Benton, Thirty Years in The Senate, vol. i, p. 95.

in the Senate because the Virginia legislature had instructed him to vote in favor of the expunging resolution, which he could not conscientiously approve.[20]

These doctrines are now abandoned. The senators consider themselves as members of an ordinary legislative body. They pay no more attention to the instructions of State legislatures than do members of the House; and in fact since their terms are longer they are more inclined to disobey them.[21]

A survey of its position throughout the history of the United States shows that the Senate has maintained, almost without interruption, the respect of the American people, and that it has vindicated the wisdom of its creation;[22] while State senates are usually more despised than State houses of assembly. It has been shorn of but a single power, that to originate general appropriation bills, which the House has, by their continuous rejection when sent there, refused to permit it to exercise successfully, although the Senate has more than once recorded a protest asserting its prerogative;[23] but in practice, through its power of amendment, the loss is rather nominal than real.[24]

[20] Schurz, Clay, vol. ii, p. 199.

[21] The latest illustrations of this are the action of Senator Lamar of Mississippi, in 1882, when he refused to vote for free silver though so requested by his State legislature, and notwithstanding secured a reelection; and the recent action of Senator Stewart of Nevada, who, although elected as a Republican, announced that he had joined the Populist party without resigning his seat. The Kentucky house of representatives in 1894, passed a resolution instructing their senators to vote against the nomination of Wheeler H. Peckham for a place in the Supreme Court of the United States (Park City Times, Bowling Green, Ky., Feb. 1, 1894).

[22] Mr. Bryce says: "So far as a stranger can judge, there is certainly less respect for the Senate collectively, and for most of the senators individually now than there was eighteen years ago," in 1870. (American Commonwealth, Part I, ch. xii, note. See also The Senate in the Light of History, The Forum, November, 1893.) The writer is unable to observe that the Senate has fallen in public respect as much as the House and the State legislatures since that time; and he attributes the decadence of all to the fact that of late years the country has been so fortunate as to have few political questions of sufficient gravity to withdraw the ablest minds from business enterprises and legal controversies.

[23] Furber, Precedents of Privileges in the Senate, pp. 282–310. See The Conduct of Business in Congress, by Senator George F. Hoar, North American Review, vol. cxxviii, pp. 113, 115–119; *infra*.

[24] Senator Hoar believes that through the House rule which, upon the report of a conference between

Secure in the confidence that the people who entrusted them with power will not mistrust their use of it, senators have been unmoved by the threats of the House to withhold the supplies, before which other second chambers have always quailed; and have only in a single instance yielded their judgment to such intimidation.[25] They have had more than one conflict with the executive concerning the prerogatives that they claimed, of which the first was at the opening of Washington's administration,[26] and but one, President Jackson, has finally triumphed.[27] Their encroachments upon the power of appointment to office have subjected them to more criticism than any of their other actions;[28] but they have been in the main successful; and though they have thus undoubtedly excluded a few who would have done good public service, and in minor cases have often compelled the appoint-

the two bodies, allows to its consideration immediate precedence of all other business, and no debate, the Senate has actually more influence upon appropriations than the House which originates them (ibid., pp. 118, 119).

[25] When they permitted the passage of the act of June 18, 1878 (20 St. at L., p. 145), in relation to the use of the army as a *posse comitatus*. See Cox, Three Decades of Federal Legislation, p. 630; *infra*, Ch. XVI, and *supra*, § 45.

[26] *Supra*, note 8. President Grant paid more deference to this custom than perhaps any other executive. For a recent history of his sacrifice of a cabinet officer, in order to obtain votes in support of the treaty for the annexation of San Domingo, see How Judge Hoar ceased to be Attorney-General, by Jacob D. Cox. Atlantic Monthly for August, 1895, vol. lxxvi, p. 162. In 1893 Senator Hoar said: "When I came into public life in 1869, the Senate claimed almost entire control of the executive function of appointment to office. Every senator, with hardly an exception, seemed to fancy that the national officers in his State were to be a band of political henchmen devoted to his personal fortunes. What was called 'the courtesy of the Senate' was depended upon to enable a senator to dictate to the Executive all appointments and removals in his territory. That doctrine has disappeared as completely as the locusts that infested Egypt in the time of the Pharaohs" (Cong. Record, 53d Congress, vol. xxv, p. 137, April 8, 1893). This was before the late conflict between the Senate and President Cleveland.

[27] In the expunging resolution which is discussed, *infra*, under the head of the Journal.

[28] "The executive department has been crippled; and the influence and power of Congress, and especially of the Senate, have become far greater than they should be under the system of proportion and balance embodied in the Constitution. Despite Jackson's victory there is, to-day, far more danger of undue encroachments on the part of the Senate than on that of the President" (Henry Cabot Lodge, Life of Webster, p. 230).

ment of unworthy candidates, in some notable instances they have saved the country from disgrace.

The action of the Senate upon treaties has usually been conservative, has at times protected the interests of the United States, and has never caused serious mischief. In its legislative action it has fulfilled the hopes of its creators. There has been occasional impatience at its deliberations over measures of reform demanded by a large majority of the people, but upon the whole there has been a feeling that little harm has been done by the delay, while many noxious measures that have passed the House have been thus defeated, and upon reflection no attempts have been made at their resurrection.[29]

In one respect alone is there any sign of a popular demand for a change in either the functions or the construction of the Senate. A movement is now on foot to secure a constitutional amendment transferring the election of senators from the State legislatures to the people; and on account of the facilities for intrigue and bribery which are afforded by the present method it is not unlikely that such a change would be beneficial.[30] But the Senate of the United States will probably endure as long as any second legislative chamber upon the earth.[31]

[29] As early as 1793 a non-importation bill passed the House and was defeated by the Senate (Morse, Jefferson, p. 167). The defeat of the Force Bill is a recent instance.

[30] An amendment to the Nebraska constitution, adopted in 1875, ordains: "The Legislature may provide that at the general election immediately preceding the expiration of a term of a United States Senator from this State, the electors may by ballot express their preference for some person for the office of United States Senator. The votes cast for such candidates shall be canvassed and returned in the same manner as for State officers." For arguments in favor of such an amendment see the speeches of Senators Turpie, Palmer and Mitchell (Cong. Record, 1st Session, 52d Congress, pp. 76, 1267, 1270, 3192–3198, 3202, 3204, 7032). On the other side is the speech of Senator Hoar (53d Congress, ibid., vol. xxv, p. 137).

[31] England's last prime minister, Rosebery, himself a member of the House of Lords, has said that the Senate is "the most powerful and efficient Second Chamber that exists" (Wilson, Congressional Government, p. 228). For discussions of the Senate, see The Federalist, Numbers lxii-lxvii; Story on the Constitution, Book II, ch. x; Wilson, Congressional Government, ch. iv; Bryce, American Commonwealth, Part I, ch. x-xii; Maine, Popular Government, Essay IV.

CHAPTER XII.

THE PRESIDENCY AND OTHER OFFICERS OF THE SENATE.

§ 81. Constitutional Provisions concerning the Presidency and Officers of the Senate.

THE Constitution ordains: —

"The Vice President of the United States shall be President of the Senate, but shall have no Vote unless they be equally divided. The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States." [1]

§ 82. History of the Provisions as to the Presidency and Officers of the Senate.

The presiding officer of the House of Lords is the Lord Chancellor, who may or may not be a peer, who has no vote unless he has a seat there, and cannot enforce order, that power being vested in the house at large.[1] In the New York Constitution of 1777, the president of the State senate was the lieutenant-governor, who was elected by the people in the same manner as the governor, whom he succeeded in case of a vacancy.[2]

In the Federal Convention the Committee of Detail inserted in their report, without previous instructions, the section: —

"The Senate shall choose its own President and other officers;" [3]

and another by which the president of the Senate was to fill a vacancy in the chief executive office until a new election, or, in the case of a disability, until its removal.[4] These provisions were

§ 81. [1] Constitution, Article I, Section 3.

§ 82. [1] Poore's Charters and Constitutions, vol. ii, p. 1336.

[2] Madison Papers, Elliot's Debates, 2d ed., vol. v, p. 377.

[3] Ibid., p. 380.

[4] Ibid., p. 401.

at first adopted without dissent. The election of the President by the legislature was then contemplated. The office of Vice-President was invented afterwards as a device which it was believed would secure a better choice in the election of a President. The reasons for making him also president of the Senate were thus stated by Roger Sherman: —

"If the Vice President were not to be president of the Senate, he would be without employment; and some other member, by being made president, must be deprived of his vote, unless when an equal division of votes might happen in the Senate, which would be but seldom."[5]

§ 83. Powers of the Vice-President over the Senate.

The Senate has shown great jealousy of the Vice-President, and has limited his powers so far as was permitted by the Constitution. The powers to supervise the journal[1] and to appoint committees with which he was once invested have been taken from him.[2] Calhoun, when Vice-President in 1826, at the time when John Randolph of Roanoke was abusing the license of debate by gross personal abuse, declared that in his opinion he had no power to call a senator to order for words spoken in debate.[3] New rules were afterwards adopted, the construction of which was doubtful as to this point, although in 1850, when the compromise of that year was under discussion and personal controversies not infre-

[5] Madison Papers, Elliot's Debates, 5d ed., vol. v, p. 522.

§ 83. [1] January 22, 1824, the Senate adopted the rule that "The presiding officer of the Senate shall examine and correct the journals before they are read." This rule was rescinded April 14, 1826 (Furber, Precedents Relating to Privileges of the Senate, p. 103).

[2] The committees were originally elected by the Senate. December 9, 1823, it was resolved that "all committees shall be appointed by the presiding officer of this House, unless ordered otherwise by the Senate." April 15, 1826, this rule was rescinded. December 4, 1828, a rule was adopted by which committees were appointed by the president *pro tempore*, or when that office was vacant, by ballot. Different rules were adopted from time to time, by some of which the Vice-President was authorized to make the appointments. The present rule was finally adopted, which provides that unless otherwise ordered, the standing committees shall be appointed by ballot in the manner therein directed (Rule XXIV). It is customary, however, to suspend the rule and appoint them by resolution (Furber, Precedents Relating to Privileges of the Senate, pp. 317, 335–341).

[3] Ibid., pp. 118, 119, 121.

quent, Fillmore expressed the opinion that they granted this power to him.[4] The present rules provide: —

"If any Senator, in speaking or otherwise, transgress the rules of the Senate, the Presiding Officer shall, or any Senator may, call him to order; and when any Senator shall be called to order he shall sit down and not proceed without leave of the Senate, which, if granted, shall be upon motion that he be allowed to proceed in order; which motion shall be determined without debate."[5]

The Senate has always refused to permit the Vice-President to designate a senator to take his place during a temporary absence; but has usually elected by unanimous consent the man whom he selected.[6]

Otherwise the Vice-President or the President *pro tempore* of the Senate has all the powers usually exercised by presiding officers at the time of the adoption of the Constitution; including the right to recognize a senator who wishes to speak, and thus to give him the floor, and the right to put the question, so far as they are not limited by rules of the Senate which are in conformity with the Constitution. In 1894, when Lieutenant-Governor Sheehan had refused to put the question as ordered by a majority of the New York senate, that body held that he had thereby abdicated his position for the time, and the question was put by the leader of the majority. The New York Constitution of 1894, on account of these proceedings, ordains that the temporary president of the senate shall preside "in case of the absence or impeachment of the Lieutenant-Governor, or when he shall refuse to act as President or shall act as Governor."[7]

The senator who thus put the question was chosen by the people to the position of Lieutenant-Governor that same year.

The Vice-President may give the casting vote upon the decision of a contested election to the Senate.[8]

The office of Vice-President, with the mode of his election and the proceedings upon his succession to the presidency, will be discussed later.

[4] Ibid., pp. 120-122.

[5] Rule XIX.

[6] Furber, Precedents Relating to Privileges of the Senate, p. 167.

[7] Art. III, Sec. 10. May, Law of Parliament, 10th ed., p. 186.

[8] Louisiana Cases, Spofford *v.* Kellogg, Taft's Senate Election Cases,

§ 84. The President pro tempore of the Senate.

At the first session of the Senate, they proceeded by ballot to the choice of a president, for the sole purpose of opening and counting the votes for President of the United States. After the withdrawal of the House, they then proceeded to the choice of a president of their body pro tempore.[1] The length of the term of the president pro tempore was at first unsettled; and the custom arose after the passage of the act, since repealed, which placed the president pro tempore in the line of succession to the presidency of the United States, for the Vice-President to vacate the chair immediately before the close of each session, in order to enable the Senate to choose a president pro tempore.[2] By the uniform practice of the Senate until 1890, the term of the president pro tempore was treated as terminated upon the resumption of the chair by the Vice-President; and it was understood that it was also determined at the meeting of the Senate after the first recess.[3] The Senate has, however, come to the following decision upon the subject: —

"That the tenure of the President pro tempore does not expire at the meeting of Congress after the first recess, the Vice-President not having appeared to take the chair." "That the death of the Vice-President does not have the effect to vacate the office of President pro tempore of the Senate." "That the office of President pro tempore of the Senate is held at the pleasure of the Senate."[4] "That it is com-

continued by Furber, pp. 471, 490; Corbin *v.* Butler, ibid., 541, 543.

§ 84. [1] Journal of Senate, vol. 1, p. 7; Furber's Precedents Relating to the Privileges of the Senate, 167.

[2] First Session 43d Congress; Senate Miscellaneous Documents, No. 101; Furber, Precedents Relating to the Privileges of the Senate, 172.

[3] Jefferson's Manual, § 9; 1st Session, 44th Congress, Senate Report, 3; Furber, Precedents Relating to Privileges of the Senate, p. 176.

[4] The first two of these resolutions were adopted unanimously; the last by a vote of 34 to 15; after the rejection of a proposition to amend the same by adding the clause: "Until the happening of the contingency provided for in the 9th Section of the act of Congress, approved March 1, 1792, when he is authorized to act as President of the United States. (January 10th and 12th, 1876, 1st Session, 44th Congress, Journal of Senate, pp. 90, 99; Cong. Record, 311–316, 360–373, Senate Report, 3; Furber's Precedents Relating to Privileges of the Senate, pp. 173–182, where all the previous precedents upon the subject are collected.) A State case of doubtful authority holds that a court may, in an information on the nature of a quo warranto, determine the title to the

petent for the Senate to elect a President pro tempore, who shall hold office during the pleasure of the Senate and until another is elected, and shall execute the duties thereof during all future absences of the Vice-President until the Senate otherwise order."[6]

It has been further held by the Senate that in the absence of express authority conferred by rule, neither the Vice-President nor the president pro tempore has the right to designate a senator to take the chair during his temporary absence.[6] The rules now provide that: —

"The President pro tempore shall have the right to name in open senate, or if absent, in writing, a senator to perform the duties of the chair; but such substitution shall not extend beyond an adjournment, except by unanimous consent."[7] "In the absence of the Vice-President, and pending the election of a President pro tempore, the Secretary of the Senate, or in his absence the Chief Clerk, shall perform the duties of the chair."[8]

The president pro tempore may resign that office while retaining his office as senator. His resignation should be addressed to the Senate.[9] The president pro tempore of the Senate retains his right to vote upon all questions before the Senate.[10] In this, he differs from the Vice-President, who can only vote in case of a tie.[11] The presiding officer of the House of Lords can never vote unless he is a peer.[12]

office of president of the State senate when there are two claimants elected by different bodies, each of which claims to be the true senate. State *v.* Rogers, 56 N. J. Law, 480; *infra*, Ch. XVI.

[6] This resolution was drawn by Senator Evarts and reported by him from the Committee on Privileges and Elections; and was adopted by the Senate without a call of the yeas and nays, March 12th, 1890 (Congressional Report, 1st Session, 51st Congress, 2144–2150; Furber, Precedents Relating to Privileges of the Senate, pp. 183, 184).

[6] See Furber, Precedents Relating to Privileges of the Senate, pp. 186–189.

[7] Senate Rule I.

[8] Ibid.

[9] Furber's Precedents Relating to Privileges of the Senate, 184–186.

[10] Resolution of March 19, 1792; Journal of Senate, vol. i, p. 429.

[11] Constitution, Article I, Section 3.

[12] May's Law of Parliament, 2d ed., p. 195.

§ 85. Other Officers of the Senate.

The other officers of the Senate are in general the same as the officers of the House of Representatives, perform similar duties, and are subject to the same liabilities.[1] They may be removed at the pleasure of the Senate at any time.[2] The officer who performs the duties of clerk is termed the Secretary of the Senate.

§ 85. [1] *Supra*, § 73. [2] Cliff *v.* Parsons (Iowa), 57, N. W. Rep., 599.

CHAPTER XIII.

IMPEACHMENT.

§ 86. Provisions of the Constitution Concerning Impeachment.

THE remainder of Section 3, of Article I, provides for the trial of impeachments. For convenience all the parts of the Constitution which relate to impeachments will be here grouped and discussed together. They are as follow: —

"The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment."[1] "The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside; and no Person shall be convicted without the Concurrence of two-thirds of the Members present. Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of Honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."[2] "In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice-President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice-President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected."[3] "The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officers of the Executive

§ 86. [1] Article I, Section 2.
[2] Article I, Section 3.
[3] Article II, Section 1.

Departments upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."[4] "The President, Vice-President, and all civil officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[5] "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury."[6]

Similar provisions are found in most of the State constitutions, although some provide for the impeachment of former officers who are out of office;[7] others, that the effect of an impeachment shall be to suspend from office the person affected;[8] others prescribe the practice with more or less detail, and in New York there is a special Court for the Trial of Impeachments, which consists of the senate with its president and the judges of the Court of Appeals.[9]

§ 87. Origin of Impeachments.

Impeachment trials are a survival from the earliest times of jurisprudence when all cases were tried before an assembly of the citizens of the tribe or State. Later, ordinary cases, both civil and criminal, were assigned to courts created for that purpose, but matters of great public importance were still reserved for the decision of the whole body of citizens, or subsequently of the council of elders, heads of families, or holders of fiefs. This was due partly because in cases of this character there was danger of undue influence in the decisions by the ordinary courts and of resistance to the execution of their decrees, and partly because they affected public as well as private interests. In Athens, all citizens voted on the ostracism of a man, which was his exile. In Rome and in most other ancient cities, those charged with capital

[4] Article II, Section 2.

[5] Article II, Section 4.

[6] Article III, Section 2.

[7] New Jersey Constitution of 1844, Art. V, Sec. 11. See Vermont Constitution of 1786, Art. XXI; and *infra*.

[8] North Dakota, Art. XIV, Sec. 190; South Dakota, Art. XVI, Sec. 5; Rhode Island, Art. XI, Sec. 1; South Carolina, Art. VII, Sec. 1; Texas, Art. XV, Sec. 5. So formerly in Arkansas and Florida. See *infra*, § 88, note 17, and Appendix.

[9] Art. VI, Sec. 1. For provisions concerning impeachments in the constitutions of other countries, see *supra*, § 77, note.

offenses had the right to a trial by the people.[1] The great councils of the Germans, in the time of Tacitus, tried capital cases by a proceeding analogous to an appeal before the English House of Lords.[2] Such appeals by individuals seem to have been common under the first Norman kings. In the reign of Richard II, the Lord Chancellor was thus tried on the accusation of a fishmonger for taking bribes in the form of money, cloth and fish.[3] These were abolished by the act of 1 Henry IV, c. 14.[4] Meanwhile, impeachments instituted by the Commons and tried before the Lords had gradually come into use. The first instances occurred between the beginning of the reign of Edward I, and the fiftieth year of the reign of Edward III; but the practice was then irregular and is obscure.[5] They seem more like bills of attainder than trials of impeachments. The first known case of a trial by the Lords upon a definite accusation by the Commons was in the Good Parliament, under Edward III, in 1356. Lords Latimer and Neville with several of their accomplices were then impeached and tried for frauds upon the revenue.[6] Under Richard II there were a number of impeachments, of which the most important was that of Michael de la Pole, the Chancellor.[7] Under Henry VI, we find two impeachments, that of the Duke of Suffolk for treason in 1451;[8] and that of Lord Stanley for a similar offense in 1459.[9] The next was that of Sir Giles Mompesson in 1621.[10] Since then there have been fifty-four impeachments in England, which ended with the acquittal of Lord

§ 87. [1] Montesquieu, Livre XI, ch. vi; 4 Blackstone's Commentaries, 261.

[2] Tacitus de Moribus Germanis, 12: "Licet apud consilium accusare, quoque et discrimen capitis intendere."

[3] Rot. Parl., III, p. 168.

[4] Clarendon's Case, 6 Howell's State Trials, 291, 311, 318; Hale's Pleas of the Crown, vol. ii, ch. xx, p. 150.

[5] Stephens, History of the Criminal Law, vol. i, pp. 145–155; Taylor's Origin and Growth of the English Constitution, pp. 441, 442.

[6] Rot. Parl., II, pp. 323–326, 328, 329; Rymer, p. 322; Hallam's Middle Ages, vol. iii, p. 56; Stubbs' Constitutional History, vol. ii, ch. xvi; Taylor's Origin and Growth of the English Constitution, p. 441.

[7] 1 State Trials, 89; Rot. Parl., III, pp. 216–219. For other Impeachments in that reign, see Rot. Parl., III, pp. 10–12, 153, 156; Stephens, History of the Criminal Law, vol. i, pp. 145–155; Taylor's Origin and Growth of the English Constitution, p. 442.

[8] 1 State Trials, 271.

[9] Rot. Parl., V, p. 369; Taylor's Origin and Growth of the English Constitution, p. 442.

[10] 2 State Trials, 1119.

Melville in 1805.[11] The reports of the trials upon them abound with matter of interest to the lovers of literature as well as students of jurisprudence and history. They describe the degradation of Bacon. They contain the pathos of Strafford, and the splendid imagery of Burke and Sheridan which adorned the trial of Warren Hastings.

§ 88. Proceedings in the Convention as to Impeachment.

In the first drafts of the Federal Constitution which were submitted to the Convention, impeachments were to be made by the lower house of Congress and tried by the "national judiciary," or "Federal judiciary."[1] Alexander Hamilton proposed "all impeachments to be tried by a court to consist of the chief-justice, or judge of the supreme court of law of each State, provided such judge shall hold his place during good behavior, and have a permanent salary."[2] Like the rest of his scheme this received little favor. And in the report of the Committee on Detail the Supreme Court was given jurisdiction over "the trial of impeachments of officers of the United States."[3] Gerry then moved that that committee be instructed to report "a mode of trying the supreme judges in cases of impeachment."[4] Such a report was made, recommending that they be tried by the Senate.[5] Gouverneur Morris was the first to point out the danger of the trial of the President by the Supreme Court.[6] The subject was again referred, with others which had not been finally determined, to a committee of one member from each State,[7] which reported this part of the Constitution in substantially the form that it retained.[8]

[11] Stephens, History of the Criminal Law, vol. i, pp. 157–159.

§ 88. [1] Elliot's Debates, 2d ed., vol. v, pp. 128–131, 188, 190, 192.

[2] Ibid., p. 205.

[3] Ibid., p. 380.

[4] Ibid., p. 447.

[5] Ibid., p. 462.

[6] Ibid., pp. 329, 480, 528.

[7] Ibid., p. 503.

[8] "The clause referring to the Senate the trial of impeachments against the President, for treason and bribery was taken up.

Col. Mason. Why is the provision restrained to treason and bribery only? Treason, as defined in the Constitution, will not reach many great and dangerous offences. Hastings is not guilty of treason. Attempts to subvert the Constitution may not be treason, as above defined. As bills of attainder, which have saved the British Constitution, are forbid-

There were at first some objections to any provision for the removal of the President by impeachment on the ground that this

den, it is the more necessary to extend the power of impeachments. He moved to add, after 'bribery,' 'or maladministration.' Mr. Gerry seconded him.

Mr. Madison. So vague a term will be equivalent to a tenure during pleasure of the Senate.

Mr. Gouverneur Morris. It will not be put in force, and can do no harm. An election of every four years will prevent maladministration.

Col. Mason, withdrew 'maladministration,' and substituted 'other high crimes and misdemeanors against the State.'

On the question, thus altered, —

New Hampshire, Massachusetts, Connecticut, Maryland, Virginia, North Carolina, South Carolina (in the printed Journal, South Carolina, no), Georgia, ay, 8; New Jersey, Pennsylvania, Delaware, no, 3.

Mr. Madison objected to a trial of the President by the Senate, especially as he was to be impeached by the other branch of the legislature; and for any act which might be called a misdemeanor. The President, under these circumstances, was made improperly dependent. He would prefer the Supreme Court for the trial of impeachments; or, rather, a tribunal of which that should form a part.

Mr. Gouverneur Morris thought no other tribunal than the Senate could be trusted. The Supreme Court were too few in number, and might be warped or corrupted. He was against a dependence of the executive on the legislature, considering the legislative tyranny the great danger to be apprehended; but there could be no danger that the Senate would say untruly, on their oaths, that the President was guilty of crimes or facts, especially as in four years he can be turned out.

Mr. Pinckney disapproved of making the Senate the court of impeachments, as rendering the President too dependent on the legislature. If he opposes a favorite law, the two Houses will combine against him, and under the influence of heat and faction, throw him out of office.

Mr. Williamson thought there was more danger of too much lenity, than of too much rigor, towards the President, considering the number of cases in which the Senate was associated with the President.

Mr. Sherman regarded the Supreme Court as improper to try the President, because the judges would be appointed by him.

On motion by Mr. Madison, to strike out the words, 'by the Senate,' after the word 'conviction,' —

Pennsylvania, Virginia, ay, 2; New Hampshire, Massachusetts, Connecticut, New Jersey, Delaware, Maryland, North Carolina, South Carolina, Georgia, no, 9.

In the amendment of Col. Mason, just agreed to, the word 'state,' after the words 'misdemeanors' against, was struck out; and the words 'United States' unanimously inserted, in order to remove ambiguity.

On the question to agree to the clause, as amended —

New Hampshire, Massachusetts, Connecticut, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, ay, 10; Pennsylvania, no, 1.

On motion, the following: —

'The Vice President, and other civil officers of the United States, shall be removed from office on im-

would render the executive too weak and destroy his independence of the other departments of the government.[9] These objectors were, however, easily convinced of their error, and of the danger of leaving the power of the President uncontrolled, and his conduct free from punishment until the termination of his office.[10] Indeed, strong objections were urged against the adoption of the Constitution because there were such difficulties in the way of his conviction on an impeachment.[11]

A short discussion took place as to what should constitute an impeachable offense. The first definition was "mal-practice or neglect of duty."[12] The report of the Committee on Detail said that the President might be removed on impeachment, and conviction "of treason, bribery, or corruption."[13] When the report was discussed Colonel Mason first moved to insert after "bribery," "or maladministration," then substituted "other high crimes and misdemeanors against the State;" and finally "United States" for "State," in which form his amendment was adopted.[14] A similar provision as to the impeachment of other officers was added.[15] The Committee on Style dropped the words "against the United States." Their report in this respect passed without criticism.

peachment and conviction, as aforesaid,' —
was added to the clause on the subject of impeachments." (Elliot's Debates, vol. v, pp. 528, 529.)

[9] Gouverneur Morris: "The executive is also to be impeachable. This is a dangerous part of the plan. It will hold him in such dependence, that he will be no check upon the legislature, will not be a firm guardian of the people and of the public interest. He will be the tool of a faction, of some leading demagogue in the legislature. These, then, are the faults of the executive establishment as now proposed. Can no better establishment be devised? If he is to be the guardian of the people, let him be appointed by the people. If he is to be a check on the legislature, let him not be impeachable." (Elliot's Debates, 2d ed., vol. v, p. 335.) "Mr. Pinckney did not see the necessity of impeachments. He was sure they ought not to issue from the legislature, who would in that case hold them as a rod over the executive, and by that means effectually destroy his independence. His revisionary power, in particular, would be rendered altogether insignificant." (Elliot's Debates, 2d ed., vol. v, p. 341.) Rufus King spoke to the same effect (ibid., pp. 341–342).

[10] Ibid., 340–343, 361, 362, 366.

[11] See Luther Martin's Letter (ibid., vol. i, pp. 379, 380).

[12] Elliot's Debates, 2d ed., vol. v, p. 149.

[13] Ibid., p. 380.

[14] Ibid., p. 528, quoted *supra*, note 8.

[15] Ibid., p. 529.

A motion was made to amend it by adding, "that persons impeached be suspended from their offices until they be tried and acquitted." This was wisely voted down.[16] The disorderly proceedings under similar constitutional provisions in the Southern States, in one of which the assembly began by imprisoning the governor in his office, have proved their mischievous character.[17]

The rest of this part of the Constitution was adopted with little or no discussion,[18] and seems to have been copied from the New York Constitution of 1777.[19]

Penn's Frame of Government of Pennsylvania in 1683 provided for impeachments by the assembly triable before the council.[20] The charters of the other colonies seem to have been silent upon the subject; but the colonial assemblies, in imitation of the English practice, claimed, and in Massachusetts, North and South Carolina exercised, the power to impeach their judges and other officers for trial before their respective councils.[21] Chief Justice Trot, in 1717, was found guilty by the Council of South Carolina on an impeachment by the House of Delegates for "having engrossed the judicial power, by acting as judge of the King's bench, the common pleas, and the admiralty."[22]

Most of the State constitutions adopted before the Federal Convention contained provisions for impeachment.[23] The Articles of Confederation were silent on the subject. In Pennsylvania,

[16] Ibid., pp. 541, 542. "Mr. Madison. The President is made too dependent already on the legislature by the power of one branch to try him in consequence of an impeachment by the other. This immediate suspension will put him in the power of one branch only. They can at any moment, in order to make way for the functions of another who will be more favorable to their views, vote a temporary removal of the existing magistrate."

[17] See the History of Impeachments in Arkansas and Florida in the Appendix.

[18] Elliot's Debates, 2d ed., vol. v, pp. 131, 381, 480, 507, 528, 529, 559, 562.

[19] N. Y. Constitution of 1777, Art. XXXIII; Professor Theodore W. Dwight in 6 American Law Register, N. S., 277.

[20] Poore's Charters and Constitutions, pp. 1521, 1523, 1528, 1529.

[21] John Adams' Works, vol. v, p. 236; Chalmers, Introduction to the History of the Revolt of the Colonies, Book VII, ch. xi; Book VIII, ch. xi. See the Appendix to this volume for an account of these proceedings.

[22] Ibid., Book VIII, ch. xi. See the Appendix to this volume.

[23] See the Massachusetts Constitution of 1780, Part II, Ch. I, Sect. 2, Art. VIII; New York Constitution of 1777, Art. XXXIII; South Carolina Constitution of 1778, Art. XXIII.

under the Confederation in 1780, Judge Hopkinson of the State Court of Admiralty was impeached by the assembly, tried and acquitted by the council. James Wilson, a prominent member of the Federal Convention, was one of his attorneys.[24]

Montesquieu, whose opinions had great weight with the framers of the Constitution, praised highly the English system of impeachment.[25] Machiavelli ascribed the fall of the republic of Florence to the lack of a law for the impeachment of citizens who plotted against it.[26] Tucker said: —

"If the want of a proper tribunal for the trial of impeachments can endanger the liberties of the United States, some future Machiavelli may perhaps trace their destruction to the same source."[27]

The members of the Federal Convention were familiar with the practice in England and the colonies as well as with the opinion of Machiavelli, and they followed the practice of their ancestors when they inserted these provisions in the Constitution.

§ 89. Reasons for the Trial of Impeachments by the Senate.

The selection of the Senate as the tribunal for the trial of impeachments has been the target of severe criticism both before[1] and since the adoption of the Constitution.[2] The defense of the method adopted may be best stated in the language of Hamilton, Story and Rawle.

"A well-constituted court for the trial of impeachments is an object not more to be desired than difficult to be obtained in a government wholly elective. The subjects of its jurisdiction are those offences which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself. The prosecution of them, for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties more

[24] See Appendix.

[25] Montesquieu, De l'Esprit des Lois, livre xi, ch. vi.

[26] History of Florence.

[27] Tucker's Blackstone, vol. i, Appendix, 348.

§ 89. [1] See Luther Martin's letter, Elliot's Debates, 2d ed., vol. i, pp. 379–380.

[2] See Tucker, Blackstone, vol. i, Appendix.

or less friendly or inimical to the accused. In many cases it will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other; and in such cases there will always be the greatest danger that the decision will be regulated more by the comparative strength of parties, than by the real demonstrations of innocence or guilt.

"The delicacy and magnitude of a trust which so deeply concerns the political reputation and existence of every man engaged in the administration of public affairs, speak for themselves. The difficulty of placing it rightly, in a government resting entirely on the basis of periodical elections, will as readily be perceived, when it is considered that the most conspicuous characters in it will, from that circumstance, be too often the leaders or the tools of the most cunning or the most numerous faction, and on this account, can hardly be expected to possess the requisite neutrality towards those whose conduct may be the subject of scrutiny.

"The convention, it appears, thought the Senate the most fit depository of this important trust. Those who can best discern the intrinsic difficulty of the thing, will be least hasty in condemning that opinion, and will be the most inclined to allow due weight to the arguments which may be supposed to have produced it.

"What, it may be asked, is the true spirit of the institution itself? Is it not designed as a method of NATIONAL INQUEST into the conduct of public men? If this be the design of it, who can so properly be the inquisitors for the nation as the representatives of the nation themselves? It is not disputed that the power of originating the inquiry, or, in other words, of preferring the impeachment, ought to be lodged in the hands of one branch of the legislative body. Will not the reasons which indicate the propriety of this arrangement strongly plead for an admission of the other branch of that body to a share of the inquiry? The model from which the idea of this institution has been borrowed, pointed out that course to the convention. In Great Britain it is the province of the House of Commons to prefer the impeachment, and the House of Lords to decide upon it. Several of the State constitutions have followed the example. As well the latter, as the former, seem to have regarded the practice of impeachments as a bridle in the hands of the legislative body upon the executive servants of the government. Is not this the true light in which it ought to be regarded?

"Where else than in the Senate could have been founded a tribunal sufficiently dignified, or sufficiently independent? What other body

would be likely to feel *confidence enough in its own situation*, to preserve, unawed and uninfluenced, the necessary impartiality between an *individual* accused, and the *representatives of the people, his accusers?*

"Could the Supreme Court have been relied upon 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 by their immediate representatives. A deficiency in the first, would be fatal to the accused; in the last, dangerous to the public tranquillity. The hazard, in both these respects, could only be avoided, if at all, by rendering that tribunal more numerous than would consist with a reasonable intention to economy. The necessity of a numerous court for the trial of impeachments, is equally dictated by the nature of the proceeding. This can never be tied down by such strict rules, either in the delineation of the offence by the prosecutors, or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favor of personal security. There will be no jury to stand between the judges who are to pronounce the sentence of the law, and the party who is to receive or suffer it. The awful discretion which a court of impeachments must necessarily have, to doom to honor or to infamy the most confidential and the most distinguished characters of the community, forbids the commitment of the trust to a small number of persons.

"These considerations seem alone sufficient to authorize a conclusion, that the Supreme Court would have been an improper substitute for the Senate, as a court of impeachments. There remains a further consideration, which will not a little strengthen this conclusion. It is this: The punishment which may be the consequence of conviction upon impeachment, is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence, and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law. Would it be proper that the persons who had disposed of his fame, and his most valuable rights as a citizen, in one trial, should, in another trial, for the same offence, be also the disposers of his life and his fortune? Would there not be the greatest reason to apprehend, that error, in the first sentence, would be the parent of error in the second sentence? That the strong bias of one decision would be apt to over-

rule the influence of any new lights which might be brought to vary the complexion of another decision? Those who know anything of human nature, will not hesitate to answer these questions in the affirmative; and will be at no loss to perceive, that by making the same persons judges in both cases, those who might happen to be the objects of prosecution would, in a great measure, be deprived of the double security intended them by a double trial. The loss of life and estate would often be virtually included in a sentence which, in its terms, imported nothing more than dismission from a present, and disqualification for a future, office. It may be said, that the intervention of a jury, in the second instance, would obviate the danger. But juries are frequently influenced by the opinions of judges. They are sometimes induced to find special verdicts, which refer the main question to the decision of the court. Who would be willing to stake his life and his estate upon the verdict of a jury acting under the auspices of judges who had predetermined his guilt?

"Would it have been an improvement of the plan, to have united the Supreme Court with the Senate, in the formation of the court of impeachments? This union would certainly have been attended with several advantages; but would they not have been overbalanced by the signal disadvantage, already stated, arising from the agency of the same judges in the double prosecution to which the offender would be liable? To a certain extent, the benefits of that union will be obtained from making the chief justice of the Supreme Court the president of the court of impeachments, as is proposed to be done in the plan of the convention; while the inconveniences of an entire incorporation of the former into the latter will be substantially avoided. This was perhaps the prudent mean. I forbear to remark upon the additional pretext for clamor against the judiciary, which so considerable an augmentation of its authority would have afforded.

"Would it have been desirable to have composed the court for the trial of impeachments, of persons wholly distinct from the other departments of the government? There are weighty arguments, as well against, as in favor of, such a plan. To some minds it will not appear a trivial objection, that it could tend to increase the complexity of the political machine, and to add a new spring to the government, the utility of which would at best be questionable. But an objection which will not be thought by any unworthy of attention is this: a court formed upon such a plan, would either be attended with a heavy expense, or might in practice be subject to a variety of casualties and inconveniences. It must either consist of permanent officers, stationary at the seat of

government, and of course entitled to fixed and regular stipends, or of certain officers of the State governments to be called upon whenever an impeachment was actually depending. It will not be easy to imagine any third mode materially different, which could rationally be proposed. As the court, for reasons already given, ought to be numerous, the first scheme will be reprobated by every man who can compare the extent of the public wants with the means of supplying them. The second will be espoused with caution by those who will seriously consider the difficulty of collecting men dispersed over the whole Union; the injury to the innocent, from the procrastinated determination of the charges which might be brought against them; the advantage to the guilty, from the opportunities which delay would afford to intrigue and corruption; and in some cases the detriment to the State, from the prolonged inaction of men whose firm and faithful execution of their duty might have exposed them to the persecution of an intemperate or designing majority in the House of Representatives. Though this latter supposition may seem harsh, and might not be likely often to be verified, yet it ought not to be forgotten that the demon of faction will, at certain seasons, extend his sceptre over all numerous bodies of men."[3]

"A review of the principal objections that have appeared against the proposed court for the trial of impeachments, will not improbably eradicate the remains of any unfavorable impressions which may still exist in regard to this matter.

"The *first* of these objections is, that the provision in the question confounds legislative and judiciary authorities in the same body, in violation of that important and well-established maxim which requires a separation between the different departments of power. The true meaning of this maxim has been discussed and ascertained in another place, and has been shown to be entirely compatible with a partial intermixture of those departments for special purposes, preserving them, in the main, distinct and unconnected. This partial intermixture is even, in some cases, not only proper but necessary to the mutual defence of the several members of the government against each other. An absolute or qualified negative in the executive upon the acts of the legislative body, is admitted, by the ablest adepts in political science, to be an indispensable barrier against the encroachments of the latter upon the former. And it may, perhaps, with no less reason be contended, that the powers relating to impeachments are, as before intimated, an essential check in the hands of that body upon the en-

[3] The Federalist, No. lxv.

croachments of the executive. The division of them between the two branches of the legislature, assigning to one the right of accusing, to the other, the right of judging, avoids the inconvenience of making the same persons both accusers and judges; and guards against the danger of persecution, from the prevalency of a factious spirit in either of those branches. As the concurrence of two-thirds of the Senate will be requisite to a condemnation, the security to innocence, from this additional circumstance, will be as complete as itself can desire.

"It is curious to observe, with what vehemence this part of the plan is assailed, on the principle here taken notice of, by men who profess to admire, without exception, the constitution of this State; while that Constitution makes the Senate, together with the chancellor and judges of the Supreme Court, not only a court of impeachments, but the highest judicatory in the State, in all causes, civil and criminal. The proportion, in point of numbers, of the chancellor and judges to the senators, is so inconsiderable, that the judiciary authority of New York, in the last resort, may, with truth, be said to reside in its Senate. If the plan of the convention be, in this respect, chargeable with a departure from the celebrated maxim which has been so often mentioned, and seems to be so little understood, how much more culpable must be the constitution of New York?[4]

"A second objection to the Senate, as a court of impeachments, is, that it contributes to an undue accumulation of power in that body, tending to give to the government a countenance too aristocratic. The Senate, it is observed, is to have concurrent authority with the Executive in the formation of treaties and in the appointment to offices: If, say the objectors, to these prerogatives is added that of deciding in all cases of impeachment, it will give a decided predominancy to senatorial influence. To an objection so little precise in itself, it is not easy to find a very precise answer. Where is the measure or criterion to which we can appeal, for determining what will give the Senate too much, too little, or barely the proper degree of influence? Will it not be more safe, as well as more simple, to dismiss such vague and uncertain calculations, to examine each power by itself, and to decide, on general principles, where it may be deposited with most advantage and least inconvenience?

"If we take this course, it will lead to a more intelligible, if not to

[4] "In that of New Jersey, also, the final judiciary authority is in a branch of the legislature. In New Hampshire, Massachusetts, Pennsylvania, and South Carolina, one branch of the legislature is the court for the trial of impeachments. — *Publius.*"

a more certain result. The disposition of the power of making treaties, which has obtained in the plan of the convention, will, then, if I mistake not, appear to be fully justified by the considerations stated in a former number, and by others which will occur under the next head of our inquiries. The expediency of the conjunction of the Senate with the Executive, in the power of appointing to offices, will, I trust, be placed in a light not less satisfactory, in the disquisitions under the same head. And I flatter myself the observations in my last paper must have gone no inconsiderable way towards proving that it was not easy, if practicable, to find a more fit receptacle for the power of determining impeachments, than that which has been chosen. If this be truly the case the hypothetical dread of the too great weight of the Senate ought to be discarded from our reasonings.

"But this hypothesis, such as it is, has already been refuted in the remarks applied to the duration in office prescribed for the senators. It was by them shown, as well on the credit of historical examples, as from the reason of the thing, that the most *popular* branch of every government, partaking of the republican genius, by being generally the favorite of the people, will be as generally a full match, if not an overmatch, for every other member of the Government.

"But independent of this most active and operative principle, to secure the equilibrium of the national House of Representatives, the plan of the convention has provided in its favor several important counterpoises to the additional authorities to be conferred upon the Senate. The exclusive privilege of originating money bills will belong to the House of Representatives. The same house will possess the sole right of instituting impeachments: is not this a complete counterbalance to that of determining them? The same house will be the umpire in all elections of the President which do not unite the suffrages of a majority of the whole number of electors; a case which it cannot be doubted will sometimes, if not frequently, happen. The constant possibility of the thing must be a fruitful source of influence to that body. The more it is contemplated, the more important will appear this ultimate though contingent power, of deciding the competitions of the most illustrious citizens of the Union, for the first office in it. It would not perhaps be rash to predict, that as a mean of influence it will be found to outweigh all the peculiar attributes of the Senate.

"A *third* objection to the Senate as a court of impeachments, is drawn from the agency they are to have in the appointments to office. It is imagined that they would be too indulgent judges of the conduct of men, in whose official creation they had participated. The principle

of this objection would condemn a practice, which is to be seen in all the State governments, if not in all the governments with which we are acquainted: I mean that of rendering those who hold offices during pleasure, dependent on the pleasure of those who appoint them. With equal plausibility might it be alleged in this case, that the favoritism of the latter would always be an asylum for the misbehavior of the former. But that practice, in contradiction to this principle, proceeds upon the presumption, that the responsibility of those who appoint, for the fitness and competency of the persons on whom they bestow their choice, and the interest they will have in the respectable and prosperous administration of affairs, will inspire a sufficient disposition to dismiss from a share in it all such who, by their conduct, shall have proved themselves unworthy of the confidence reposed in them. Though facts may not always correspond with this presumption, yet if it be, in the main, just, it must destroy the supposition that the Senate, who will merely sanction the choice of the Executive, should feel a bias, towards the objects of that choice, strong enough to blind them to the evidences of guilt so extraordinary, as to have induced the representatives of the nation to become its accusers.

"If any further arguments were necessary to evince the improbability of such a bias, it might be found in the nature of the agency of the Senate in the business of appointments.

"It will be the office of the President to *nominate*, and, with the advice and consent of the Senate, to *appoint*. There will of course, be no exertion of *choice* on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves *choose* — they can only ratify or reject the choice of the President. They might even entertain a preference to some other person, at the very moment they were assenting to the one proposed, because there might be no positive ground of opposition to him; and they could not be sure, if they withheld their assent, that the subsequent nomination would fall upon their own favorite, or upon any other person in their estimation more meritorious than the one rejected. Thus it could hardly happen, that the majority of the Senate would feel any other complacency towards the object of an appointment than such as the appearances of merit might inspire, and the proofs of the want of it destroy.

"*A fourth* objection to the Senate, in the capacity of a court of impeachments, is derived from its union with the Executive in the power of making treaties. This, it has been said, would constitute the senators their own judges, in every case of a corrupt or perfidious

execution of that trust. After having combined with the Executive in betraying the interests of the nation in a ruinous treaty, what prospect, it is asked, would there be of their being made to suffer the punishment they would deserve, when they were themselves to decide upon the accusation brought against them for the treachery of which they have been guilty?

"This objection has been circulated with more earnestness and with greater show of reason than any other which has appeared against this part of the plan; and yet I am deceived if it does not rest upon an erroneous foundation.

"The security essentially intended by the Constitution against corruption and treachery in the formation of treaties, is to be sought for in the numbers and characters of those who are to make them. The JOINT AGENCY of the Chief Magistrate of the Union, and of the two-thirds of the members of a body selected by the collective wisdom of the legislatures of the several States, is designed to be the pledge for the fidelity of the national councils in this particular. The convention might with propriety have meditated the punishment of the Executive, for a deviation from the instructions of the Senate, or a want of integrity in the conduct of the negotiations committed to him; they might also have had in view the punishment of a few leading individuals in the Senate, who should have prostituted their influence in that body as the mercenary instruments of foreign corruption; but they could not with more or with equal propriety, have contemplated the impeachment and punishment of two-thirds of the Senate, consenting to an improper treaty, than of a majority of that or of the other branch of the national legislature, consenting to a pernicious or unconstitutional law, — a principle which, I believe, has never been admitted into any government. How, in fact, could a majority in the House of Representatives impeach themselves? No better, it is evident, than two-thirds of the Senate might try themselves. And yet what reason is there, that a majority of the House of Representatives, sacrificing the interests of the society by an unjust and tyrannical act of legislation, should escape with impunity, more than two-thirds of the Senate, sacrificing the same interests in an injurious treaty with a foreign power? The truth is, that in all such cases it is essential to the freedom and to the necessary independence of the deliberations of the body, that the members of it should be exempt from punishment for acts done in a collective capacity; and the security to the society must depend on the care which is taken to confide the trust to proper hands, to make it their interests to execute it with fidelity, and to make it as difficult as possible for them to combine in any interest opposite to that of the public good.

"So far as might concern the misbehavior of the Executive in perverting the instructions or contravening the views of the Senate, we need not be apprehensive of the want of a disposition in that body to punish the abuse of their confidence, or to vindicate their own authority. We may thus far count upon their pride, if not upon their virtue. And so far even as might concern the corruption of leading members, by whose arts and influence the majority may have been inveigled into measures odious to the community if the proofs of that corruption should be satisfactory, the usual propensity of human nature will warrant us in concluding that there would be commonly no defect of inclination in the body to divert the public resentment from themselves by a ready sacrifice of the authors of their mismanagement and disgrace."[5]

"In regard to political offences, the selection of the senators has some positive advantages. In the first place they may be fairly presumed to have a more enlarged knowledge than persons in other situations, of political functions and their difficulties and embarrassments; of the nature of diplomatic rights and duties; of the extent, limits, and variety of executive powers and operations; and of the sources of involuntary error and undesigned excess, as contradistinguished from those of meditated and violent disregard of duty and right. On the one hand, this very experience and knowledge will bring them to the trial with a spirit of candor and intelligence, and an ability to comprehend and scrutinize the charges against the accused; and, on the other hand, their connection with, and dependence on, the States, will make them feel a just regard for the defence of the rights and the interests of the States and the people. And this may properly lead to another remark; that the power of impeachment is peculiarly well fitted to be left to the final decision of a tribunal composed of representatives of all the States, having a common interest to maintain the rights of all, and yet beyond the reach of local and sectional prejudices. Surely, it will not readily be admitted by the zealous defenders of State rights and State jealousies, that the power is not safe in the hands of all the States, to be used for their own protection and honor."[6]

"That there is a great force in this reasoning all persons of common candor must allow; that it is in every respect satisfactory and unanswerable has been denied, and may be fairly questioned. That part of it which is addressed to the trial at law by the same judges might have been in some degree obviated by confiding the jurisdiction at law over the offence (as in fact it is now confided) to an inferior tribunal,

[5] The Federalist, No. lxvi. [6] Story on the Constitution, § 750.

and excluding any judge who sat at the impeachment from sitting in the court of trial. Still, however, it cannot be denied that even in such a case the prior judgment of the Supreme Court, if an appeal to it were not allowable, would have very great weight upon the minds of inferior judges. But that part of the reasoning which is addressed to the importance of numbers in giving weight to the decision, and especially that which is addressed to the public confidence and respect which ought to follow upon a decision, is entitled to very great weight. It is fit, however, to give the answer to the whole reasoning by the other side in the words of a learned commentator, who has embodied it with no small share of ability and skill. The reasoning 'seems,' says he. 'to have forgotten that senators may be discontinued from their seats merely from the effect of popular disapprobation, but that the judges of the Supreme Court cannot. It seems also to have forgotten that, whenever the President of the United States is impeached, the Constitution expressly requires that the Chief Justice of the Supreme Court shall preside at the trial. Are all the confidence, all the firmness, and all the impartiality of that court supposed to be concentred 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 a particular State; much less to decide upon the life and death of a person whose crimes might subject him to impeachment, but whose influence might avert a conviction. Yet the courts of the United States are by the Constitution regarded as the 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 will nevertheless be liable to indictment, trial, judgment, and punishment according to law, etc. 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 a more unprejudiced tribunal than a court composed of judges holding their offices during good behavior and who could neither be presumed to have participated in the crime, nor to have prejudged the criminal?"[7]

"This reasoning also has much force in it; but in candor also it must be admitted to be not wholly unexceptionable. That part which

[7] Ibid., § 760, citing Tucker's Blackstone, vol. i, App., p. 237.

is addressed to the circumstance of the Chief Justice's presiding at the trial of the President of the United States was (as we shall hereafter see) not founded on any supposition that the Chief Justice would be superior in confidence and firmness and impartiality to the residue of the judges (though in talents and public respect and acquirements he might fairly be presumed their superior), but on the necessity of excluding the Vice-President from the chair when he might have a manifest interest which would destroy his impartiality. That part which is addressed to the supposition of the senators being *participes criminis* is still more exceptionable; for it is not only incorrect to affirm that the senators *must* be in such a predicament, but in all probability the senators would, in almost all cases, be without any participation in the offence. The offences which would be generally prosecuted by impeachment would be those only of a high character, and belonging to persons in eminent stations, — such as a head of department, a foreign minister, a judge, a vice-president, or a president. Over the conduct of such persons the Senate could ordinarily have no control; and a corrupt combination with them in the discharge of the duties of their respective offices could scarcely be presumed. Any of these officers might be bribed, or commit gross misdemeanors, without a single senator having the least knowledge or participation in the offence. And, indeed, very few of the senators could at any time be presumed to be in habits of intimate personal confidence or connection with many of these officers. And so far as public responsibility is concerned or public confidence is required, the tenure of office of the judges would have no strong tendency to secure the former, or to assuage public jealousies so as peculiarly to encourage the latter. It is perhaps, one of the circumstances most important in the discharge of judicial duties, that they rarely carry with them any strong popular favor or popular influence. The influence, if any, is of a different sort, arising from dignity of life and conduct, abstinence from political contests, exclusive devotion to the advancement of the law, and a firm administration of justice; circumstances which are felt more by the profession than they can be expected to be praised by the public."[8]

"There are, however, reasons of great weight besides those which have been already alluded to, which fully justify the conclusion that the Supreme Court is not the most appropriate tribunal to be invested with authority to try impeachments."[9]

"In the first place, the nature of the functions to be performed.

[8] Story on the Constitution, § 761. [9] Ibid., § 763.

The offences to which the power of impeachments has been and is ordinarily applied as a remedy are of a political character. Not but that crimes of a strictly legal character fall within the scope of the power (for as we shall presently see, treason, bribery, and other high crimes and misdemeanors are expressly within it); but that it has a more enlarged operation, and reaches what are aptly termed political offences, growing out of personal misconduct or gross neglect, or usurpation, or habitual disregard of the public interests, in the discharge of the duties of political office. These are so various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide systematically for them by positive law. They must be examined upon very broad and comprehensive principles of public policy and duty. They must be judged of by the habits and rules and principles of diplomacy, of departmental operations and arrangements, of parliamentary practice, of executive customs and negotiations, of foreign as well as domestic political movements; and, in short, by a great variety of circumstances, as well those which aggravate as those which extenuate or justify the offensive acts which do not properly belong to the judicial character in the ordinary administration of justice, and are far removed from the reach of municipal jurisprudence. They are duties which are easily understood by statesmen, and are rarely known to judges. A tribunal composed of the former would therefore be far more competent in point of intelligence and ability than the latter for the discharge of the functions, all other circumstances being equal. And, surely, in such grave affairs, the competency of the tribunal to discharge the duties in the best manner is an indispensable qualification." [10]

"In the next place, it is obvious that the strictness of the forms of proceeding in cases of offences at common law is ill adapted to impeachments. The very habits growing out of judicial employments, the rigid manner in which the discretion of judges limited and fenced in on all sides, in order to protect persons accused of crimes by rules and precedents, and the adherence to technical principles, which, perhaps, distinguishes this branch of the law more than any other, are all ill adapted to the trial of political offences in the broad course of impeachments. And it has been observed, with great propriety, that a tribunal of a liberal and comprehensive character, confined as little as possible to strict forms, enabled to continue its session as long as the nature of the law may require, qualified to view the charge in all its bearings and dependencies, and to appreciate on sound principles of

[10] Story on the Constitution, § 764.

public policy the defence of the accused, seems indispensable to the value of the trial. The history of impeachments, both in England and America, justifies the remark. There is little technical in the mode of proceeding; the charges are sufficiently clear and yet in a general form; there are few exceptions which arise in the application of the evidence which grow out of mere technical rules and quibbles. And it has repeatedly been seen that the functions have been better understood, and more liberally and justly expounded, by statesmen than by mere lawyers. An illustrious instance of this sort is upon record in the case of the trial of Warren Hastings, where the questions whether an impeachment was abated by a dissolution of Parliament was decided in the negative by the House of Lords, as well as the House of Commons, against what seemed to be the weight of professional opinion."[11]

"In the next place, the very functions involving political interests and connections are precisely those which it seems most important to exclude from the cognizance and participation of the judges of the Supreme Court. Much of the reverence and respect belonging to the judicial character arise from the belief that the tribunal is impartial, as well as enlightened, just, as well as searching. It is of very great consequence that judges should not only be, in fact, above all exception in this respect, but that they should be generally believed to be so. They should not only be pure, but, if possible, above suspicion. Many of the offences which will be charged against public men will be generated by the heats and animosities of party, and the very circumstance that judges should be called to sit, as umpires, in the controversies of party, would inevitably involve them in the common odium of partisans, and place them in public opinion, if not in fact, at least in form, in the array on one side or the other. The habits, too, arising from such functions, will lead them to take a more ardent part in public discus-

[11] Story on the Constitution, § 765, citing Rawle on the Constitution, ch. xxii; 4 Blackstone's Commentaries, p. 400, Christian's Note. In New York, where the judges of the Court of Appeals and the Senate form the Court for the Trial of Impeachments, the former, with exception of Judge Grover, have almost uniformly required far stronger proof of guilt than would satisfy an ordinary jury before voting for conviction. See Dorn's Impeachment Trial and Barnard's Impeachment Trial described in the Appendix, *infra*. The cases where impeachments have been tried in the ordinary courts have all resulted in acquittals, in at least one instance where the proof against the respondents seemed very clear. See The State *ex rel.* Attorney-General *v.* Buckley, 54 Ala., 599; State of Nebraska *v.* William Leese, Ex-Attorney-General, 37 Neb., 92; State of Nebraska *v.* George H. Hastings, Attorney-General, and others, 37 Neb., 96; which are described in the Appendix, *infra*.

sions, and in the vindication of their own political decisions, than seems desirable for those who are daily called upon to decide upon the private rights and claims of men distinguished for their political consequence, zeal, or activity in the ranks of party. In a free government like ours there is a peculiar propriety in withdrawing as much as possible all judicial functionaries from the contests of mere party strife. With all their efforts to avoid them, from the free intercourse, and constant changes in a republican government both of men and measures, there is at all times the most imminent danger that all classes of society will be drawn into the vortex of politics. Whatever shall have a tendency to secure in tribunals of justice a spirit of moderation and exclusive devotion to juridical duties is of inestimable value. What can more surely advance this object than the exemption of them from all participation in, and control over, the acts of political men in their official duties? Where, indeed, those acts fall within the character of known crimes at common law or by positive statute, there is little difficulty in the duty, because the rule is known, and equally applies to all persons, in and out of office; and the facts are to be tried by a jury, according to the habitual course of investigation in common cases. The remark of Mr. Woodeson on this subject is equally just and appropriate. After having enumerated some of the cases in which impeachments have been tried for political offences, he adds that from these 'it is apparent how little the ordinary tribunals are calculated to take cognizance of such offences, or to investigate and reform the general polity of the State.'"[12]

"In the next place, the judges of the Supreme Court are appointed by the executive, and will naturally feel some sympathy and attachment for the person to whom they owe this honor, and for those whom he selects as his confidential advisers in the departments. Yet the President himself and those confidential advisers are the very persons who are eminently the objects to be reached by the power of impeachment. The very circumstance that some, perhaps a majority, of the Court, owe their elevation to the same chief magistrate whose acts, or those of his confidential advisers, are on trial, would have some tendency to diminish the public confidence in the impartiality and independence of the tribunal."[13]

"But in the next place, a far more weighty consideration is, that some of the members of the judicial department may be impeached for malconduct in office; and thus, that spirit which, for want of a better term, has been called the corporation spirit of organized tribunals and

[12] Story on the Constitution, § 766, citing 2 Woodeson, Lect. 40, p. 602.

[13] Ibid., § 767.

societies, will naturally be brought into play. Suppose a judge of the Supreme Court should himself be impeached; the number of his triers would not only be diminished, but all the attachments and partialities, or it may be the rivalries and jealousies, of peers on the same bench, may be, (what is practically almost as mischievous) may be suspected to be, put in operation to screen or exaggerate the offence. Would any person soberly decide that the judges of the Supreme Court would be the safest and the best of all tribunals for the trial of a brother judge, taking human feelings as they are and human infirmity as it is? If not, would there not be, even in relation to inferior judges, a sense of indulgence, or a bias of opinion upon certain judicial acts and practices, which might incline their minds to undue extenuation or to undue harshness? And if there should be, in fact, no danger from such a source, is there not some danger, under such circumstances, that a jealousy of the operations of judicial tribunals over judicial offences would create in the minds of the community a broad distinction in regard to convictions and punishments between them and merely political offences? Would not the power of impeachment cease to possess its just reverence and authority if such a distinction should prevail; and especially if political victims rarely escaped, and judicial officers as rarely suffered? Can it be desirable thus to create any tendency in the public minds towards the judicial department which may impair its general respect and daily utility?" [14]

"Considerations of this sort cannot be overlooked in inquiries of this nature; and if to some minds they may not seem wholly satisfactory, they at least establish that the Supreme Court is not a tribunal for the trial of impeachment wholly above all reasonable exception. But if to considerations of this sort it is added that the common practice of free governments, and especially of England and of the States composing the Union, has been to confide this power to one department of the legislative body upon the accusation of another; and that this has been found to work well, and to adjust itself to the public feelings and prejudices, to the dignity of the legislature, and to the tranquillity of the State, the influence in its favor cannot but be greatly strengthened and confirmed." [15]

"On a review of all the departments of government provided by a Constitution, none will be found more suitable to exercise this peculiar jurisdiction than the Senate. Although, like their accusers, they are representatives of the people, yet they are by a degree more removed,

[14] Story on the Constitution, § 768.
[15] Ibid., § 769, pp. 562, 563. See, however, Rawle on the Constitution, ch. xxii, p. 214.

and hold their stations for a longer term. They are, therefore, more independent of the people, and being chosen with the knowledge that they may, while in office, be called upon to exercise this high function, they bring with them the confidence of their constituents that they will faithfully execute it, and the implied compact, on their own part, that it shall be honestly discharged. Precluded from ever becoming accusers themselves, it is their duty not to lend themselves to the animosities of party or the prejudices against individuals, which may sometimes unconsciously induce the House of Representatives to the acts of accusation. Habituated to comprehensive views of the great political relations of the country, they are naturally the best qualified to decide on those charges which may have any connection with transactions abroad, or great political interests at home. And although we cannot say that, like the English House of Lords, they form a distinct body, wholly uninfluenced by the passions and remote from the interests of the people, yet we can discover in no other division of the government a greater probability of independence and impartiality." [16]

These arguments have convinced the American people, and in all the States except New York, Oregon, and Nebraska, impeachments are made and tried substantially as is provided in the Constitution of the United States, although in a few the Chief-Justice of the Supreme Court presides in all impeachment trials except when he is a party. New York maintains the practice established in her first constitution, and has a special court for the trial of impeachments which is composed of the president of the Senate, the senators, or a major part of them, and the judges of the Court of Appeals, or the major part of them.[17] Experience has shown that the judges have been more disposed to acquit than have the senators.[18] The Oregon Constitution ordains: —

"Public officers shall not be impeached; but incompetency, corruption, or malfeasance, or inefficiency in office, may be tried in the same manner as criminal offences, and judgment may be given of dismissal from office, and such further punishment as may be prescribed by law." [19]

In Nebraska impeachments are made by a majority of the legislature in joint convention. They are tried by the Supreme Court,

[16] Rawle on the Constitution, ch. xxii, pp. 201-202, quoted with approval in Story on the Constitution, § 775.

[17] New York Constitution, Art. VI, Sec. 1.

[18] *Supra*, note 11.

[19] Art. VII, Sec. 19.

unless a judge of that court is impeached, when he is tried by the judges of the District Court.[20]

In Louisiana there is a remedy alternate to impeachment by a suit in the Supreme Court by the Attorney-General for the removal of the judges of the Court of Appeals and other courts.[21] These provisions have not been tried sufficiently to determine whether it is yet safe to trust the courts with so tremendous a jurisdiction as that of the removal of a President of the United States.

§ 90. History of Impeachments before the Senate of the United States.

There have been seven impeachment trials before the Senate of the United States, of which two only have resulted in convictions. On July 7th, 1797, William Blount, a senator from Tennessee, was impeached for high crimes and misdemeanors. On the same day the Senate resolved that the respondent be taken into the custody of the messenger until he should enter into a recognizance, which he gave, binding himself in the sum of $20,000 with two sufficient sureties in the sum of $15,000 each, to appear and answer such articles of impeachment as might be exhibited against him. On the following day he was expelled from the Senate as guilty of a high misdemeanor, entirely inconsistent with his public trust and duty as a senator. Thereupon the sureties surrendered his person, and asked to be discharged. It was then resolved that he be taken into custody of the messenger, until he should enter into another recognizance to the same effect, himself in the sum of $1,000, with two sufficient sureties in the sum of $500 each, which was also given. Articles of impeachment were not presented until the next session, in January, 1798. They charged: —

That the respondent while senator had conspired to create and promote, and set on foot, within the jurisdiction and territory of the United States, and to conduct and carry on from thence, a military hostile expedition against the territories and dominions of Spain in the Floridas and Louisiana for the purpose of wresting the same from Spain, and of conquering the same for Great

[20] Art. V, Sec. 14. [21] Art. CC.

Britain, with which Spain was then at war. That at the same time he had conspired and contrived to excite the Creek and Cherokee nations of Indians, then inhabiting within the United States, to commence hostilities against the subjects and possessions of Spain, in the Floridas and Louisiana, for the same purpose, in violation of a treaty by which the United States and Spain had agreed to maintain peace and harmony with all the means in their power among the Indians who inhabited the country adjacent to the boundaries of the Floridas. That he had further conspired and contrived to alienate and divert the confidence of the said Indian tribes or nations from Benjamin Hawkins, the principal temporary agent of the United States appointed by the President in accordance with law to reside among the tribes, and to diminish, impair and destroy the influence of that agent with those tribes, and their friendly intercourse and understanding with him. That he had conspired and contrived to seduce James Carey, the interpreter duly appointed by the United States to reside within said Indian tribes, from the duty and trust of his appointment, and to engage Carey to assist in the promotion and execution of his said criminal intentions and conspiracies aforesaid; and that he had for the same purpose further conspired and contrived to diminish and impair the confidence of the Cherokee nation in the government of the United States, and to create and foment discontents and disaffection among the said Indians, towards the government of the United States, in relation to the ascertainment and marking of the boundary line between the United States and the Cherokee nation, which a treaty between them provided should be ascertained and marked by commissioners in a manner therein prescribed.

The managers of the House of Representatives included James A. Bayard and Robert G. Harper. Blount's counsel were Jared Ingersoll and A. J. Dallas. They filed a plea to the jurisdiction on the ground that the respondent was not then a senator, and was not then, nor at the time of the offenses charged, a civil officer of the United States. The House filed a replication to the plea, alleging that the matters therein set forth were insufficient to exempt Blount from answering the articles. The questions of law arising thereupon, which are discussed later, were argued by Bayard and

Harper for the United States, and by Dallas and Ingersoll for the respondent. The plea was sustained by a vote of 14 to 11; and the respondent consequently acquitted. Blount returned to Tennessee, where he had not forfeited the confidence of his constituents; for he was subsequently elected to the State Senate, made speaker of that body, and was about to be elected governor at the time of his death, not long after his expulsion.[1]

Upon the destruction of the Federalist party on the election of Jefferson to the presidency, the Democrats found most of the judicial offices in the States as well as the United States filled by their political opponents, whose terms did not expire until their deaths, or at least a long period of time. The incumbents had been chosen from the "ranks of the wealthy and well born"; and had made themselves obnoxious by their arrogance to the poor, and to those who had not attained social distinction and were not adherents to the prevailing religious sect. The opinion which now generally prevails, that judges should abstain from interference in politics, was not then in force. It was the constant custom for their charges to grand juries to include arguments on the party questions of the day; and in many cases, when not holding court, they also took the stump during political campaigns. Human nature would have been different had not the Democrats who had then gained nearly all the offices which were supplied at the last election, tried to fill the benches also with members of their own party. An assault upon the judiciary, State and Federal, was made all along the lines. In some States, as New Hampshire, old courts were abolished and new ones with similar jurisdiction created for the sole purpose of obtaining new judges. In Pennsylvania, one obnoxious Federal judge was removed from the Common Pleas by impeachment;[2] and an impeachment of all the Federal judges of the highest court was made, but failed through the uprising of the entire bar, irrespective of party lines, in defense of their official chiefs.[3] A similar attack was made upon the Federal judiciary.

§ 90. [1] Wharton's State Trials, pp. 250–321. Some of the arguments are quoted *infra*, § 93.

[2] Addison's Impeachment Trial, *infra*, § 93, and Appendix to this volume.

[3] Impeachment Trial of Shippen, Smith, and Yeates, *infra*, Appendix.

On February 3d, 1803, Jefferson sent a message to the House of Representatives in which he said: —

"The enclosed letter and affidavits exhibiting matter of complaint against John Pickering, District Judge, of New Hampshire, which is not within executive cognizance, I transmit them to the House of Representatives, to whom the Constitution has confided a power of instituting proceedings of redress if they be of opinion that the cases call for them."[4]

The result was the immediate impeachment of that judge. The articles charged disobedience to the law in the course of proceedings on the part of the United States to condemn the ship Eliza with its cargo for a violation of the custom laws: where the judge delivered the ship to the claimant after its attachment by the marshal without requiring any bond as the law directed; refused to hear testimony offered by the District Attorney on behalf of the United States; refused to allow an appeal by the Government from his decree to the Circuit Court of the United States; sat drunk upon the bench, using profane language; "and was then and there guilty of other high misdemeanors degrading to his own character as a judge and degrading to the honor and dignity of the United States." There was no appearance on the part of the respondent. His son, however, presented, through Robert G. Harper as counsel, a petition, alleging the insanity of his father and praying a postponement of the trial with leave to defend on his behalf. Harper expressly disclaimed any appearance for the respondent. He was allowed, against the protest of the managers of the House of Representatives, to present evidence of the respondent's insanity in support of the petition. The managers thereupon retired to take the opinion of the House respecting their further procedure. The House discussed the matter, but took no action upon the subject. Meanwhile, the depositions, one of which was sworn to before a State justice of the peace, were read. They tended to support the allegations in the petition. No action was taken by the Senate thereupon. The managers then returned and continued the trial. The facts alleged in the articles were proved. One of the witnesses on the impeachment, the marshal of

[4] Annals of Congress, 1802, 1803, p. 460.

his court, swore that Judge Pickering was never deranged except when drunk. Others, including one of the senators from New Hampshire, both of whom after their testimony voted for an acquittal, testified that Pickering was insane when sober. The Senate voted that the form of putting the final question should be: "Is the respondent guilty as charged in the —— Article?"

Five senators thereupon retired from the court, —

"not because they believed Judge Pickering guilty of high crimes and misdemeanors, but because they did not choose to be compelled to give so solemn a vote upon a form of question which they considered an unfair one, and calculated to preclude them from giving any distinct and explicit opinion upon the true and most important points in the cause, viz.: as to the insanity of Judge Pickering, and whether the charges contained in the articles of impeachment, if true, amounted in him to high crimes and misdemeanors, or not."

The impeached was convicted on each of the articles by a vote of 19 to 7. He was sentenced to removal from office by a vote of 20 to 6. One of the senators who voted for an acquittal voted for his removal.[5]

Meanwhile proceedings were taken to rid the bench of a still more obnoxious judge. On the same day that Judge Pickering was convicted, the House of Representatives adopted a resolution impeaching Samuel Chase, a Justice of the Supreme Court. He was a native of the State of Maryland, which he had represented in the Continental Congress. During that time an unsuccessful attempt had been made to impeach him in the house of delegates; and he had been temporarily excluded from the place on account of certain business transactions in which he had engaged.[6]

He was afterwards chief-justice of the criminal court in Baltimore, and while holding that position was also commissioned chief-justice of the General Court. He held both positions until, after an unsuccessful attempt in the house of delegates to remove him, a joint resolution passed both houses of the State legislature declaring the juncture of the two offices unconstitutional.[7]

[5] Annals of Congress, 1802-1803, pp. 267-268. Annals of Congress, 1803-1804, pp. 27, 76, 224-225, 268, 270-271, 275, 298, 315-367.

[6] Wharton's State Trials, p. 43.

[7] Ibid.

Notwithstanding this history, he was appointed Justice of the Supreme Court of the United States by Washington, against the protest of a number of the President's friends.[8] In his early life he had been an extreme Democrat, but after his appointment he became the most rabid of the Federalists. He attached himself with enthusiasm to the support of President Adams. He supported the enforcement of the Sedition Law, both by urging grand juries to find indictments, many of which they refused, and by gross unfairness on the trial of those who were indicted. His charges to grand juries abounded in denunciations of the French Revolution and the Democratic party. He took the stump for Adams at the time when Jefferson was elected.[9] He grossly insulted the bar by his treatment of some of its leading members, including Wirt. For this reason his impeachment seemed the best opportunity for the insertion of an opening wedge which might result, if not in the removal, at least in the intimidation of all the Federalists on the Supreme Court of the United States. A few days after its delivery a violent charge made by Justice Chase to the grand jury at Baltimore was the occasion of the following letter by the President to Joseph Nicholson, who was then one of the managers of Pickering's impeachment: —

"You must have heard of the extraordinary charge of Chase to the grand Jury at Baltimore. Ought this seditious and official attack on the principles of our Constitution and on the proceedings of a State to go unpunished; and to whom so pointedly as yourself will be looked for the necessary measures? I ask these questions for your consideration; for myself it is better that I should not interfere."[10]

Nicholson, at the advice of friends, declined to move in the matter. The fact that in case of Chase's removal he would have probably been his successor seemed in itself a sufficient reason.[11] The task was assumed by John Randolph of Roanoke. His ignorance of law, and even of the elementary principles of justice, and his lack of tact, which was never so apparent as in the management of this prosecution, was the main cause of its failure.

[8] Gibb's Wolcott, vol. i, p. 300.

[9] Wharton's State Trials, pp. 42-45.

[10] Jefferson to Nicholson, May 13, 1803, Jefferson's Works, vol. iv, p. 486.

[11] Macon to Nicholson, August 6, 1803, Nicholson's MSS. Adams, History of the United States, vol. ii, pp. 150-151.

The articles charged misconduct on the trials of John Fries for treason, and James Thompson Callender for breach of the Sedition Law; an improper attempt to induce a grand jury in Delaware to find an indictment against the editor of the "Mirror of the Times and General Advertiser," for breach of the Sedition Law; and a perversion of his official right and duty to address a grand jury in Maryland,

"for the purpose of delivering to the said grand jury an intemperate and inflammatory political harangue, with intent to excite the fears and resentment of the said grand jury, and of the good people of Maryland against their state, government and constitution, a conduct highly censurable in any, but peculiarly indecent and unbecoming in a judge of the Supreme Court of the United States, and moreover, that the said Samuel Chase, then and there, under pretence of exercising his judicial right to address the said grand jury, as aforesaid, did, in a manner highly unwarrantable, endeavor to excite the odium of the said grand jury, and of the good people of Maryland against the government of the United States, by delivering opinions, which, even if the judicial authority were competent to their expression, on a suitable occasion in a proper manner, were at that time and as delivered by him, highly indecent, extra-judicial and tending to prostitute the high judicial character with which he was invested to the low purpose of an electioneering partisan."

As misconduct upon Fries' trial the respondent was charged with delivering an opinion in writing, on the question of law, upon the construction of which the defense of the accused materially depended, tending to prejudice the minds of the jury against the case of the defendant, before counsel had been heard in his defense; with restricting the defendant's counsel from referring to such English authorities as they believed apposite, or from citing certain statutes of the United States, which they deemed illustrative of the positions upon which they intended to rest the defense; with debarring the prisoner from his constitutional privilege of addressing the jury on the law, as well as on the fact, and at the same time endeavoring to wrest from the jury their indisputable right to hear argument, and determine upon the question of law, as well as the question of fact, involved in the verdict which they were required to give. The allegations of fact

as distinct from the legal conclusions in these charges were clearly proven. Fries had been indicted for treason in taking part in the Whiskey Rebellion in Pennsylvania. On his first trial he was convicted, but a new trial was granted on account of the bias of one of the jurors. Upon his second trial in the Circuit Court of the United States in Philadelphia on April 29th, 1800, as soon as the Court opened, Judge Chase stated: —

"'that the Court had made up their minds as to the law of Treason, and to avoid being misunderstood they had reduced their opinion to writing, and that they had directed three copies of the opinion to be made out; one for the District Attorney, another for counsel for the prisoner and a third for the jury to be delivered to them after the case had gone through on the part of the prosecution.'"[12]

The prisoner's counsel, two of the most eminent lawyers at the Philadelphia bar, Dallas and Lewis, thereupon stated, that as there was no dispute about the facts, and the only doubt was as regards the law, they could not proceed. On the following day, the prisoner was brought to the bar, and the court asked the counsel whether they were ready to proceed with the trial.

"Mr. Lewis then observed, that if he had been employed by the prisoner, he would think himself bound to proceed; but having been assigned as his counsel — (He was interrupted by Judge Chase, who said, 'You are not bound by the opinion delivered yesterday, but are at liberty to contest it on both sides'). Mr. Lewis answered, that he had understood that the court had made up their minds as to the law, and as the prisoner's counsel had a right to address the jury both on the law and the fact, it would place him in too degrading a situation to argue the case after what had passed, and, therefore, he would not proceed with the defence. Judge Chase answered with impatience, 'You are at liberty to proceed as you think proper. Address the jury and lay down the law as you think proper.' Mr. Lewis answered, with considerable warmth, 'I will never address myself to the court upon a question of law in a criminal case.' He then went into a lengthy argument upon the law of high treason in England, previous to their revolution, and contended that the courts, since that period, had considered themselves as bound by those decisions which were made prior to it.

[12] Testimony of William Rawle, who was counsel for the prosecution on Chase's Impeachment Trial.

Judge Chase observed, that the counsel must do as they please. Mr. Dallas then rose, and went into a general view of the ground, which had been taken by Mr. Lewis, and concluded with his determination not to proceed as counsel for Fries. Judge Chase observed, 'No opinion has been given as to the facts of the case. I would not suffer the witnesses against those persons charged with seditious combinations, to be examined before the trial of Fries came on, lest their evidence might have been heard by some of the jury. As to the law, I know that the trial before took a considerable time, and that cases at common law, and decisions in England before the Revolution of the law of treason, such as the case of the man whose stag the king killed, and wished the horns of the stag in the king's belly, and the case of the innkeeper, who kept the sign of the crown, and who said he would make his son heir to the crown. These cases ought not, and shall not go to the jury. There is no case which can come before me on which I have not a decided opinion as to the law; otherwise I should not be fit to preside here. I have always conducted myself with candour, gentlemen, and meant to have saved you trouble by what I did. Is it not respectable for counsel to say that they have a right to offer what they please to the jury? What! would you cite decisions in Rome, in Turkey, or in France? You will now proceed, and stand acquitted or condemned in your own consciences as you conduct the defense, and go on in your own way. The case will be opened by the attorney — the manner must be regulated by the court.' Judge Peters added, that the papers were all withdrawn. Mr. Lewis said, the paper was withdrawn, but the impressions remained with the jury; he, therefore, should not act. A pause then ensued for a few moments, when Judge Chase said: 'You can't bring this court into difficulties, gentlemen; you do not know me if you think so.' "[13]

Dallas testified that Chase then told the counsel

"that we might address the jury on the law, but it would be at the hazard of our reputation."[14]

Both counsel then withdrew. Fries was convicted without counsel and sentenced to death. As his counsel, however, undoubtedly expected when they retired from the trial, in consequence of the irregularity of the proceeding, their client was pardoned by President Adams.[15]

[13] Rawle's testimony on Chase's Impeachment Trial.

[14] Dallas' testimony on Chase's Impeachment Trial.

[15] For this act he was severely criticized by Hamilton and Pickering. (Wharton's State Trials, pp. 640–648.)

The misconduct on Callender's trial, charged against the respondent, consisted in overruling a challenge to a juryman who wished to be excused from serving on the trial because he had made up his mind as to the publication from which the words, charged to be libellous in the indictment, were extracted; in excluding the evidence of a material witness of the defendant; in compelling the prisoner's counsel to reduce to writing, and submit to the inspection of the court, for their admission or rejection, all questions which they meant to propound to that witness; in refusing to postpone the trial, although an affidavit was regularly filed, stating the absence of material witnesses on behalf of the accused, and although it was manifest that, with the utmost diligence, their attendance could not have been procured at that term; in the use of unusual, rude and contemptuous expressions towards the prisoner's counsel, and in falsely insinuating that they wished to excite the public fears and indignation and to produce that insubordination to law, to which the conduct of the judge did, at the same time, manifestly tend; with repeated and vexatious interruptions of the said counsel, on the part of the judge, which, at length, induced them to abandon their cause and their client, who was thereupon convicted and condemned to fine and imprisonment; in an indecent solicitude, manifested by the judge, for the conviction of the accused, unbecoming even a public prosecutor, but highly disgraceful to the character of a judge as it was subversive of justice; in refusing to follow the State laws on the subject of bail which it was claimed were made applicable by an act of Congress; and in refusing to follow the State law on the subject of presentment of criminal indictments, which it was claimed had also been adopted by Congress. These last two charges were clearly ill-founded, since it is well settled that the acts of Congress directing that the laws of the several States as to the rights and remedies shall be followed at common law in the courts of the United States do not apply to criminal actions. If, however, a conviction had been obtained on them, an excuse might have been had for proceeding against Chief-Justice Marshall, who had himself made similar rulings to those charged against Chase.[16] Some of the other charges of misconduct on Callender's trial were frivolous; since it seems

[16] Adams, History of the United States, vol. ii, p. 25.

apparent from an examination of the trial that the application for a postponement was made more with the object of exciting sympathy for the accused, than with the idea that the witnesses whose testimony it was claimed was material, namely, President Adams, the Secretary of War, and several senators, would have aided the accused. Judge Chase's conduct, however, on the trial was so scandalous that it would have undoubtedly caused his conviction upon an impeachment at the present day. He had throughout the case endeavored to secure a conviction. He had insulted eminent counsel, among others, William Wirt, to such a degree that they finally refused to continue the arguments in the course of which they had been interrupted. It was said that before the trial he had publicly announced "that he would teach the lawyers in Virginia the difference between liberty and the licentiousness of the press," and that he had told the marshal that if he had "any of those creatures or people called Democrats" on the panel of jurymen he should strike them off. He had constantly throughout the trial referred to counsel who were men of mature age, as "young gentlemen," in order to influence the jury by these as well as other sneers which abounded throughout the reports of the trial. When, on the conclusion of the testimony for the United States, the counsel for the defendant called as a witness the celebrated John Taylor of Caroline County, afterwards a senator of the United States, and the author of several important works on constitutional law, as soon as he was sworn, the judge demanded of them what they intended to prove by the witness. After they had told him, he ordered a previous statement in writing of the questions which they intended to put, and after this had been given, excluded the evidence of the witness. The libel had charged that the President of the United States was an aristocrat and had proved faithful and serviceable to the British interests. Taylor's testimony was offered to prove part of these charges in the libel. The court held that both the points must be proved, or neither of them, and that consequently the evidence was inadmissible. It did not appear at that time whether witnesses would be called to prove the other points of the libel, so that there can be little doubt of the outrageous impropriety of the ruling. Callender was convicted and sentenced to a fine

of $200 and an imprisonment of nine months. As soon as Jefferson was inaugurated he was pardoned, as were the other victims of the Sedition Law.[17]

It was clearly proven that the respondent at the term of the Circuit Court of the United States for the District of Delaware, held in June, 1800, used his best efforts to persuade the grand jury to find an indictment against the editor of the "Mirror of the Times and General Advertiser." The cause of this was a series of articles in which that paper had attacked President Adams and the Federalists in New England.[18]

[17] *Supra*, § 32, over notes 16 and 17.

[18] The alleged libels upon which the grand jury refused to find indictments, although urged by Chase to do so, were as follows:

Extract from the The Mirror of February 5th, 1800: —

"COMMUNICATION.

"The *Illuminati* of New England are composed of certain *ecclesiastics*, who wish for political sway; and of laymen in office, who wish for clerical influence to retain them in place; by the means of the pulpit and sword; or church and state. The senators and representatives in Congress from Connecticut, belong to the New England *Illuminati*, and obey the President of Yale, who rules with the united power of a teacher and ecclesiastic. Mr. Hillhouse guides the state treasury so far as to gain unlawful and unconstitutional grants of money for the *Illuminati*. The wives of Messrs. Dwight, Hillhouse, and Davenport, of Congress, are cousins; Messrs. Goodrich are brothers — Messrs. Wolcott of the treasury, and Griswold of Congress, are cousins; as are Messrs. Griswold and Hillhouse; Mr. Chauncey Goodrich married the sister of Oliver Wolcott; and Mr. Eleazar Goodrich married the sister of Mr. Allen, late of Congress. Thus are church and state, and the ties of blood and marriage united, to form an hierarchy and aristocracy in Connecticut, which some fail not to call a monarchy, controlled by Dr. Dwight. A desire for place, favor and power, conducts this system. Mr. Tracy and his son-in-law at home, are seeking for money and influence thro' this union. Mr. Tracy wishes to be a foreign envoy — Mr. Eleazar Goodrich is looking for the place of collector of the customs in New Haven.

"President Dwight has a host of brothers, sons and cousins, who want employment. His brother Theodore wants to be a district attorney, and to have a seat in Congress, or the upper house in Connecticut. Tapping Reeve, one of the *Illuminati*, and one of the judges of the superior court is a promoter of the tyranny assumed by members of Congress from Connecticut, in order to obtain the place of district judge. The above is a clue to the sedition law — certain gentlemen did not wish to have their conduct and designs investigated at home; for this cause they have wished to destroy the Editor of the Bee, and introduce a system of *terror*."

Extract from the Mirror of February 8th, 1800: —

"COMMUNICATION.

"In our last, we presented a 'clue' to the politics of Connecticut, from their desire to obtain place and favor. We now exhibit a *clue* to the New Hampshire aristocracy. The collector of the customs, loan officer, marshal, one of the

The charge to the grand jury in Maryland was delivered May 2d, 1803. It contained criticisms upon the conduct of the Demo-

senators of Congress, and two of the representatives in that body, were *old and avowed tories*, and have ever continued to be such. The contractor for the naval or ship building department was also a tory — he is brother to one of the representatives, whose sister is married to the district judge, (whose former respect for the independence of America is doubtful). These three gentlemen are allied to the President of Cambridge college, who married the sister of the wife of the district judge, and of the naval contractor and one of the representatives.

"The former *tory* senator is Mr. Livermore. The representatives are Messrs. Sheaff and Gordon; the district judge is a Mr. Pickering; the naval contractor is a Mr. Jacob Sheaff; the marshal is Mr. Rogers; the loan officer is Mr. Pierce, a cousin to the late governor Wentworth, and the collector is Mr. Martin, whose wife is sister to Mr. Pierce. Dwight and Willard, as heads of literary institutions and ecclesiastical societies, thus have the chief sway in Connecticut and New Hampshire.

" *These equivocal Whigs and old tories have the control in our national affairs;* are conspicuous in public processions; and wear the weed of mourning for Washington, whom they have often branded with the epithet of *Rebel.*"

Extract from the Mirror of February 22d, 1800: —

"COMMUNICATION.

" We have presented the readers with a view of the New England Illuminati, and a clue to British, tory or monarchical influence, in New Hampshire and Connecticut, in which intolerance, and a want of due respect to the revolution and its promoters and defenders must be clearly seen. This formidable body are hedged round by, or shelter themselves under the *sedition* law, *tory* marshals and juries, which may be packed out of British *commissaries*, and the plunderers of our farms, the murderers of our fathers, brothers and sons, or those who burned our churches, and laid waste our literary and benevolent institutions during the last war."

Extract from The Mirror of March 18th, 1800: —

" For The Mirror, &c.

" What are the fruits of John Adams's administration? He has engaged to pay 8 per cent on five millions of dollars. He has established a standing army, which besides its enormous expense of four millions and two hundred thousand dollars, keeps a number of citizens in fear of their lives. He has obtained an appropriation for supporting fortifications, of 700,000 dollars. For the navy 1799, four millions three hundred and fifty thousand dollars, amounting in the whole to nine millions two hundred and fifty thousand dollars, exclusively of a number of voluntary and unascertained subscriptions for building and equipping vessels of war, for which the subscribers receive interest, at 8 per cent. He has levied a *direct tax*, which in this state amounts to more than the whole of the tax paid into our state treasury. He has procured the enaction of an alien and sedition law, which are a curse to any country in which they exist. He has given orders to one of our judges to deliver up Jonathan Robbins, an American seaman, to be tried by a British court martial, although the name of the person accused was Nash; in direct contradiction to the laws of nations, and of our constitution. And finally he is to have a new loan of 3,500,000 dollars, for which he will be obliged to pay 8, and probably 10 per cent." (Chase's Impeachment Trial, Evans' Report, Appendix, pp. 58–60.)

cratic party for having abolished the offices of Circuit Judges of the United States, the recent changes in the Constitution of Maryland which established universal suffrage, and the further changes contemplated in the judiciary of that State, which, it was said, —

"will, in my judgment take away all security for property and personal liberty. The independence of the national judiciary is already shaken to its foundation, and the virtue of the people alone can restore it. The independence of the judges of this State will be entirely destroyed if the bill for abolishing the two supreme courts should be ratified by the next general assembly. The change of the State Constitution by allowing universal suffrage will in my opinion certainly and rapidly destroy all protection to property and all security to personal liberty, and our republican constitution will sink into a mobocracy, the worst of all possible governments."

The principal managers for the House of Representatives were John Randolph and Joseph Nicholson. Judge Chase's counsel were Luther R. Martin, R. G. Harper and Josephson Hopkinson, of whom Harper had taken part in the trials of both Blount and Pickering. They were far more than a match with the counsel for the prosecution. The answer of Chase, which was quite lengthy, was prepared with great ability. It admitted most of the facts charged in the articles of impeachment; but defended them by arguments well calculated to appeal to laymen as well as lawyers.

Aaron Burr, who was then Vice-President, presided at the trial. The managers, especially John Randolph, displayed great weakness in their arguments, and were inconsistent as to the principles on which a conviction was demanded. Some of them contended that an impeachment was in the nature of an inquest of office, and that the respondent might be removed although not guilty of any crime, while others admitted that what in substance amounted to a crime must be proved before a conviction. The arguments of the counsel for the defendant were on the other hand able, vigorous and logical. The result was an acquittal upon all the charges; unanimously on the article which charged his failure to follow, on Callender's trial, the law of Virginia as to bail; by a majority of 30 to 4 on that which charged that in the same case he had refused to follow the law of Virginia pro-

viding for the adjournment of criminal trials; and by a minority of more than one-third in his favor upon all other articles. The highest vote against him was 19 to 15 on the article in relation to his charge to the grand jury at Baltimore. The majority of the dominant party in the Senate was then more than two-thirds; but the manner in which the impeachment was conducted, and the fear that a conviction would result in further attacks on the Supreme Court of the United States were undoubtedly the reasons that induced a number of the Northern followers of Jefferson to vote for an acquittal. It is not likely that similar offenses, if committed by a judge at the present day, would remain unpunished. The result of the impeachment was, however, in one respect beneficial. Chase was harmless during the short period which he survived upon the bench.[19]

The next impeachment trial was that of James H. Peck, judge of the District Court of the United States for the District of Missouri, in 1830 and 1831. A large number of suits against the United States founded upon Spanish land claims were pending in his court. After an opinion in favor of the United States, in a suit against them by the widow and heirs of Antoine Soulard, in 1825, Luke Edward Lawless, the plaintiff's counsel, published an anonymous letter in a newspaper in which he temperately, and with no more unfairness than is usual in newspaper arguments, pointed

[19] Report of the Trial of the Hon. Samuel Chase, one of the Associate Justices of the Supreme Court of the United States, before the High Court of Impeachment, composed of the Senate of the United States, for charges exhibited against him by the House of Representatives, in the name of themselves, and of all the People of the United States, for High Crimes & Misdemeanors, supposed to have been by him committed; with the necessary Documents and Official Papers, from his Impeachment to final Acquittal. Taken in Shorthand, by Charles Evans, and the Arguments of Counsel revised by them from his Manuscript. Baltimore: Printed for Samuel Butler and George Keatinge, 1805, pp. 268, with Appendix containing the pleadings and exhibits, pp. 68. Trial of Samuel Chase, an Associate Justice of the Supreme Court of the United States, impeached by the House of Representatives for High Crimes and Misdemeanors, taken in Shorthand by Samuel H. Smith and Thomas Lloyd, vol. i, pp. 387, and vol. ii, pp. 493, Washington City. Printed for Samuel H. Smith, 1805. History of the United States by Henry Adams, vol. ii, pp. 148–159, 218–244. History of the United States by John Bach McMaster, vol. iii, pp. 162, 168, 173, 181, 182.

out certain errors into which he claimed the judge had fallen when rendering that decision. The decision was subsequently reversed by the Supreme Court of the United States.[20] Judge Peck, as soon as he read the article, brought Lawless before him by an attachment, abused him for some time in open court, held him guilty of contempt and ordered his imprisonment for twenty-four hours and suspension from the bar of that court for eighteen calendar months, the result of which was to practically prevent him from any further prosecution of Spanish land-claims, since the time allowed for their prosecution expired during or shortly after his term of punishment. Lawless immediately complained to the House of Representatives. In 1826, the House Committee on the Judiciary, one of whom was Daniel Webster, reported that the petitioner should have leave to withdraw. Two years later, the petition was again presented and referred to the Judiciary Committee, but no report was made. Finally, in 1829, when the matter was again referred to them, the Judiciary Committee reported in favor of an impeachment, which was accordingly voted and tried. The managers of the House were James Buchanan, afterwards President of the United States, Henry R. Storrs and Ambrose Spencer of New York, George McDuffie of South Carolina and Charles A. Wickliffe of Kentucky. The counsel for the respondent were William Wirt and Jonathan Meredith. The case was tried with great ability on both sides. The best discussion on the subject of impeachable offenses with which the writer is acquainted may be found in the arguments on the trial, especially in those of Wickliffe, Buchanan and Wirt. It appears clearly that the English authorities justified Judge Peck in punishing a criticism upon his decision as a contempt of court. It seemed to the Senate that he was at least justified in assuming that such power existed; and that there was no such clear proof of malice in its exercise as would justify his conviction. He was consequently acquitted by a vote of 22 of guilty to 21 of not guilty. Daniel Webster voted with the majority, and Hayne of South Carolina with the minority.[21]

[20] Soulard v. U. S., 4 Peters, 510; s. c. 10 Peters, 100.

[21] Report of the Trial of James H. Peck, Judge of the United States District Court for the District of Missouri, before the Senate of the United States, on an impeachment preferred by the House of Representa-

The result was the passage of a law limiting the power of the Courts of the United States to punish for contempt to

"the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in the official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts."[22]

When the Southern Confederacy was formed, S. H. Humphreys, district judge of the United States for the district of Tennessee, accepted and discharged the duties of a similar position under the Confederate Government without resigning the office held by him under the United States. He was consequently impeached and tried before the Senate in June, 1862. The articles charged him with a public speech inciting revolt and rebellion against the Constitution and Government of the United States, and a public declaration therein of the right of secession; with support, advocacy and agreement in the ordinance of secession; with organizing armed rebellion against the United States; with joining in a conspiracy to oppose by force the authority of the Government of the United States; with a refusal to hold court; and with unlawfully acting as judge of the Confederate District Court, in which charge there were three specifications of unlawful arrest, imprisonment and confiscation. Judge Humphreys was served by leaving the process at his house and by publication. He made no appearance and was tried in his absence, in the same manner as if a plea of not guilty had been entered. Amongst other witnesses in support of the impeachment were Andrew Johnson, who was subsequently impeached when President of the United States, and the well-known Parson Brownlow, afterwards governor of Tennessee. The judge was convicted on all the charges except the specification concerning

tives against him for High Misdemeanors in office. By Arthur J. Stansbury, Boston. Published by Hilliard, Gray & Co., 1833, pp. 592.

[22] Act of March 2, 1831, 4 St. at L., p. 487; U. S. Rev. St., § 725; Foster's Federal Practice, § 341. This statute was introduced by Buchanan, and was suggested by a similar statute passed in Pennsylvania after the acquittal of the judges who were impeached for the imprisonment of Passmore. See Appendix to this volume. Similar statutes have been passed in many of the different States.

the arrests and confiscation; sentenced to removal and disqualification to hold any office.[23]

The impeachment trial of President Johnson is the most remarkable event in the annals of jurisprudence. Never before had an attempt been made to remove the chief executive of a nation under the forms of law. Despotism tempered by assassination had prevailed in many countries. In England and in France, kings had been given the form of a trial before their execution; but in each case the tribunal which pronounced the condemnation had no foundation in law nor jurisdiction over the accused, and the proceedings were as irregular and as destitute of legal sanction as those before the lynch courts which condemn cattle-thieves in our frontier States. Then, for the first time, did a court of justice with full jurisdiction determine whether the chief executive magistrate of a nation had committed such offenses as justified his removal from office. And although the accused was obnoxious to a large majority of the people, the tribunal over which the Chief-Justice of the United States presided paid due respect to the solemnity of the occasion, kept the proceedings free from all unfairness and irregularity, and the President was acquitted by the votes of men with no sympathy, for his feelings, his political tenets, or his personal character.

The assassination of Lincoln displayed for the third time the weakness of that part of the Constitution which regulates the succession to the presidency. Andrew Johnson, a man of coarse habits and defective education, had been nominated with him as a mark of sympathy with the Southern loyalists. Formerly a Democrat with strong views on the subject of State rights, it was only natural that he should sympathize with his neighbors in the South and lack harmony with the measures adopted by the victorious North for the reconstruction of the Union and the government of the States that had formed the Southern Confederacy. Soon after his accession to power, he collided with both Houses of Congress; and by the use of the powers of appointment, pardon and veto, did his best to strengthen his own position.[24] Two-thirds of both

[23] Trial of Judge Humphreys, Congressional Globe, 2d Session, 37th Congress, Part IV, pp. 2942-2953.

[24] See *supra*, § 38.

Houses of Congress enacted law after law over his veto. So it seemed as if his tenure of office depended upon their will.

On January 7th, 1867, James M. Ashley of Ohio submitted the following preamble and resolution, which were passed by a large majority of the House of Representatives: —

"I do impeach Andrew Johnson, Vice-President and acting President of the United States, of high crimes and misdemeanors. I charge him with a usurpation of power and violation of law: In that he has corruptly used the appointing power; in that he has corruptly used the pardoning power; in that he has corruptly used the veto power; in that he has corruptly disposed of public property of the United States; in that he has corruptly interfered in elections, and committed acts and conspired with others to commit acts, which, in contemplation of the Constitution, are high crimes and misdemeanors.

"*Therefore, be it resolved*, That the Committee on the Judiciary be, and they are hereby, authorized to inquire into the official conduct of Andrew Johnson, Vice-President of the United States, discharging the powers and duties of the office of President of the United States, and to report to this House whether, in their opinion, the said Andrew Johnson, while in said office, has been guilty of acts which were designed or calculated to overthrow, subvert, or corrupt the Government of the United States, or any department or officer thereof; and whether the said Andrew Johnson has been guilty of any act, or has conspired with others to do acts, which, in contemplation of the Constitution, are high crimes or misdemeanors, requiring the interposition of the constitutional powers of this House; and that said committee have power to send for persons and papers and to administer the customary oath to witnesses."

A month later, the Committee on the Judiciary reported that they had examined a large number of witnesses and documents, but not having completed the investigation, deemed it inexpedient to submit any conclusion beyond the statement that sufficient testimony had been brought to its notice to justify and admit a further prosecution of the investigation. On March 4th of the same year, a new Congress assembled. On the motion of Mr. Ashley, the House resolved that the Judiciary Committee when appointed should continue the investigation authorized by the resolution passed during the last session of the former Congress. In November, the reports of the Committee were presented. The majority reported a resolution directing the impeachment of President

Johnson because of his failure to call a special session of Congress on the final surrender of the Confederate forces, his acts in recognizing without statutory authority the governments in the States which had been the seat of the rebellion, his public substantial denial of the right of Congress to provide for the Reconstruction, his abuse of the powers of veto, appointment, removal, and pardon, his attempts to prevent the ratification of the Fourteenth Amendment, his public statements encouraging resistance to the scheme of Reconstruction directed by Congress, his disposition of captured railroads and other property, and his use of the army to disperse a lawful assembly of citizens in Louisiana.

A minority, which was composed of Republicans as well as Democrats, submitted two reports with a resolution directing that the committee be discharged from further consideration of the proposed impeachment, and that the subject be laid upon the table. The proposed impeachment was voted down by a large majority.[25] The proceedings had accomplished for the time their object — the intimidation of the President into the execution of the Reconstruction acts which he considered unconstitutional.

Meanwhile a bitter quarrel was brewing between Johnson and Stanton, who was then Secretary of War, holding over since Lincoln's administration. A year before, Congress had passed over the veto of the President the Tenure of Office Act. This placed a restraint upon the removal of officers by the Executive, which in the opinion of many of the best lawyers, was unconstitutional.[26]

With an evident view to an impeachment in case of disobedience to the act, a section had been added, making such disobedience a high misdemeanor. The act provided,

"That every person holding any civil office to which he has been appointed by and with the advice and consent of the Senate and every person who shall hereafter be appointed to any such office, and shall

[25] McPherson, History of the Reconstruction, pp. 187-190; Blaine, Twenty Years in Congress, vol. ii, pp. 340-347; House Reports, 40th Cong., 1st Session, No. 7, Nov. 25, 1867. The minority report of James F. Wilson and Frederick E. Woodbridge, both of whom were Republicans, contains an able discussion of the subject of impeachment. *Supra*, § 38.

[26] This subject will be discussed subsequently under the Executive Power.

become duly qualified to act therein, is, and shall be, entitled to hold such office until a successor shall have been in like manner appointed and duly qualified, except as herein otherwise provided: Provided, That the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster General and the Attorney-General shall hold their offices respectively for and during the term of the President by whom they may have been appointed, and for one month thereafter, subject to removal by and with the advice and consent of the Senate."

"That when any officer appointed as aforesaid, excepting judges of the United States courts, shall, during the recess of the Senate, be shown, by evidence satisfactory to the President, to be guilty of misconduct in office, or crime, or for any reason shall become incapable or legally disqualified to perform its duties, in such case, and in no other, the President may suspend such officer, and designate some suitable person to perform temporarily the duties of such office until the next meeting of the Senate, and until the case shall be acted upon by the Senate; and such person, so designated, shall take the oaths and give the bonds required by law to be taken and given by the person duly appointed to fill such office; and in such case it shall be the duty of the President, within twenty days after the first day of such next meeting of the Senate, to report to the Senate such suspension, with the evidence and reasons for his action in the case and the name of the person so designated to perform the duties of such office. And if the Senate shall concur in such suspension, and advise and consent to the removal of such officer, they shall so certify to the President, who may thereupon remove such officer, and, by and with the advice and consent of the Senate, appoint another person to such office. But if the Senate shall refuse to concur in such suspension, such officer so suspended shall forthwith resume the functions of his office, and the powers of the person so performing its duties in his stead shall cease, and the official salary and emoluments of such officer shall, during such suspension, belong to the person so performing the duties thereof, and not to the officer so suspended: Provided, however, that the President, in case he shall become satisfied that such suspension was made on insufficient grounds, shall be authorized, at any time before reporting such suspension to the Senate as above provided, to revoke such suspension and reinstate such officer in the performance of the duties of his office."

"That the President shall have power to fill all vacancies which may happen during the recess of the Senate, by reason of death or resignation, by granting commissions which shall expire at the end of their next session thereafter. And if no appointment, by and with the ad-

vice and consent of the Senate, shall be made to such office so vacant or temporarily filled as aforesaid during such next session of the Senate, such office shall remain in abeyance without any salary, fees, or emoluments attached thereto, until the same shall be filled by appointment thereto, by and with the advice and consent of the Senate; and during such time all the powers and duties belonging to such office shall be exercised by such other officer as may by law exercise such powers and duties in case of a vacancy in such office." [27]

As first introduced and passed in the Senate, the bill expressly excepted cabinet officers from its operation, and an amendment to include them was voted down. In the House such an amendment was adopted after considerable discussion.[28] The Senate refused by a large majority to concur in it. Upon a conference a substitute was adopted declaring that the members of the cabinet

"shall hold their office respectively for and during the term of the President by whom they may have been appointed, and for one month thereafter subject to removal by and with the advice and consent of the Senate."

In the course of the debate, Senator Sherman, who was a member of the conference committee, said: —

"We provide that a cabinet minister shall hold his office, not for a fixed term, not until the Senate shall consent to his removal, but as long as the power that appoints him holds the office." [29]

After the passage of the bill, it was claimed, however, by Stanton and his supporters, that Johnson had no power to remove the cabinet officers, including the Secretary of War, who were holding over after the death of Lincoln, and had not been reappointed. On August 5th, 1867, the President wrote to Stanton: —

"Public considerations of a high character constrain me to say that your resignation as Secretary of War will be accepted."

Mr. Stanton replied immediately acknowledging the receipt of the letter and adding: —

"I have the honor to say that public considerations of a high char-

[27] 14 St. at L., p. 430.

[28] Blaine, Twenty Years in Congress, vol. ii, pp. 269–274.

[29] Ibid., pp. 353–356.

acter which alone have induced me to continue at the head of this Department, constrain me not to resign the Secretaryship of War before the next meeting of Congress."

On August 12th, 1867, Johnson suspended Stanton from his office under the Tenure of Office Act, and appointed General Grant secretary of war *ad interim*. Stanton replied denying the President's right to suspend him without the advice and consent of the Senate, and without legal cause: —

"but inasmuch as the general commanding the armies of the United States has been appointed *ad interim* and has notified me that he has accepted the appointment, I have no alternative but to submit under protest to superior force."

When the Senate met in December, the President notified it of the suspension, with his reasons. The Senate refused to concur in the same. Thereupon, General Grant at once surrendered the War Department to Stanton. The President accused Grant of bad faith in this; and claimed, what Grant denied, that he had promised to hold the office and thus aid in bringing the case before the Supreme Court of the United States for determination.[80]

On February 21st, 1868, the President wrote the following letters, which were the immediate cause of his impeachment: —

"EXECUTIVE MANSION,
WASHINGTON, D.C., February 21, 1868.

SIR: By virtue of the power and authority vested in me as President by the Constitution and laws of the United States, you are hereby removed from office as Secretary of the Department of War, and your functions as such will terminate upon receipt of this communication. You will transfer to Brevet Major General Lorenzo Thomas, Adjutant General of the army, who has this day been authorized and empowered to act as Secretary of War *ad interim*, all records, books, papers, and other public property now in your custody and charge.

Respectfully yours,
ANDREW JOHNSON.

Hon. E. M. STANTON,
Washington, D.C."

"EXECUTIVE MANSION,
WASHINGTON, D.C., February 21, 1868.

SIR: Hon. Edwin M. Stanton having been this day removed from

[80] Blaine, Twenty Years in Congress, vol. ii, pp. 348–351.

office as Secretary for the Department of War, you are hereby authorized and empowered to act as Secretary of War *ad interim*, and will immediately enter upon the discharge of the duties pertaining to that office. Mr. Stanton has been instructed to transfer to you all the records, books, papers and other public property now in his custody and charge.

Respectfully yours,

ANDREW JOHNSON.

To

Brevet Major General LORENZO THOMAS,
Adjutant General, United States Army,
Washington, D.C."

The President informed the Senate of his action upon the same day. Stanton refused to surrender his office to General Thomas, who demanded possession and remained in control of the Department. The Senate forthwith passed a resolution declaring, —

"that under the Constitution and Laws of the United States, the President has no power to remove the Secretary of War, or to designate any other officer to perform the duties of that office *ad interim*."

On the same day a resolution for the impeachment of the President was introduced in the House of Representatives and referred to the Committee on Reconstruction. The next morning Thomas was arrested before breakfast by the marshal of the district under a warrant issued by the Chief-Justice of the District Supreme Court, upon an affidavit by Stanton, charging a violation of the Tenure of Office Act. A writ of habeas corpus was immediately issued by the same judge that granted the warrant, and upon its return that day Thomas was discharged from custody upon giving five thousand dollars bail.[31]

Meanwhile the Committee on Reconstruction reported to the House a recommendation that Johnson be impeached. The debate occupied the entire day until the adjournment of the House to February 24th, the intervening day being Sunday. On Monday, February 24th, 1868, a resolution for the impeachment of President Johnson passed the House of Representatives by a strict party vote of 126 to 47. The following members of the House were elected managers of the impeachment: John A. Bingham,

[31] Johnson's Impeachment Trial, vol. i, 427–441, 515–517.

George S. Boutwell, John F. Wilson, Benjamin F. Butler, John A. Logan and Thaddeus Stevens.[32]

The articles of impeachment were eleven in number. They charged in eight different articles, which stated the same facts in different legal form, the attempted removal of Stanton and appointment of Thomas as a violation of the Tenure of Office Act, and "An act to define and punish certain conspiracies, approved July 31, 1861." The ninth article charged that on February 22d, 1868, the President brought before himself, William H. Emery, a General of the Army in command at the department at Washington, and instructed him that the act, which provided that "all orders and instructions in relation to military operations issued by the President or Secretary of War, shall be issued through the General of the Army, and in case of his inability through his next in rank,"[33] was unconstitutional; with intent thereby to induce Emery in his official capacity as the commander of the department at Washington, to violate the provisions of the said act and to take and receive, act upon and obey such orders as he the said Andrew Johnson might make and give, and which should not be issued through the General of the army of the United States, according to the provisions of said act, and with the further intent thereby to enable the President to prevent the execution of the Tenure of Office Act and to unlawfully prevent Stanton from continuing to hold the office of Secretary of War.

"That said Andrew Johnson, President of the United States, unmindful of the high duties of his office, and the dignity and proprieties thereof, and of the harmony and courtesies which ought to exist and be maintained between the executive and legislative branches of the government of the United States, designing and intending to set aside the rightful authority and powers of Congress, did attempt to bring into disgrace, ridicule, hatred, contempt, and reproach the Congress of the United States, and the several branches thereof, to impair and destroy the regard and respect of all the good people of the United States for the Congress and legislative powers thereof, (which all officers of the government ought inviolably to preserve and maintain), and to excite the odium and resentment of all the good people of the

[32] Blaine, Twenty Years in Congress, vol. ii, pp. 350–363.

[33] *Supra*, § 38, over note 95.

United States against Congress and the laws by it duly and constitutionally enacted; and in pursuance of his said design and intent, openly and publicly, and before divers assemblages of the citizens of the United States, convened in divers parts thereof to meet and receive said Andrew Johnson as the Chief Magistrate of the United States, did, on the eighteenth day of August, in the year of our Lord one thousand eight hundred and sixty-six, and on divers other days and times, as well before as afterward, make and deliver, with a loud voice, certain intemperate, inflammatory, and scandalous harangues, and did therein utter loud threats and bitter menaces, as well against Congress as the laws of the United States, duly enacted thereby, amid the cries, jeers, and laughter of the multitudes then assembled and in hearing, which are set forth in the several specifications hereinafter written, in substance and effect, that is to say:

"*Specification First.* — In this, that at Washington, in the District of Columbia, in the Executive Mansion, to a committee of citizens who called upon the President of the United States, speaking of and concerning the Congress of the United States, said Andrew Johnson, President of the United States, heretofore, to wit, on the eighteenth day of August, in the year of our Lord one thousand eight hundred and sixty-six, did, in a loud voice, declare, in substance and effect, among other things, that is to say:

"'So far as the executive department of the government is concerned, the effort has been made to restore the Union, to heal the breach, to pour oil into the wounds which were consequent upon the struggle, and (to speak in common phrase) to prepare, as the learned and wise physician would, a plaster healing in character and co-extensive with the wound. We thought, and we think, that we had partially succeeded; but, as the work progresses, as reconstruction seemed to be taking place, and the country was becoming reunited, we found a disturbing and marring element opposing us. In alluding to that element I shall go no further than your convention, and the distinguished gentleman who has delivered to me the report of its proceedings. I shall make no reference to it that I do not believe the time and occasion justify.

"'We have witnessed in one department of the government every endeavor to prevent the restoration of peace, harmony and union. We have seen hanging upon the verge of the government, as it were, a body called, or which assumes to be, the Congress of the United States, while, in fact, it is a Congress of only a part of the States. We have seen this Congress pretend to be for the Union, when its every step and

act tended to perpetuate disunion and make a disruption of the States inevitable. * * * We have seen Congress gradually encroach, step by step, upon constitutional rights, and violate, day after day, and month after month, fundamental principles of the government. We have seen a Congress that seemed to forget that there was a limit to the sphere and scope of legislation. We have seen a Congress in a minority assume to exercise power which, allowed to be consummated, would result in despotism or monarchy itself.'

"*Specification Second.* — In this, that at Cleveland, in the State of Ohio, heretofore, to wit, on the third day of September, in the year of our Lord one thousand eight hundred and sixty-six, before a public assemblage of citizens and others, said Andrew Johnson, President of the United States, speaking of and concerning the Congress of the United States, did, in a loud voice, declare, in substance and effect, among other things, that is to say:

"'I will tell you what I did do. I called upon your Congress that is trying to break up the government.'

* * * * * * * *

"'In conclusion, besides that, Congress had taken much pains to poison their constituents against him. But what had Congress done? Have they done anything to restore the union of these States? No; on the contrary, they had done everything to prevent it; and because he stood now where he did when the rebellion commenced, he had been denounced as a traitor. Who had run greater risks or made greater sacrifices than himself? But Congress, factious and domineering, had undertaken to poison the minds of the American people.'

"*Specification Third.* — In this, that at St. Louis, in the State of Missouri, heretofore, to wit, on the eighth day of September, in the year of our Lord one thousand eight hundred and sixty-six, before a public assemblage of citizens and others, said Andrew Johnson, President of the United States, speaking of and concerning the Congress of the United States, did, in a loud voice, declare in substance and effect, among other things, that is to say:

"'Go on. Perhaps if you had a word or two on the subject of New Orleans you might understand more about it than you do. And if you will go back — if you will go back and ascertain the cause of the riot at New Orleans, perhaps you will not be so prompt in calling out New Orleans. If you will take up the riot at New Orleans, and trace it back to its source or its immediate cause, you will find out who is responsible for the blood that was shed there. If you will take up the riot at New Orleans and trace it back to the radical Congress, you will find that the

riot at New Orleans was substantially planned. If you will take up the proceedings in their caucuses you will understand that they there knew that a convention was to be called which was extinct by its power having expired; that it was said that the intention was that a new government was to be organized, and on the organization of that government the intention was to enfranchise one portion of the population, called the colored population, who had just been emancipated, and at the same time disfranchise white men. When you design to talk about New Orleans you ought to understand what you are talking about. When you read the speeches that were made, and take up the facts on the Friday and Saturday before that convention sat, you will there find that speeches were made incendiary in their character, exciting that portion of the population, the black population, to arm themselves and prepare for the shedding of blood. You will also find that that convention did assemble in violation of law, and the intention of that convention was to supersede the reorganized authorities in the State government of Louisiana, which had been recognized by the government of the United States; and every man engaged in that rebellion in that convention, with the intention of superseding and upturning the civil government which had been recognized by the government of the United States, I say that he was a traitor to the Constitution of the United States, and hence you find that another rebellion was commenced, *having its origin in the radical Congress.*

* * * * * * * *

"'So much for the New Orleans riot. And there was the cause and the origin of the blood that was shed, and every drop of blood that was shed is upon their skirts, and they are responsible for it. I could test this thing a little closer, but will not do it here to-night. But when you talk about the cause, and consequences that resulted from proceedings of that kind, perhaps, as I have been introduced here, and you have provoked questions of this kind, though it does not provoke me, I will tell you a few wholesome things that have been done by this radical Congress in connection with New Orleans and the extension of the elective franchise.

"I know that I have been traduced and abused. I know it has come in advance of me here as elsewhere, that I have attempted to exercise an arbitrary power in resisting laws that were intended to be forced upon the government; that I had exercised that power; that I had abandoned the party that elected me, and that I was a traitor, because I exercised the veto power in attempting, and did arrest for a time, a bill that was called a 'Freedman's Bureau' bill; yes, that I was

a traitor. And I have been traduced, I have been slandered, I have been maligned, I have been called Judas Iscariot, and all that. Now, my countrymen, here to-night, it is very easy to indulge in epithets; it is easy to call a man Judas and cry out traitor; but when he is called upon to give arguments and facts he is very often found wanting. Judas Iscariot — Judas. There was a Judas, and he was one of the twelve apostles. Oh! yes, the twelve apostles had a Christ. The twelve apostles had a Christ, and he never could have had a Judas unless he had had twelve apostles. If I have played the Judas, who has been my Christ that I have played the Judas with? Was it Thad. Stevens? Was it Wendell Phillips? Was it Charles Sumner? These are the men that stop and compare themselves with the Saviour; and everybody that differs with them in opinion, and to try to stay and arrest their diabolical and nefarious policy, is to be denounced as a Judas. . . .'

"'Well, let me say to you, if you will stand by me in this action, if you will stand by me in trying to give the people a fair chance — soldiers and citizens — to participate in these offices, God being willing, I will kick them out. I will kick them out just as fast as I can.'

"Let me say to you, in concluding, that what I have said I intended to say. I was not provoked into this, and I care not for their menaces, the taunts, and the jeers. I care not for threats. I do not intend to be bullied by my enemies nor overawed by my friends. But, God willing, with your help, I will veto their measures when any of them come to me.'

"Which said utterances, declarations, threats, and harangues, highly censurable in any, are peculiarly indecent and unbecoming in the Chief Magistrate of the United States, by means whereof said Andrew Johnson has brought the high office of the President of the United States into contempt, ridicule, and disgrace to the great scandal of all good citizens, whereby said Andrew Johnson, President of the United States, did commit, and was then and there guilty of a high misdemeanor in office."[84]

"That said Andrew Johnson, President of the United States, unmindful of the high duties of his office, and of his oath of office, and in disregard of the Constitution and laws of the United States, did, heretofore, to wit, on the eighteenth day of August, A.D. eighteen hundred and sixty-six, at the city of Washington and the District of Columbia, by public speech, declare and affirm, in substance, that the thirty-ninth Congress of the United States was not a Congress of the United States authorized by the Constitution to exercise legislative power under the

[84] Johnson's Impeachment Trial, Article X, pp. 8-9.

same, but, on the contrary, was a Congress of only part of the States, thereby denying, and intending to deny, that the legislation of said Congress was valid or obligatory upon him, the said Andrew Johnson, except in so far as he saw fit to approve the same, and also thereby denying, and intending to deny, the power of the said thirty-ninth Congress to propose amendments to the Constitution of the United States; and in pursuance of said declaration, the said Andrew Johnson, President of the United States, afterwards, to wit, on the twenty-first day of February, A.D. eighteen hundred and sixty-eight, at the city of Washington, in the District of Columbia, did, unlawfully, and in disregard of the requirements of the Constitution, that he should take care that the laws be faithfully executed, attempt to prevent the execution of an act entitled 'An act regulating the tenure of certain civil offices,' passed March second, eighteen hundred and sixty-seven, by unlawfully devising and contriving, and attempting to devise and contrive means by which he should prevent Edwin M. Stanton from forthwith resuming the functions of the office of Secretary for the Department of War, notwithstanding the refusal of the Senate to concur in the suspension theretofore made by said Andrew Johnson of said Edwin M. Stanton from said office of Secretary for the Department of War; and also, by further unlawfully devising and contriving, and attempting to devise and contrive means, then and there, to prevent the execution of an act entitled 'An act making appropriations for the support of the army for the fiscal year ending June thirtieth, eighteen hundred and sixty-eight, and for other purposes,' approved March second, eighteen hundred and sixty-seven; and, also, to prevent the execution of an act entitled 'an act to provide for the more efficient government of the rebel States,' passed March second, eighteen hundred and sixty-seven, whereby the said Andrew Johnson, President of the United States, did, then, to wit, on the twenty-first day of February, A.D. eighteen hundred and sixty-eight, at the city of Washington, commit, and was guilty of, a high misdemeanor in office." [35]

The defense of the President was managed with great tact and skill. He himself did not appear at the trial.[36] His leading

[35] Johnson's Impeachment Trial, Article XI, p. 10.

[36] "I had brought it to the attention of the board of managers that we should have Mr. Johnson brought in and placed at the bar of the Senate, — and required by the Senate to be tried according to the forms of the English law, — or as Judge Chase had been tried when Aaron Burr presided over the Senate, — and required by the presiding officer to stand until the Senate offered him a chair. But our board of managers

counsel, who introduced the testimony offered in his support, was the former attorney-general, Henry Stanbery, who resigned in order to defend him. He was an old Whig who had attained great eminence at the bar in Ohio. Having advised the President throughout the course of events which led to his impeachment, he was thoroughly familiar with all the arguments, decisions, and evidence that could be used in his defense. He possessed a remarkable faculty of clear and compact reasoning. Illustrations may be found in his arguments before the Supreme Court on constitutional questions when attorney-general, many of which are reported by Wallace. This proceeding was a fitting termination of his public life; for the Senate, after the trial, refused to confirm his renomination. So that he sacrificed his position by his devotion to his chief. Another was Benjamin R. Curtis, who, as Justice of the Supreme Court of the United States, had written the dissenting opinion in the Dred Scott case, which was the repository of the arguments in support of the constitutional views of the Free Soil party. Shortly after rendering that decision, he had resigned and returned to practice in Massachusetts, where, until his death, he was constantly retained in the cases of most importance, not only before the State Supreme Court, but also in other States, and before the Supreme Court of the United States. At his death, he was considered by his brethren in Massachusetts to be the leader of the American bar. His arguments on questions of law were famous for the manner in which he would present, without a superfluous word, every suggestion that could aid his cause. That which has been praised the most was his opening for the defense of President Johnson. It is said that as soon as he was retained by the President he purchased the English State Trials and read through the reports of all that had taken place before the House of Lords. With him was associated William M. Evarts, afterwards attorney-general, secretary of state, and senator of the United States. He was then the acknowledged leader of the bar of New York, where the competition is sharper than in any other place in the world. He possessed not only learning, but unusual tact in the management of a case, skill in

was too weak in the knees or back to insist upon this, and Mr. Johnson did not attend." (Butler's Book, p. 929.)

unfolding a legal argument and reiterating the same point in different language, together with wit to enliven it, and hold the attention, — faculties indispensable to great success before a large audience. To these talents he owed his triumphs in the greatest trials of his generation, which were the most important that the world has ever seen. He was on the winning side on the impeachment trial of President Johnson, before the Electoral Commission, and at the Geneva Arbitration. The close of his political career was marked by the passage of the Evarts Act; which relieved the Supreme Court of the United States from the accumulation of work, that made it impossible for them to complete and discharge the duties imposed on them by statute, and created the Circuit Courts of Appeals. He, like Curtis, was a Republican.

Although it was said by many that his concluding speech contained not a single argument that had not been advanced in the opening of Curtis,[37] which was so admirable as a presentation of questions of law to trained legal minds; yet its wit, its appeals to the motives which often unconsciously influence men's judgments, and at times its eloquence, made it undoubtedly more effective upon the ordinary senator.

The famous Jeremiah S. Black was at one time counsel for the President, but at the last moment he withdrew. Two Democratic lawyers were retained. William S. Groesbeck of Cincinnati, Ohio, who had been a Democratic representative in Congress, contributed a masterly argument upon the legal questions in the case. A confidential friend from his own State, Tennessee, Thomas A. R. Nelson, was added by Johnson in order that the President might present those views of the Constitution which he himself had most at heart; although in the conduct of the trial, no other attention was paid to them.

Great pains were taken to conciliate public opinion. On the day following Stanton's removal, General Thomas Ewing, formerly a senator from Ohio, was nominated as his successor. Ewing's nomination was of course rejected; but his position in the Repub-

[37] "It is due to the truth of history to say, as heretofore remarked, that after he had presented the case of his client, in my judgment, nothing *more* was said in his behalf, although in the five or six closing speeches presented by his other counsel, much *else* was said." (Ibid., p. 930.)

lican party, and his war record were such as to indicate to the public that Johnson had no intention to corrupt the army and use military force to aid the South in their struggle for representation. Throughout the trial all of his counsel but Nelson confined themselves to the presentation of the questions of statutory and constitutional law raised by the articles; to the construction of the Tenure of Office Act, the power of Congress to enact it, and the power of the Senate to impeach a President for bad taste in his speeches on the stump; upon all of which public opinion in the North was not excited; thus avoiding the questions as to the power of the House and the Senate to exclude representatives from the States which had lately been in rebellion, the constitutionality of the Reconstruction Acts, and other questions as to which the voters had recently shown that they were not in sympathy with the administration. At the opening of the case, before the answer of the President was filed, Senator Davis of Kentucky moved the adoption of the following order: —

"The Constitution having vested the Senate with the sole power to try the articles of impeachment of the President of the United States preferred by the House of Representatives, and having also declared that 'the Senate of the United States shall be composed of two Senators from each State chosen by the legislatures thereof,' and the States of Virginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi, Arkansas, Louisiana, and Texas, having each by its legislature chosen two senators who have been and continue to be excluded by the Senate from their seats respectively, without any judgment by the Senate against them personally and individually on the points of their elections, returns and qualifications, it is

"*Ordered*, That a Court of Impeachment for the trial of the President cannot be legally and constitutionally formed while the senators from the States aforesaid are thus excluded from the Senate; and this case is continued until the Senators from these States are permitted to take their seats in the Senate, subject to all constitutional exceptions to their elections, returns, and qualifications severally."

The counsel for the President offered no argument and no concurrence in this motion, which was defeated by a vote of 49 to 2.[38]

[38] Johnson's Impeachment Trial, p. 36. The noes were Garrett Davis, and McCreery, of Kentucky.

Chief-Justice Chase presided with great impartiality; and his decisions on points of evidence were frequently overruled by the Republican majority of the Senate. The answer of the President was short and clear. It rested his defense upon the legal questions which have been stated above, and which were undoubtedly the grounds of his acquittal. The case was opened by General Butler, one of the managers of the House of Representatives.[39] His argument was extremely adroit, and was accompanied by a learned brief upon the law of impeachable crimes and misdemeanors, prepared by William Lawrence, a member of Congress from Ohio, which is of great value to all students of the subject. Butler's examination of the witnesses of the House was masterly, both for what he brought out, and for the manner in which he displayed to the audience and public matters reflecting upon the President, which were excluded as incompetent.[40] The honors

[39] "When the board of managers met, Thaddeus Stevens of Pennsylvania, the 'great Commoner,' as he was styled, wished to be chosen chairman of the board, as he had drawn up one of the articles of impeachment. While he was a very great man, he was very erratic, and the majority of the board was in favor of the appointment of the Hon. Geo. S. Boutwell, of Massachusetts, afterwards Secretary of the Treasury, or of the Hon. John A. Bingham, of Ohio. And I suppose it is no harm to state at this day, that considerable acrimony arose between the managers on the subject. I took no part in this because I was desirous of having my own place in the first presentation of the case to the Senate. This would insure my putting the evidence before the Senate in the trial. The House insisted upon immediate prosecution. We had but three days then in which to get our case ready and prepare the opening arguments for its presentation before the highest court of justice in the land. We spent most of the morning over the question of selecting the chief manager, — in selecting the Hon. Thaddeus Stevens, chairman of the board, who was to make the closing argument in behalf of the House. That having been settled, I said: 'But who is to make the opening argument, and put the case in form for presentation in the Senate? There are less than three days in which to prepare it. Who is anxious for that place?' There were not many candidates for this labor, and I said: 'Very well, I suppose, as usual, the opening of the case will fall upon the youngest counsel, and that is myself.' The members of the board unanimously said: 'Will you undertake it?' 'Yes, if the board desires it, and no one else will have it, I will.' It was agreed upon that I should prepare the case and make the opening argument, and I thought that it would not be of much consequence after that was done who did the rest. And thus I became the leading figure of the impeachment, for better or worse." (Butler's Book, pp. 927–928.)

[40] "The morning after the opening of the argument, I asked one of the board of managers, a very clever gentleman, to have the kindness to offer a piece of written evidence, but his

of the impeachment were carried off by him; although the concluding argument of John A. Bingham was perhaps that which displayed the most oratorical ability. Butler opened the case for the House on March 30th, and the trial continued almost daily until May 6th, 1868, when the whole case was submitted to the Senate. A few days were occupied in the settlement of the form of the question and the practice upon the judgment, and there was a short adjournment on account of the illness of one of the senators. At the Senate conference it appeared that two at least of those who were in favor of a conviction were unwilling to sustain the article which charged a violation of the Tenure of Office Act, since they believed that Stanton's case was excepted by its proviso.[41] For the test vote, accordingly, they selected the concluding article, which included several charges, a belief in the sufficiency of any one of which might be sufficient to satisfy the conscience of a senator who voted "guilty," to the whole.[42] On May 16th that vote was taken and the respondent was acquitted by the votes of nineteen senators "not guilty," against thirty-five, "guilty"; the majority lacking only one of the requisite two-thirds. The President of the Senate, Benjamin F. Wade of Ohio, who would have succeeded Johnson upon a conviction, voted guilty.

An adjournment was taken until the 26th; and meanwhile great pressure was brought upon the recalcitrant Republicans, one of whom, Senator Ross of Kansas, it was believed, had been won over to the side of conviction.[43] But the votes were taken upon the second and third articles with precisely the same re-

hand shook so while he was examining the paper, that I concluded to relieve him. As for myself, I came to the conclusion to try the case upon the same rules of evidence, and in the same manner as I should try a horse case, and I knew how to do that. I therefore was not in trepidation. When I discussed that question with the managers they seemed to be a good deal cut up. They said: 'This is the greatest case of the times, and it is to be conducted in the highest possible manner.' 'Yes,' I said, 'and that is according to law; that is the only way I know how to conduct a case.' Finding me incorrigible, they left me to my devices." (Butler's Book, pp. 929-930.)

[41] Political Leaders of the Reconstruction Period, by E. G. Ross, The Forum, vol. xx, pp. 218, 225; Opinion of Senator Sherman, Johnson's Trial, vol. iii, p. 1; Opinion of Senator Howe, ibid., p. 58.

[42] Johnson's Impeachment Trial, vol. ii, p. 484. McPherson, History of the Reconstruction, p. 282.

[43] Blaine, Twenty Years in Congress, vol. ii, p. 375. An attempt to

sult. The court then adjourned without a day, and the Chief Justice entered a judgment of acquittal upon these three articles. Twenty-nine senators afterwards filed opinions in justification of their votes. The minority included eight Democrats and four Republican supporters of the administration whose votes for an acquittal were in accordance with their political position. The scale was turned, however, by seven Republicans who had, hitherto, opposed the policy of the President ;[44] and who by this action sacrificed their hopes of a political future. For most of them disobeyed the instructions of their State legislatures or of the leaders of the State organizations of their party; and in consequence lost all chances of a re-election. The reputation of one or two may lend color to the suspicion that they were influenced by improper considerations. But the character and position of the rest, who thus in obedience to their oaths cast away the objects of their ambition, put the integrity of their motives beyond all question. Their judgment was given because their consciences would not permit judicial action in opposition to their convictions. And history has already pronounced her verdict that they saved the country from a precedent big with danger and vindicated the wisdom of those who made the Senate a court for the trial of impeachments.[45]

expel him on the charge of having sold his vote was afterwards projected, but abandoned. Political Leaders of the Reconstruction Period, by E. G. Ross, The Forum, vol. xx, p. 227.

[44] William Pitt Fessenden of Maine, Joseph S. Fowler of Tennessee, James W. Grimes of Iowa, John B. Henderson of Missouri, Edward G. Ross of Kansas, Lyman Trumbull of Illinois and Peter G. Van Wynkle of West Virginia.

[45] Blaine, who voted for the impeachment when in the House, eight years later pronounced his judgment that the proceedings were not justified and the acquittal proper (Blaine, Twenty Years in Congress, vol. ii, pp. 375-383). Mr. Justice Miller was of the same opinion (Lectures on the Constitution, p. 172). S. S. Cox in his Three Decades of Federal Legislation, pp. 582-593, gives an interesting account of an interview between the President and Senator Grimes of Iowa at the rooms of Reverdy Johnson, during the trial, when Andrew Johnson expressed his views of his political duty in such a manner as to convince the senator that his continuance in office would not be injurious to the country. Cox also claims to have influenced Henderson's vote. The official report is Trial of Andrew Johnson, President of the United States, before the Senate of the United States, on Impeachment for High Crimes and Misdemeanors. Published by Order of the Senate. Washington: Government Printing Office, 1868. Three volumes. Vol. i, pp. 741; vol. ii, pp. 498; vol. iii, pp. 401.

The next impeachment trial before the Senate of the United States would seem like an anti-climax, were it not for the disgraceful nature of the charge, the important constitutional question which it raised, and the wonderful ability which the counsel on both sides displayed.

In 1876, in the course of an investigation by a committee of the House of Representatives, it appeared that the Secretary of War, William W. Belknap, had for several years been receiving between $6,000 and $12,000 annually out of the proceeds of a post-tradership, the incumbent of which had been appointed by him. Belknap, as soon as the fact had been discovered, resigned, and his resignation was accepted by President Grant. Upon the same day, but a few hours later than the acceptance of the resignation, he was impeached. He was tried during the spring and summer of that year between April 5th and August 1st, when judgment was pronounced. The managers on the part of the House were Scott Lord of New York, J. Proctor Knott of Kentucky, W. T. Lynde of Wisconsin, John A. McMahon of Ohio, Elbridge G. Lapham of New York, and George Frisbie Hoar of Massachusetts. His counsel were Matthew H. Carpenter, formerly senator of the United States, Jeremiah S. Black, formerly attorney-general of the United States and justice of the Supreme Court of Pennsylvania, and Montgomery H. Blair. Five articles of impeachment were presented, each of which charged the transaction in different form, but in substance as the acceptance of bribes. A plea was filed to the jurisdiction upon the ground that, at the time of the impeachment, Belknap was not an officer of the United States. The plea was overruled by the vote of a majority of less than two-thirds. The counsel for the respondent refused to plead further, but the case continued under the Senate rules as if a plea of not guilty had been filed, the witnesses were examined and cross-examined, and arguments made upon the whole case by counsel for both sides. Upon the final vote, nearly all the senators who had voted in support of the plea, voted "not guilty" upon the ground that they had no jurisdiction, and consequently Belknap was acquitted, since the majority vote of guilty was less than two-thirds. All but one of the senators [46] who voted for an acquittal were members of the

[46] William W. Eaton of Connecticut. His successor was a Republican.

Republican party, to which Belknap belonged. A number of Republican senators, however, voted with the other Democrats in the Senate in favor of his conviction. The report of the trial is interesting, and the arguments of Hoar for the prosecution, and Carpenter and Black for the defense, are masterpieces of forensic eloquence.[47]

§ 91. Persons Subject to Impeachment.

The Constitution says: "The President, Vice-President, and all civil officers of the United States shall be removed from Office on Impeachment for and Conviction of Treason, Bribery or other high Crimes and Misdemeanors."[1] Upon Blount's impeachment it was claimed by the managers from the House of Representatives that these words were not restrictive of the power of impeachment conferred in the preceding article; and that private citizens or even State officers might be impeached[2] as in England, where

[47] Proceedings of the Senate sitting for the trial of William W. Belknap, Late Secretary of War, on the Articles of Impeachment exhibited by the House of Representatives, 44th Congress, 1st Session. Washington: Government Printing Office, 1876, pp. 1166. The questions of law are discussed *infra*, §§ 91-92.

§ 91. [1] Article II, Section 4.

[2] "The Constitution has said who shall have the power to impeach and who of trying impeachments. It has also limited the extent of the punishment. But it has not described the persons who shall be the objects of impeachment, nor defined the cases to which the remedy shall be confined. We cannot do otherwise, therefore, than presume, that upon these points we are designedly left to the regulations of the common law. Sir, in the very threshold, has not this law given us the foundation upon which we stand? Where have we looked for the form of the pleadings, which has brought the present question before the Court? And if, sir, a question of evidence should arise, as happened upon a former occasion, should we hesitate as to the law which ought to determine its competency? If we were asked, whether a greater looseness in pleadings on impeachment were not allowed, than in suits at law, we should answer in the affirmative; and if it were inquired, whether the rules of evidence were more lax, we should answer in the negative; and in such opinions, I trust, we should not be contradicted by the learned counsel of the party impeached, and yet, sir, the opinions could alone be collected from the rules of the common law. It is, perhaps, worthy of observation, that even as it regards those persons who are clearly liable to impeachment, there is no direct provision, which subjects them to it. Thus in the 4th section of the 2d article, which has the closest connection with the point, it has not said that the President, Vice-President, and civil officers, shall be liable to impeachment; but taking it for granted that they were liable at com-

the only limitation is that a commoner cannot be impeached for a

mon law, has introduced an imperative provision as to their removal upon conviction of certain crimes. The question, therefore, is, what persons, for what offences, are liable to be impeached at common law? And I am confident, as to this point, the learning and liberality of the counsel will save me the trouble of argument, or the citation of authorities, to establish the position, that the question of impeachability is a question of discretion only, with the Commons and Lords. Not that I mean to insist, that the Lords have legal cognizance of a charge of a capital crime against a commoner, but simply that all the King's subjects are liable to be impeached by the Commons, and tried by the Lords, upon charges of high crimes and misdemeanors. And this, sir, goes to the extent of the articles exhibited against William Blount. And for my part, I do not conceive it would have been sound policy to have laid any restriction as to person upon the power of impeaching. It is not difficult to imagine a case in which the punishment it imposes would be the most suitable which could be inflicted. Let us suppose, that a citizen not in office, but possessed of extensive influence, arising from popular arts, from wealth or connections, actuated by strong ambition and aspiring to the first place in the Government, should conspire with the disaffected of our own country, or with foreign intriguers, by illegal artifice, corruption or force, to place himself in the Presidential Chair. I would ask in such a case, what punishment would be more likely to quell a spirit of that description, than absolute and perpetual disqualification for any office of trust, honour or profit under the Government; and what punishment could be better calculated to secure the peace and safety of the State from the repetition of the same offence?" (Manager Bayard in Blount's Impeachment, Wharton's State Trials, pp. 265, 266.)

"Nor can I conceive how the universal extent of the power of impeachment, contended for by my honorable colleague, is contrary to the spirit, the objects, or the policy, either of the law of impeachment, or of the Federal Constitution. The use of the law of impeachment is to punish and thereby prevent offences which are of such a nature as to endanger the safety, or injure the interests of the United States: and the object of the Federal Constitution was to provide for that safety, and to protect those interests. Such offences may be committed, as well by persons out of office, as by persons in office; and although the punishment can go no further than removal and disqualification, which restriction was, perhaps, wisely introduced in order to prevent those abuses of the power of impeachment which had taken place in another country, yet it may often be extremely important to prevent such offenders from getting into office, as well as to remove them when they are in; and it is, therefore, as consistent with the policy of impeachments, and the principles of the Federal compact, to punish them in the one case as in the other. This doctrine, it is further said, would enable Congress to interfere with the State governments, by impeaching their officers. But those impeachments must be founded on offences against the United States; and if such offences were committed by State officers, I cannot see why they ought not to be punished, as well as in any other case.

capital offense.[3] This contention was easily refuted by the counsel for the defendant[4] and rejected by the judgment of the

Surely they would not be less dangerous. If the convictions in such impeachments, could remove men from State offices, or disqualify them for holding such offices, there might be something in the objection; but that could not be the case, since the removal and disqualification apply to offices under the general government alone." (Manager Harper in Blount's Impeachment, Wharton's State Trials, pp. 300-301.)

[3] 2 Woodeson's Lectures, p. 601. The same rule prevails in France (Loi Constitutionnelle sur les Rapports des Pouvoirs Publics, 16-28 Juillet 1875, Art. 12): "Le Président de la République ne peut être mis en accusation que par la Chambre des députés et ne peut être jugé que par le Sénat. Les Ministres peuvent être mis en accusation par la Chambre des députés pour crimes commis dans l'exercice de leurs fonctions. En ce cas, ils sont jugés par le Sénat. Le Sénat peut être constitué en cour de justice par un décret du Président de la République, rendue en conseil des ministres, pour juger toute personne prévenue d'attentat commis contre le sûreté de l'État. Si l'instruction est commencée par la justice ordinaire, le décret de convocation du Sénat peut être rendu jusqu'à l'arrêt de renvoi. Une loi déterminera le mode de procéder pour l'accusation, l'instruction et le jugement." Loi relative à l'Organization des Pouvoirs Publics, 25-28, Février 1875, Art. 6: . . . "Le Président de la République n'est responsable que dans le cas de haute trahison." See Burgess, Political Science and Comparative Constitutional Law, vol. i, Appendix, pp. 336-337, 334; ibid., vol. ii, pp. 291-292, 300-304; Lebon, Das Staatsrecht der Französischen Republik, § 55.

[4] "Independent of all precedent and authority, the distinction was founded upon the very nature of a free government. The Legislature is, in theory, the people: they do not themselves assemble, but they depute a few to act for them; and the laws which are thus made are the expressions of the will of the people. Over their Representatives, the people have a complete control, and if one set transgress they can appoint another set, who can rescind and annul all previous bad laws. But the power of the people is only to make the laws; they have nothing to do with *executing* them; they have nothing to do with *expounding* them; and hence arises the diversity in the modes of remedying any grievance, which they may suffer from the conduct of their Representatives or agents. If a Legislator acts wrong, he may be expelled before the term for which he was chosen has expired; he may be rejected at the next periodical election; and the laws which he has sanctioned may be repealed by a new representation. But if an Executive or a Judicial magistrate acts wrong, the people have no immediate power to correct; prosecution and impeachment are the only remedies for the evil. Then, it is manifest, that by the power of impeachment, the people did not mean to guard against themselves, but against their agents; they did not mean to exclude themselves from the right of re-appointing, or pardoning; but to restrain the Executive magistrate from doing either with respect to officers, whose offices were held independent of popular choice. The subject is made more plain, by two considerations: — 1st, that although either House may expel a member, they cannot (on the principles of the Constitution, without any express prohibition) expel him twice for the same cause: 2d, that the President is not empowered to pardon in cases of impeachment. In the case

Senate.[5] The maxim of construction that the expression of one thing is the exclusion of another, clearly controls. The Constitution is a grant of limited powers for Federal purposes only. The object of the grant of the power of impeachment was to free the commonwealth from the danger caused by the retention of an unworthy public servant. A further extension might be danger-

of expulsion, the member is sent to the people, but if they choose to return him again, he has a perfect title to his seat. In the case of an impeachment, the delinquent officer is dismissed; on the general power of the Executive he might be reappointed; but to guard against the abuse of that power, the Constitution superadds a sentence of perpetual disqualification." (A. J. Dallas, respondent's counsel in Blount's Impeachment, Wharton's State Trials, p. 281.)

"That the Constitution of the United States, limited in its Legislative and Executive powers to certain enumerated objects, as well as in its judiciary, where a jury constitutes a part of its administration of justice, should be left without bounds in this hazardous proceeding by impeachment only, is grossly improbable, and, I trust, unfounded. Contrary, I am sure, to the spirit, and, I think, also to the letter of the Constitution. Let us trace the operation of this principle. A State officer is liable to impeachment, in the Senate of the State. Is he liable at the same time, and for the same offence, to impeachment in the Senate of the United States? Will an acquittal in one be a bar in the other? In disputes between the powers and relative jurisdictions of State and United States, the same reasons may induce an acquittal in the former and a condemnation in the latter. Would not this occasion a Babel, a confusion of constitutions, a monster of jurisprudence? In jurisdictions not emanating from the same authority, where a party had not his choice, the citizen is liable, it is said, to successive trials, and contradictory determinations, for one offence. The distant inhabitant is amenable, we are told, at the bar of this Court, for every species of offence, at the distance of a hundred or a thousand miles from his vicinage, to whom the prosecution itself would be ruin, and here must submit to the awful *discretion* of the Senate whether he shall retain his honour or be doomed to disgrace, recorded and transmitted to posterity, upon your archives, as unworthy the offices of Government, and, in part, reduced from the rank of a citizen. I have said, sir, to the discretion of the Senate; because it is perfectly well known that, not only in the delineation of the offence by the prosecutors, but also in the construction of it by the judge, a Court of Impeachment is not tied down by such strict rules as, in common cases, before a court and jury, give personal security. Improvident citizens: They have taken care that they shall not be subjected to a fine of one shilling, or to imprisonment of their bodies for one hour, but, in consequence of a verdict of the neighborhood; at the same time that it is suggested, their honour they have not secured with equal precaution. The suggestion I undertake to say, is unfounded. The mistake is not in the people, but in these who impute to them so great an inadvertency." (Jared Ingersoll, counsel for the respondent in Blount's Impeachment, Wharton's State Trials, pp. 287–288.)

[5] Blount's Impeachment, Wharton's State Trials, p. 316.

ous, would certainly be oppressive, and could scarcely conceivably be of use.[6]

Only the President, Vice-President and "civil Officers of the United States," then, can be impeached. Who are civil officers of the United States? The word "civil" is used in contradistinction to military.[7] Consequently, officers of the army and navy are exempt from impeachment.

"The reason for excepting military and naval officers is, that they are subject to trial and punishment according to a peculiar military code, the laws, rules, and usages of war. The very nature and efficiency of military duties and discipline require this summary and exclusive jurisdiction; and the promptitude of its operations is not only better suited to the notions of military men, but they deem their honor and their reputation more safe in the hands of their brother officers than in any merely civil tribunal. Indeed, in military and naval affairs it is quite clear that the Senate could scarcely possess competent knowledge or experience to decide upon the acts of military men. So much are these acts to be governed by mere usage and custom, by military discipline and military discretion, that the Constitution has wisely committed the whole trust to the decision of courts-martial."[8]

[6] Bayard, in Blount's Impeachment, Wharton's State Trials, pp. 273-277; Harper, ibid., pp. 287-292.

[7] Harper in Blount's Impeachment, Wharton's State Trials, 302, 305; Ingersoll, ibid., p. 290; Story on the Constitution, § 791; Cf., Blackstone, vol. i, pp. 332, 396, 408, 417.

[8] Story on the Constitution, § 792; citing Rawle on the Constitution, ch. xxi. Mr. William Lawrence of Ohio, however, said in his brief for the House of Representatives upon Johnson's Impeachment (vol. i, p. 124, note): "In England, naval and military officers are impeachable. If a military or naval officer here should conspire with the President to overthrow Congress, the impeachment of both would be a necessary protection, which it may be doubted if the Constitution intended to surrender. In such case a court-martial would not, against the President's will, remove from office."

In Belknap's Impeachment Trial, Manager Jenks said (pp. 172-173): "Now, why should it be that a civil officer should be impeachable rather than a military officer? Is the one more dangerous than the other? Were the framers of the Constitution more careful to guard one than the other? No. They simply took this into consideration: This provision simply meant that it was imperative that on impeachment for certain crimes of a high grade civil officers should be removed. Why not military officers? Because military talent is of a peculiar character. One man in an army may not represent only one man, but his name may be good for a thousand, ten thousand or more. Suppose you take the case of the Duke of Marlborough — a man noted per-

The meaning of the phrase, "officer of the United States," is more doubtful. The question was discussed with great ability on the trial of the impeachment of Senator William Blount, for trying to corrupt an Indian agent and interpreter, and induce him to alienate the Indians from the United States.[9] Pending the impeachment, Blount was expelled by the Senate for the same offense. His plea that the Senate had no jurisdiction, which was filed subsequently to his expulsion, was sustained by a vote of fourteen to eleven and the impeachment dismissed.[10] As is said by Wharton, "in a legal point of view, all that this case decides is, that a Senator of the United States who has been expelled from his seat is not after such expulsion subject to impeachment."[11]

haps for his avarice — a man who, if he had been prosecuted for official malpractice under our Constitution, would have been removed from office had this power been extended to military officers as well as civil officers; but to remove the Duke of Marlborough from the head of the armies of England would have been equivalent to yielding her place as a military nation in the face of the world. So there is a reason why military officers should not be necessarily removed. You may remove them. If the demands of the Republic require you should remove them you should do it, but you are not compelled by the Constitution to do it. That is why it was made applicable to civil officers alone, and in reference to civil officers, we have daily and hourly indications that if the very best of civil officers were to be removed, highest or lowest, abundance of people would spring up, numerous as the frogs of Egypt, fully competent and amply willing to fill the places. It was restricted as to military officers because of the character of the duties they have to perform; it was restricted as to naval officers for the same reason; and it was not, as I apprehend, for the cause suggested by Judge Story; that there were courts-martial to try their crimes. The spirit of our institutions is that the people shall at the time hold their hand on every officer in the United States. As to those that were elected by themselves, Congressmen, they placed it in the power of Congress to remove them. As to those that represented the States, they placed it in the power of those representing the States to remove them. That is, they held the power of removal all the time, directly or indirectly, and intrusted it to no single individual. As to the officers of the United States, who are those under the Executive, they meant to hold the same hand upon them, and they did hold it. They meant that the military, the maritime, and the civil alike shall be subject to impeachment and trial, and that if it is necessary this court can drag from his height the military hero, or may draw from his depths the depredating custom-house officer. This is the view we take of this, and nothing more."

[9] Blount's Impeachment, Wharton's State Trials, pp. 200–321; *supra*, § 90.

[10] Ibid., p. 316; *supra*, § 90.

[11] Ibid., p. 317, note.

The fact of the expulsion, however, played little part in the argument.[12] The main questions discussed were whether persons not civil officers of the United States could be impeached, which was necessarily negatived by the decision; and whether a senator is such an officer. The practical construction and the better opinion since has been that neither a senator nor a member of the House of Representatives can be impeached.[13] The only remedy for the misconduct of a member of either House of Congress during his term of office is expulsion by his colleagues.[14]

This construction seems clear from the letter as well as the spirit of the Constitution. In every other instance but one, the full meaning of which is doubtful,[15] where the word "officer" is used, the context shows clearly that a member of Congress is not included. The President —

"shall Commission all the Officers of the United States,"[16] "by and with the Advice and Consent of the Senate shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law."[17] "No Senator or Representative shall during the Time for which he was elected be appointed to any civil Office under the Authority of the United States, which shall have been created or the Emoluments whereof shall have been increased during such time, and no Person holding any office under the United States, shall be a Member of either House during his Continuance in Office.[18] "No Senator or Representative or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."[19]

When we consider the object of impeachment, the meaning is still more clear. The remedy was provided as a check upon the President by the removal of an unworthy officer and the prevention of his reappointment to any office. This appears by the punish-

[12] See Dallas, ibid., p. 284; Ingersoll, ibid., p. 296.

[13] Rawle on the Constitution, p. 203; Story on the Constitution, §§ 793, 795; Manager George Frisbie Hoar in Belknap's Case, p. 186; quoted, *infra*, note 20.

[14] See the section on Expulsion, *infra*.

[15] Article I, Section 9. See Ingersoll in Blount's Impeachment, Wharton's State Trials, p. 295, 296; quoted, *infra*, § 92, note 13.

[16] Article II, Section 3.

[17] Article II, Section 2.

[18] Article I, Section 6.

[19] Article II, Section 1.

ment, which is limited to that and goes no further. Inasmuch as the President and Vice-President were not chosen by the people, but by the Electoral College, a provision to prevent their subsequent eligibility to office seemed also expedient. For the removal of an unworthy senator or representative, the power of expulsion was conferred upon their respective houses. It was not intended to allow either house to regulate the membership of the other. Nor did the people intend impeachment as a check upon themselves.[20]

[20] A. J. Dallas, respondent's counsel in Blount's Trial, Wharton's State Trials, p. 281. See also ibid., p. 278; Jared Ingersoll, respondent's counsel, ibid., p. 293 and *passim*. "Is it to be tolerated — can two branches of a legislative body dwell together under the Constitution in peace if one of them has the constitutional prerogative to lay its hand upon a member of the other and force that body to which he belongs to put him on trial for an abuse of that very legislative office to which he was elected?" (Manager George Frisbie Hoar in Belknap's Case, p. 186.)

"The Senator is not an officer of the United States; the Congressman is not an officer of the United States. Why? In the formation of our Government three elements entered. There were the people, the States, and the General Government. The people are represented by the Congressmen; they receive their commissions directly from the people. They are the officers of the people of a State, and not of the United States. They may do official duty with reference to the United States, as some other State officers do now; but they are still officers of the State. The Senators represent the sovereignty of the several States; they represent the States, and as such are officers of the States, and not of the United States. So that a Senator is not impeachable, in that he is not an officer of the United States. A Congressman is not impeachable, in that he is not an officer of the United States, but an officer of the people of a State. It leaves it, then, that those cognizable before this Court are only those who are the Government officers of the United States; who are officers alike for every State; who receive their powers alike from every State, directly or indirectly, who are commissioned by the people of all the States, or who are commissioned by some person representing the people of all the States. So that the officers of the United States are those included in the executive department of the Government, and every officer of that executive department we conceive to be impeachable before this tribunal." (Manager George A. Jenks in Belknap's Case, p. 172.) See, however, the very able arguments of Bayard and Harper to the contrary, in Blount's Case, Wharton's State Trials (pp. 266–272, 302–314). In the conventions which ratified the Constitution, General Charles Cotesworth Pinckney and Governor Randolph, who were active members of the Federal Convention, spoke as if a senator could be impeached (Elliot's Debates, 2d ed., vol. iv, pp. 263–265. See also ibid., vol. iii, p. 202. See also ibid., vol. iii, p. 402). The Speaker of the House cannot be impeached. *In re* Speakership of the House of Representatives, 15 Col., 520.

§ 92. Impeachment after Expiration of Official Term.

A more difficult question is still undecided. Can an officer of the United States be impeached after he is out of office for his acts while in office? The point was thoroughly discussed in the case of William W. Belknap, who was impeached in 1876 for receiving bribes while Secretary of War. On March 1st, 1876, he was informed by the Chairman of the Committee of the House on the expenditures of the War Department, which was then conducting an investigation, that he would be impeached unless he resigned before the meeting of the House at noon on the following day. At about ten o'clock in the morning of March 2d he presented his resignation to President Grant, who accepted it. At eleven o'clock he notified the committee of his resignation. Later in the day the House of Representatives resolved that he be impeached. A majority of the Senate upon his trial overruled his plea to the jurisdiction, and held that he was subject to impeachment. This question was decided by a vote of thirty-seven to twenty-nine. Upon the final vote as to his conviction of the charges, thirty-six senators voted for, and twenty-five against the conviction, and he was consequently acquitted for want of a condemnation by two-thirds of the Senate. But three senators voted for his acquittal upon the express ground that the charges were not proven.[1] Nearly all the rest assigned as reasons that they believed the Senate had no jurisdiction; that upon the final vote they were judges of both the law and the fact; and that consequently they could not conscientiously vote for his conviction in a case which they thought they had no right to decide.

The arguments in support of the jurisdiction to impeach an officer after he is out of office for his acts while in office were substantially as follows: The grant of the power of impeachment, in the first article of the Constitution,[2] is absolute and unlimited by its terms. Consequently, the power of impeachment here is as extensive as in England. The provision in the second article that

§ 92. [1] Senators Oglesby, Patterson, and Wright. Senator Conover gave no reason for his vote. This case is also described *supra*, § 90.

[2] Article I, Sections 2 and 3.

"The President, Vice-President, and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of Treason, Bribery, or other High Crimes and Misdemeanors,"

is not a limitation upon the previous provision for impeachment, but merely a direction that in case of the impeachment of the President, Vice-President, or civil officers of the United States, the defendant, on conviction of the offenses named, must be removed from office; whereas, in other cases, the Senate may impose a less penalty than removal from office, such as censure or suspension for a term of years.[3]

This argument proves too much; since, if the power of impeachment under the Constitution is co-extensive with that in England, private citizens who have never held office may be impeached, as was Sacheverell,[4] and so may senators and representatives. Blount's case and the practical construction since have settled the rule to the contrary.[5]

The power of impeachment is granted for the public protection in order to not only remove, but perpetually disqualify for office a person who has shown himself dangerous to the commonwealth by his official acts. The object of this salutary constitutional provision would be defeated, could a person by his resignation from office obtain immunity from impeachment. It was said that in the United States, a resignation of a public office, when duly filed or presented, is valid without the acceptance of anyone.[6] If acceptance by the President is necessary to make a resignation take effect, the President would then have the power indirectly to pardon an impeachable offense, which the Constitution expressly withholds from him.[7]

[3] Manager George A. Jenks, in Belknap's Case, pp. 154–155; Manager George Frisbie Hoar, ibid., pp. 192–193; and arguments of other managers and opinions of senators who voted for conviction, *passim*.

[4] Howell's State Trials, vol. xv, p. 1.

[5] *Supra*, § 90. That Blount's Case settled that no senator or representative could be impeached, and that no private citizen can be impeached except for an act done under an official capacity, was conceded by the managers of the House of Representatives in Belknap's case (Manager Scott Lord, Belknap's Case, p. 109; Manager George A. Jenks, Belknap's Case, p. 171; Manager George Frisbie Hoar, Belknap's Case, p. 179).

[6] Manager George Frisbie Hoar in Belknap's Case, pp. 195–196; citing Whittemore's Case. See *supra*, § 71. *Contra*, Edwards *v.* U. S., 103 U. S., 471; Mechem on Public Officers, § 414.

[7] Article II, Section 2.

If it be conceded that in any case a person can be convicted by the Senate upon an impeachment when out of office, the rule must apply to all. No arbitrary point of time can be selected, before which, by resignation, he can be absolved from the consequences of his high crimes and misdemeanors, and after which he cannot. Consequently, if the view maintained on behalf of the respondent is correct, a public officer may resign his office during an impeachment, after his conviction, at any time before the sentence has been actually pronounced. That would be to render the whole proceedings nugatory and absurd. It cannot be that the Constitution warrants such an absurdity.[8]

The last part of this argument seems not beyond dispute. There is a wide distinction between an exit from office pending an impeachment and one before. After the jurisdiction of the court has once attached, by the vote of the House of Representatives that an officer be impeached, it may well be claimed that no subsequent act by him or by the President can divest it. That this was so appears to have been the opinion of a number of senators who thought the Senate had no jurisdiction over Belknap.[9]

The third point of the argument seems the strongest. The language of the Constitution providing that a civil officer of the United States can be impeached, it is true, limits the jurisdiction to the officers named in that section of the Constitution. The jurisdiction granted, however, is over the person who is the officer; and attaches to him for the rest of his life. There is certainly no express provision in the Constitution, nor does its language necessarily imply that when he ceases to be an officer he is relieved from liability to impeachment. If a statute provided that an officer or a director of a national bank should be liable to punishment for an official act, the courts would not dismiss an indictment.

[8] See the arguments of the managers and opinions of the senators who voted for conviction in Belknap's case, *passim*.

[9] Senator Conkling in Belknap's Trial, p. 239; Senator Frelinghuysen, ibid., pp. 259-262; Senator Ingalls, ibid., p. 394. See Montgomery Blair, counsel for the respondent, ibid., p. 883. Ex-Senator Matthew H. Carpenter, respondent's counsel, claimed that in such a case the Senate would lose jurisdiction, ibid., p. 137. Ex-Judge Jeremiah S. Black declined to express an opinion on this point, ibid., p. 216. Cf. *In re* Walker, 3 Am. Jurist, 281. The Mississippi senate continued the trial of Lieutenant-Governor Davis and pronounced judgment against him notwithstanding his resignation after the proceedings had begun. (See Appendix, *infra*.)

because found after the official term had expired. That is said to be the natural and practical meaning of the language used by the Constitution. Public policy may well demand the perpetual disqualification from office of a criminal whom it was not possible to impeach during his official term because the evidence to prove his guilt had then not been discovered. In the Federal Convention, there was some discussion as to whether it would not be well to confine impeachments of the President to a time when he was out of office, as was the practice in Virginia.[10] This shows that it was the belief of those who drew the Constitution that impeachments might take place at that time. Several State constitutions before and since have provided for impeachment after the expiration of an official term, as well as during the same.[11] The failure to provide against impeachment after an official term shows an intention that it should be included. To this it was replied that the failure to include, showed that it was intended to exclude it.[12] In Blount's case both the counsel for the defendant conceded that an officer could not relieve himself from the

[10] Elliot's Debates, 2d ed., vol. v, p. 840. See Virginia Constitution of 1776. Similar is the Chilian Constitution, Art. 83.

[11] Pennsylvania Constitution of 1776, Sec. 22; Delaware Constitution of 1776, Art. 23; Vermont Constitution of 1786, Ch. II, Art. XXI, and Georgia Constitution of 1798, Art. I, Sec. 10.

[12] "It is argued that if a resignation should be permitted under such circumstances, the people would be defrauded out of their rights to have the offender disqualified. The argument is that, as the party ought to escape, the law does not prevent it. But this does not follow. It might be the common case of a *casus omissus*. But I contend that it is not a *casus omissus*, and point to the debates to show that it was never contemplated that any but persons holding office should be impeached, and also to show that, so far from being a fraud upon the jurisdiction of the Senate to resign pending an impeachment, those debates show that an influential part of the convention was opposed to impeachment altogether, and thought the better way was an appeal to the people by the accused party; and it is, therefore, consistent with the views of all sides in the convention that a way of escape by resignation should be left to an accused officer in order to enable him to have his day when a more auspicious period for a fair and just judgment could be had upon his case, while effecting the only object contemplated, namely, the removal of the officer. No evil or abuse can result from the resignation. It is a purely imaginary ill which can arise from withholding the hand that would disfranchise a citizen and disable him from vindicating himself in a calmer moment." (Montgomery Blair, Counsel for the Defendant in Belknap's Case, pp. 98–99.)

impeachment by resignation.[13] John Quincy Adams said in Congress that an officer could be impeached for an official act at any

[13] "The principal argument on both sides was on the question whether a Senator was an impeachable civil officer, and there is no doubt that the judgment sustaining the plea was on that ground. But the opinions of the very able counsel on both sides constitute very weighty evidence of the contemporaneous understanding of the Constitution. The two managers, Mr. Bayard and Mr. Harper, and the two counsel for the defendant, Mr. Dallas and Mr. Ingersoll, were among the ablest lawyers of their day. Mr. Bayard said: —

"'It is also alleged in the plea that the party impeached is not now a Senator. It is enough that he was a Senator at the time the articles were preferred. If the impeachment were regular and maintainable when preferred, I apprehend no subsequent event grounded on the willful act, or caused by the delinquency of the party, can vitiate or obstruct the proceeding. Otherwise the party, by resignation or the commission of some offense which merited and occasioned his expulsion, might secure his impunity. This is against one of the sagest maxims of the law, which does not allow a man to derive a benefit from his own wrong.' Mr. Dallas, for the defendant, said: '*There was room for argument* whether an officer could be impeached after he was out of office; not by a voluntary resignation to evade prosecution, but by an adversary expulsion.'" (Blount's Case, Wharton's State Trials, p. 284.)

"Mr. Ingersoll, for the defendant, said: 'It is among the less objections of the cause that the defendant is now out of office not by resignation. I certainly shall never contend that an officer may first commit an offense and afterward avoid punishment by resigning his office; but the defendant has been expelled. Can he be removed at one trial and disqualified at another for the same offense? Is it not the form rather than the substance of a trial? Do the Senate come, as Lord Mansfield says a jury ought, like a blank paper, without a previous impression on their minds? Would not error in the first sentence naturally be productive of error in second instance? Is there not reason to apprehend the strong bias of a former decision would be apt to prevent the influence of any new lights brought forward upon a second trial?'" (Blount's Case, Wharton's State Trials, p. 296.)

"It seems to me that the consenting opinion of these leaders of the American bar, two of them making a concession against their client, is entitled to great respect. They all agree that the fact that there can be no judgment of removal is not decisive against the maintenance of the proceeding; for that is true whenever the office has been laid down. But the defendant's counsel confine their objection solely to the fact that the removal has been accomplished by another constitutional mode of dealing with the same offense, and one which has disqualified the tribunal itself from proceeding to give judgment in impeachment. I do not agree with the distinguished gentlemen on the other side as to the statement of a principle of constitutional law made by Jared Ingersoll and Mr. Dallas — a concession directly against the interest of their client — because they were conceding that under some circumstances a person could be impeached after he had left an office.

time during his subsequent life.[14] State senates have sustained articles of impeachment for offenses committed at previous and immediately preceding terms of the same or a similar office.[15] It

It was for the interest of their client to maintain the general doctrine that under no circumstances a person could be impeached after he had left an office. It was for the interest of their client to maintain the general doctrine that under no circumstances could that be done. One of these distinguished gentlemen says he is not capable, he never will be led by any professional necessity, to argue that a man who lays down his office to avoid the penalty of his crime can so escape, and the others in different language but in substance concurred in the same opinion. They put their argument on the ground that under another constitutional provision the man had been expelled for the same cause from the Senate within a few days. In other words, a constitutional and quasi judicial proceeding had been had which not only exempted the defendant but disqualified the tribunal. One of the gentlemen goes on to argue, 'How is it possible to have a trial on impeachment before a body that by a two-thirds vote has just determined every question of fact which is involved in the issue?' That was the argument which those counsel submitted to the Senate at that time. Of the soundness of the decision to the Blount case no question, as far as I can remember, has been raised since. That the members of either house of Congress should be impeachable by or before the other, or that an officer whose duties are legislative should be called in question elsewhere for official acts, could never be tolerated and is repugnant to the nature of the office itself." (Manager George Frisbie Hoar in Belknap's Case, pp. 186, 187.)

[14] "The manager from Massachusetts cited John Quincy Adams, and coupled the citation with as lofty a eulogy as one man can make upon another. I, of course, do not detract from the merits of that distinguished man. He must have had some attractive qualities, since he was considered by a very large number of his countrymen fit to be set up as a candidate for President against him who was then the foremost man of all this world. But the public history of Mr. Adams shows that he of all men that ever lived was the least reliable upon a question of law. He was too fond of personal controversy to care which side he took. It appears from the citation itself that the general opinion of the House, as expressed by other members, was that the power of impeachment applied only to persons actually in office. Mr. Adams of course opposed what everybody else believed to be true. Nothing, indeed, would have given him greater pleasure than to be impeached. It would have given him an opportunity to come over here, and lay about him right and left. His organ of combativeness was always in a state of chronic inflammation. He enjoyed nothing so much as he did the *certaminis gaudia* — the rapture of the strife. That was the strongest passion of his nature. He tried to provoke a motion for his own expulsion from the House, and that failing, he presented a petition from some outside enemy to expel himself." (Jeremiah S. Black, Counsel for the Defendant in Belknap's Case, p. 218.)

[15] Barnard's Impeachment Trial, vol. I, p. 191. Butler's Impeachment Trial; Hubbell's Impeachment Trial.

has been held that after a man has ceased to be a soldier he may be tried by a court-martial for an offense committed while he was subject to the articles and rules of war.[16]

In the arguments on the other side it was claimed that the provisions for impeachments were penal and must be construed strictly. They deprive the accused of a trial by a jury and of the other safeguards granted to criminals by the Constitution; and he may be put twice into jeopardy for the same offense, since an impeachment is not a bar to a subsequent indictment in a court of common law for the same crime.[17] If a private citizen can be successfully impeached one day after his exit from office, he may be impeached at any time during his subsequent life. To authorize such proceedings would place a terrible weapon in the hands of a dominant political party. That no such attempt was made before the case of Belknap, was a sign of the belief that the power did not exist, since party feeling was quite as bitter after the defeat of the Federalists by the Democrats, and the defeat of the Democrats by the Republicans, as at any subsequent time. It has been the repeated practice in the House of Representatives to drop the proceedings when the accused has resigned, pending an investigation as to whether he had committed an impeachable offense.

It was held by the New York Assembly, in the cases of Fuller and Cardozo, that after a resignation a public officer could not be

"There was good reason for overruling the plea to the jurisdiction in the three cases just mentioned. Each respondent was a civil officer at the time he was impeached, and had been such uninterruptedly since the alleged misdemeanors in office were committed. The fact that the offense occurred in the previous term was immaterial. The object of impeachment is to remove a corrupt or unworthy officer. If the term has expired and he is no longer in office, that object is attained, and the reason for his impeachment no longer exists. But if the offender is still an officer, he is amenable to impeachment, although the acts charged were committed in his previous term of the same office." (State *v.* Hill, Ex-Treasurer, 37 Nebraska, 80.)

"The term officer cannot properly be applied to a person who is not at the time in the holding of an office. When a person ceases to hold office, he immediately becomes a private citizen." (Ibid., p. 90.)

[16] Lord George Sackville's Case, A. D. 1760, Tytler on Military Law, ch. ii.; *In re* William Walker, 3 American Jurist, 281. But see Winthrop, Digest of Opinions of Judge Advocate Generals, ed. 1880, p. 209.

[17] Ex-Judge Jeremiah S. Black, Counsel for Defendant in Belknap's Case, pp. 226-227.

impeached.[18] The Supreme Court of Nebraska has held that no one can be impeached after the expiration of his official term.[19]

"The Constitution declares that when the President is impeached the Chief-Justice shall preside. The question has been propounded repeatedly, and by several Senators, who would preside if an Ex-President was impeached? I will admit that is a puzzle. The puzzle arises out of the absurdity of impeaching an Ex-President. Our friends on the other side are so hampered by their own theory that they are obliged simply to decline answering. There is one answer and only one consistent with their logic, and that is this: That when an Ex-President is impeached an Ex-Chief-Justice ought to preside at the trial."[20]

The doubt upon the question and the unsatisfactory result of Belknap's case, make it highly improbable that a similar attempt will be made in the future.

§ 93. Impeachable Offenses.

The provision in the Constitution of the United States concerning impeachable offenses is, that —

"the President, Vice-President and all civil officers of the United States shall be removed from Office on Impeachment for and Conviction of Treason, Bribery, and other high Crimes and Misdemeanors."[1]

It has been claimed, as has been shown above, that this clause does not limit the power of impeachment; but that under the previous provision on the subject,[2] the persons liable to impeachment are the same here as in England.[3] It is, however, well settled that the sole impeachable offenses are "Treason, Bribery and other high Crimes and Misdemeanors." Treason has been defined in the Constitution as follows: —

"Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort."[4]

[18] Cited in Barnard's Trial, vol. 1, pp. 158, 451. See the Mississippi cases in the Appendix, *infra*.

[19] State *v.* Hill, Ex-Treasurer, 37 Nebraska, 80; quoted *supra*, note 15. See Appendix, *infra*.

[20] Ex-Judge Jeremiah S. Black in Belknap's Case, p. 225.

§ 93. [1] Article II, Section 4.

[2] Article I, Section 2.

[3] *Supra*, § 91.

[4] Article III, Section 3. See the discussion of the Judicial Power, *infra*.

For the definition of the crime of bribery we must look to the common law.[5] The only difficulty arises in the construction of the term, "other high Crimes and Misdemeanors." As to this four theories have been proposed: That except treason or bribery no offense is impeachable which is not declared by a statute of the United States to be a crime subject to indictment. That no offense is impeachable which is not subject to indictment by such a statute or by the common law. That all offenses are impeachable which were so by that branch of the common law known as the law of Parliament. And that the House and Senate have the discretionary power to remove and stigmatize by perpetual disqualification an officer subject to impeachment for any cause that to them seems fit. The position that, except treason or bribery, no offense is impeachable which is not indictable by law, was maintained by the counsel for the respondents on the trials of Chase[6] and Johnson.[7] Out of abundant caution in this respect certain

[5] Story on the Constitution, 5th ed., § 796. See the debate in Barnard's Impeachment Trial, pp. 2059–2075; and the proceedings in Belknap's Impeachment Trial, *supra*, § 90. The twentieth article of Barnard's Impeachment charged that suitors who had cases then pending in his court had presented $1,000 to his child, and on another occasion had given to him a number of costly chairs of the value of $500 and upwards. The testimony proved the present to the child, but was conflicting as to whether the judge had paid for the chairs. A majority of the New York Court of Impeachment, including all the judges of the Court of Appeals, except Judge Grover, voted not guilty on this article upon the ground that the present to the child was given in such a manner as to create a trust which he had no power to refuse. (Ibid.)

[6] Luther Martin's argument in Chase's Impeachment Trial, published by Samuel H. Smith, vol. ii, pp. 137–144.

[7] Benjamin R. Curtis, Ex-Justice of the Supreme Court of the United States, counsel for the defendant in Johnson's Impeachment Trial, vol. i, pp. 408–411:

"In the front of this inquiry the question presents itself: What are impeachable offences under the Constitution of the United States? Upon this question learned dissertations have been written and printed. One of them is annexed to the argument of the honorable manager who opened the cause for the prosecution. Another one on the other side of the question, written by one of the honorable managers themselves, may be found annexed to the proceedings in the House of Representatives upon the occasion of the first attempt to impeach the President. And there have been others written and published by learned jurists touching this subject. I do not propose to vex the ear of the Senate with any of the precedents drawn from the middle ages. The framers of our Constitution were quite as familiar with them as the learned authors of these treatises, and the framers of our Constitution, as I conceive, have drawn from them the les-

criminal statutes such as the Tenure of Office Act of 1868 [8] have

[8] 14 St. at L., p. 431; U. S. R. S., § 1772.

son which I desire the Senate to receive, that these precedents are not fit to govern their conduct on this trial. In my apprehension, the teachings, the requirements, the prohibitions of the Constitution of the United States prove all that is necessary to be attended to for the purposes of this trial. I propose, therefore, instead of a search through the precedents which were made in the times of the Plantagenets, the Tudors, and the Stuarts, and which have been repeated since, to come nearer home and see what provisions of the Constitution of the United States bear on this question, and whether they are not sufficient to settle it. If they are, it is quite immaterial what exists elsewhere. My first position is, that when the Constitution speaks of 'treason, bribery and other high crimes and misdemeanors,' it refers to, and includes only, high criminal offences against the United States, made so by some law of the United States existing when the acts complained of were done, and I say that this is plainly to be inferred from each and every provision of the Constitution on the subject of impeachment. 'Treason' and 'bribery.' Nobody will doubt that these are here designated high crimes and misdemeanors against the United States, made such by the laws of the United States, which the framers of the Constitution knew must be passed in the nature of the government they were about to create, because these are offences which strike at the existence of that government. 'Other high crimes and misdemeanors.' *Noscitur a sociis.* High crimes and misdemeanors; so high that they belong in this company with treason and bribery. That is plain on the face of the Constitution — in the very first step it takes on the subject of impeachment. 'High crimes and misdemeanors' against what law? There can be no crime, there can be no misdemeanor without a law, written or unwritten, express or implied. There must be some law, otherwise there is no crime. My interpretation of it is that the language 'high crimes and misdemeanors' means 'offences against the laws of the United States.' Let us see if the Constitution has not said so. The first clause of the second section of the second article of the Constitution reads thus: 'The President of the United States shall have the power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.' 'Offences against the United States' would include 'cases of impeachment,' and they might be pardoned by the President if they were not excepted. Then cases of impeachment are, according to the express declaration of the Constitution itself, cases of offences against the United States.

"Still, the learned manager says that this is not a court, and that, whatever may be the character of this body, it is bound by no law. Very different was the understanding of the fathers of the Constitution on this subject.

"Mr. Manager Butler. Will you state where it was I said it was bound by no law?

"Mr. Stanbery. 'A law unto itself.'

"Mr. Manager Butler. 'No common or statute law' was my language.

"Mr. Curtis. I desire to refer to the sixty-fourth number of The Federalist, which is found in Dawson's edition, on page 453: 'The remaining powers which the plan of the Convention allots to the Senate, in a distinct capacity, are comprised in their participation with the Executive in the appointment to offices, and in their judicial character as a court for the trial of impeachments, as in the business of appointments the Executive will be the principal agent, the provisions relating to it will most properly

stated that the acts therein forbidden shall be "high misdemeanors."

be discussed in the examination of that department. We will therefore conclude this head with a view of the judicial character of the Senate.' And then it is discussed. The next position to which I desire the attention of the Senate is, that there is enough written in the Constitution to prove that this is a Court in which a judicial trial is now being carried on. 'The Senate of the United States will have the sole power to try all impeachments.' 'When the President is tried the Chief Justice shall preside.' 'The trial of all crimes, except in case of impeachment, shall be by jury.' This, then, is the trial of a crime. You are triers, presided over by the Chief Justice of the United States in this particular case, and that on the express words of the Constitution. There is also, according to its express words, to be an acquittal or a conviction on this trial for a crime. 'No person shall be convicted without the concurrence of two-thirds of the members present.' There is also to be a judgment in case there shall be a conviction. Judgment in cases of impeachment shall not extend further than removal from office and disqualification to hold any office of honor, trust, or profit under the United States. Here, then, there is the trial of a crime, a trial by a tribunal designated by the Constitution in place of court and jury; a conviction, if guilt is proved; a judgment on that conviction; a punishment inflicted by the judgment for a crime; and this on the express terms of the Constitution itself. And yet, say the honorable managers, there is no court to try the crime and no law by which the act is to be judged. The honorable manager interrupted me to say that he qualified that expression of no law; his expression was, 'no common or statute law.' Well, when you get out of that field you are in a limbo, a vacuum, so far as law is concerned, to the best of my knowledge and belief. I say, then, that it is impossible not to come to the conclusion that the Constitution of the United States has designated impeachable offences as offences against the United States; that it has provided for the trial of those offences; that it has established a tribunal for the purpose of trying them; that it has directed the tribunal, in case of conviction, to pronounce a judgment upon the conviction and inflict a punishment. All this being provided for, can it be maintained that this is not a court, or that it is bound by no law?

"But the argument does not rest mainly, I think, upon the provisions of the Constitution concerning impeachment. It is, at any rate, vastly strengthened by the direct prohibitions of the Constitution. 'Congress shall pass no bill of attainder or *ex post facto* law.' According to that prohibition of the Constitution, if every member of this body, sitting in its legislative capacity, and every member of the other body, sitting in its legislative capacity, should unite in passing a law to punish an act after the act was done, that law would be a mere nullity. Yet what is claimed by the honorable managers in behalf of members of this body? As a Congress you cannot create a law to punish these acts if no law existed at the time they were done; but sitting here as judges, not only after the fact, but while the case is on trial, you may individually, each one of you, create a law by himself to govern the case.

"According to this assumption, the same Constitution which has made it a bill of rights of the American citizen, not only as against Congress but as against the legislature of every State in the Union, that no *ex post facto* law shall be passed — this same Constitution has erected you into a body and empowered every one of you to say *aut inveniam*

The first two theories are impracticable in their operation, inconsistent with other language of the Constitution, and overruled by precedents. If no crime, save treason and bribery, not forbidden by a statute of the United States, will support an impeachment, then almost every kind of official corruption or oppression must go unpunished.[9] Suppose the Chief-Justice of

[9] "Is the silence of the statute-book to be deemed conclusive in favor of the party until Congress have made a legislative declaration and enumeration of the offences which shall be deemed high crimes and misdemeanors? If so, then, as has been truly remarked" (citing Rawle on the Constitution, ch. xxix, p. 273), "the power of impeachment, except as to the two expressed cases, is a complete nullity, and the party is wholly dispunishable, however enormous may be his corruption or criminality. It will not be sufficient to say that, in the cases where any offence is punished by any statute of the United States, it may and ought to be deemed an impeachable offence. It is not every offence that by the Constitution is so impeachable. It must not only be an offence, but a *high* crime and misdemeanor. Besides, there are many most flagrant offences which, by the statutes of the United States, are punishable only when committed in special places and within peculiar jurisdictions, as, for instance, on the high seas, or in forts, navy yards, and arsenals ceded to the United States. Suppose the offence is committed in some other than these privileged places, or under circumstances not reached by any statute of the United States, would it be impeachable?" (Story on the Constitution, 5th ed., § 796; see also ibid., § 798.)

aut faciam: If I cannot find a law I will make one. Nay, it has clothed every one of you with imperial power; it has enabled you to say, *sic volo, sic jubeo, stat pro ratione voluntas:* I am a law unto myself, by which law I shall govern this case. And, more than that, when each one of you before he took his place here called God to witness that he would administer impartial justice in this case according to the Constitution and the laws, he meant such laws as he might make as he went along. The Constitution, which had prohibited anybody from making such laws, he swore to observe; but he also swore to be governed by his own will; his own individual will was the law which he thus swore to observe; and this special provision of the Constitution, that when the Senate sits in this capacity to try an impeachment the senators shall be on oath, means merely that they shall swear to follow their own individual wills. I respectfully submit, this view cannot consistently and properly be taken of the character of this body, or of the duties and powers incumbent upon it.

"Look for a moment, if you please, to the other provision. The same search into the English precedents, so far from having made our ancestors who framed and adopted the Constitution in love with them, led them to put into the Constitution a positive and absolute prohibition against any bill of attainder. What is a bill of attainder? It is a case before the Parliament where the Parliament make the law for the facts they find. Each legislator — for it is in their legislative capacity they act, not in a judicial one, — is, to use the phrase of the honorable managers, 'a law unto himself,' and according to his discretion, his

the United States were convicted in a State court of a felony or misdemeanor, must he remain in office unimpeached and hold court in a State prison ? [10]

The term, " high Crimes and Misdemeanors," has no significance in the common law concerning crimes subject to indictment. It can be found only in the law of Parliament and is the technical term which was used by the Commons at the bar of the Lords for centuries before the existence of the United States.

The Constitution provides that —

" The Judges, both of the Supreme and inferior Courts, shall hold their offices during good Behavior.[11]

This necessarily implies that they may be removed in case of bad behavior. But no means except impeachment is provided for their removal,[12] and judicial misconduct is not indictable by either a statute of the United States or the common law.[13]

In 1803 Pickering, a District Judge of the United States, was convicted on impeachment for his official action in surrendering to the claimant, without requiring the statutory bond, a vessel libelled by the United States, for refusing to allow an appeal from this order, and for drunkenness and profane language on the bench.[14]

[10] See the argument of Manager Charles A. Wickliffe in Peck's Impeachment Trial, p. 309.

[11] Article III, Section 1.

[12] Such means are provided in most State constitutions. *Infra*, § 96.

[13] Bishop's Criminal Law, § 462, citing Yates *v.* Lansing, 9 Johns (N. Y.), 282; s. c. 9 Johns (N. Y.), 375; Hammond *v.* Howell, 2 Mod., 218; Floyd *v.* Barker, 12 Coke, 23, 25.

[14] Pickering's Trial, Annals of Congress, 1802–1803, pp. 267, 268; ibid., 1803–1804, pp. 27, 76, 224, 225, 268, 274, 271, 275, 298, 315–367; *supra*, § 90.

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views of what is politic or proper under the circumstances, he frames a law to meet the case, and enacts it or votes in its enactment. According to the doctrine now advanced, bills of attainder are not prohibited by this Constitution; they are only slightly modified. It is only necessary for the House of Representatives by a majority to vote an impeachment and send up certain articles and have two-thirds of this body vote in favor of conviction, and there is an attainder; and it is done by the same process and depends on identically the same principles as a bill of attainder in the English Parliament. The individual wills of the legislators, instead of the conscientious discharge of the duty of the judges, settle the result."

To the same effect are Trial by Impeachment, a lecture by Prof. Theodore W. Dwight to the students of the Columbia Law School; Am. Law Reg., N. S., vol. vi, pp. 257, 269; and Minority Report of James F. Wilson and Frederick G. Woodbridge on first proposition to impeach Andrew Johnson, House Reports, 40th Congress, 1st Sess., No. 7.

None of these offenses were indictable by the common law or by statute.

Humphreys, a District Judge of the United States, was convicted on impeachment, not only for treason but also for refusing to hold court, for holding office under the Confederate States and for imprisoning citizens for expressing their sympathy with the Union.[15] The manager of the House of Representatives who opened the case, admitted that none of these offenses except the treason was indictable.[16]

Some advocates have gone so far as to maintain, by a misapplication of a term of the common law, that the proceedings on an impeachment are not a trial, but a so-called inquest of office, and that the House and Senate may thus remove an officer for any reason that they approve.[17] That Congress has the power

[15] Humphreys' Trial; The Congressional Globe, 37th Congress, 2d Session, Part 4, pp. 2942-2953; *supra*, § 90.

[16] Manager Train, ibid., p. 2943: "It may be supposed that the first charge in the articles of impeachment against William Blount was a statutable offence; but on an accurate examination of the Act of Congress of 1794, it will be found not to have been so." (Story on the Constitution, 5th ed., § 799, note 2.) In State *v.* George H. Hastings, Attorney-General and others, 37 Nebraska, 96, 114; s. c., 55 N. W. Rep., 774; the court said that an impeachable offense was not necessarily indictable.

[17] See the argument of John Randolph in Chase's Impeachment Trial, *supra*, § 90; *infra*, § 94; and those of Benjamin F. Butler, and William Lawrence in Johnson's Impeachment Trial, vol. I, pp. 93, 123-147; opinion of Charles Sumner, ibid., vol. iii, pp. 247-254. "Much has been said in the course of the trial upon the nature of this proceeding, and the nature of the offences which can fairly be embraced with the terms of the Constitution. In my opinion this high tribunal is the sole and exclusive judge of its own jurisdiction in such cases, and that as the Constitution did not establish this procedure for the punishment of crime, but for the secure and faithful administration of the law, it was not intended to cramp it by any specific definition of high crimes and misdemeanors, but to leave each case to be defined by law, or, when not defined to be decided upon its own circumstances, in the patriotic and judicial good sense of the representatives of the States. Like the jurisdiction of chancery in cases of fraud, it ought not to be limited in advance, but kept open as a great bulwark for the preservation of purity and fidelity in the administration of affairs, when undermined by the cunning and low practices of low offenders, or assailed by bold and high-handed usurpation, or defiance; a shield for the honest and law-abiding official; a sword to those who pervert or abuse their powers, teaching the maxim which rulers endowed with the spirit of a Trajan can listen to without emotion, that, 'Kings

to do so may be admitted. For it is not likely that any court would hold void collaterally a judgment on an impeachment where the Senate had jurisdiction over the person of the condemned. And undoubtedly a court of impeachment has the jurisdiction to determine what constitutes an impeachable offense. But the judgments of the Senate of the United States, in the cases of Chase and Peck, as well as those of the State senates, in the different cases which have been before them have established the rule that no officer should be impeached for any act that does not have at least the characteristics of a crime. And public opinion must be irremediably debauched by party spirit before it will sanction any other course.

Impeachable offenses are those which were the subject of impeachment by the practice in Parliament before the Declaration of Independence, except in so far as that practice is repugnant to the language of the Constitution and the spirit of American institutions.[18] An examination of the English precedents will show that, although private citizens as well as public officers have been impeached, no article has been presented or sustained which did not charge either misconduct in office or some offense which was injurious to the welfare of the State at large.[19]

can be cashiered for misconduct.'" (Opinion of Senator Edmunds in Johnson's Impeachment Trial, vol. iii, p. 94.)

[18] See an article on Impeachable Offences by G. Willett Van Ness, Am. Law. Review, vol. xvi, p. 798; State v. George H. Hastings, Attorney-General and others officers, 37 Nebraska, 96; s. c. 55 N. W. Rep., 774.

[19] Woodeson's Lectures, vol. ii, pp. 601–602.

"The Duke of Suffolk was impeached for high treason, 28 H. 6, Seld. Jud. Parl., 29 (3 vol. 2 P. 1597).

For high treason in subverting the fundamental laws, and introducing arbitrary power, Lord Finch, Sir Robert Berkley and Lord Strafford. 2 Rush., 606; 3 Rush, 1365. (*Vide* Rush, part 3, vol. 1, 136.)

The Duke of Suffolk was impeached, 28 H. 6, for that being ambassador he consented to the delivery of divers towns to the King of France, without the privity of the other ambassadors. Art. 4 (*vide* Seld. 3 vol. 2 P. 1597).

The Earl of Bristol, that he, being ambassador, gave false informations to the king. 1 Rush, 249.

That he did not pursue his instructions. Art. 2, 1 Rush, 250.

That he pursued his embassy for his own profit only. Art. 4. 1 Rush, 250.

Cardinal Wolsey, that he made a treaty between the Pope and the King of France, when ambassador to H. 8, without the privity of his king. 4 Inst. 89, 156.

That he joined himself with the king. 4 Inst. 90.

The Earl of Bristol was impeached,

In this class of cases, which rest so much in the discretion of

2 Car., that he counselled against a war with Spain, when that king affronted us, to the dishonour and detriment of the realm. Art. 3. 1 Rush, 250.

That he advised a toleration of the papists. 1 Rush, 251.

That he enticed the king to popery. 1 Rush, 252, 262.

Michael de la Poole was impeached, that he incited the king to act against the advice of Parliament. Seld. Jud. Parl., 25 (3 vol. 2 P. 1596).

The Spencers, that they gave bad counsel to the king. 4 Inst. 54.

The Earl of Orford, that he advised a prejudical peace. 8 May, 1701.

Lord Finch, that he, being speaker of the commons, refused proceedings in the house.

The Duke of Buckingham was impeached, for that he, being admiral, neglected the safeguards of the sea. Rush, 308.

The Earl of Orford, that he hazarded the navy, and had neglected to take ships of the enemy. 8 May, 1701.

Michael de la Poole was impeached that he being chancellor acted contrary to his duty. Seld. Jud. Parl., 26 (3 vol. 2 P. 1596).

Lord Somers that he ratified a peace, not approved by the parties concerned, under the great seal. 16 May, 1701.

That he put the great seal without warrant. Ibid.

And to a blank commission. Ibid.

Michael de la Poole was impeached, that he purchased lands of the king, which he had procured to be surveyed under their value. Seld. Jud. Parl. 24 (3 vol. 2 P. 1596).

For a fraudulent purchase from the king. Seld. Jud. Parl., 26 (3 vol. 2 P. 1596.)

Sir John, Lord Somers. 16 May, 1701.

The Duke of Buckingham was impeached for plurality of offices. 2 Car. Rush 306.

The Earl of Orford, for exercising incompatible offices. 8 May, 1701.

So the Lord Halifax. 9 June, 1701.

The Duke of Buckingham was impeached for giving a medicine to the king without the advice of the physicians. Rush, 351.

So the Spencers, father and son, were impeached for that they prevented the great men of the realm from giving their counsel to the king except in their presence. 4 Inst. 53.

That they put good magistrates out of office and advanced bad. Ibid.

The Earl of Orford was impeached that he encouraged pirates. 8 May, 1701.

Sir G. Mompesson was impeached for the procurement of patents of monopoly. 18 Jac. Rush, 24, 27. Seld. Jud. Parl. 31 (3 vol. 2 P. 1598.)

Lord Chancellor Bacon was impeached for bribery. 18 Jac. Rush, 28. Seld. Jud. Parl. 31 (3 vol. 2 P. 1599).

The Duke of Buckingham, for the sale and purchase of offices. Rush, 334.

The Lord Finch, for unlawful methods of enlarging the forest, when assistant to the justices in eyre. Art. 3, *vide* Rush, part 3, vol. 1, 137.

For threatening other judges to subscribe to his opinion. Ibid., Art. 4, 5, 6.

For delivering opinions which he knew to be contrary to law. Art. 7. Ibid.

For drawing the business of the court to his chamber. Art. 8. Ibid.

So an impeachment was exhibited for several extortions and deceits to the public. Seld. Jud. Parl. 19 (3 vol. 2 P. 1594, 1595).

An Article was exhibited against

the Senate, the writer would be rash who were to attempt to prescribe the limits of its jurisdiction in this respect.[20]

Cardinal Wolsey for exercising legative authority to the prejudice of the authority and oppression of ordinaries and houses of religion. 4 Inst. 89.

So against the Earl of Orford, for converting the public money to his own use, without account. 8 May, 1701.

So an impeachment was against the Earl of Orford, that he procured from the king to himself exorbitant grants in lands and money. 8 May, 1701.

So against Lord Somers. 16 May, 1701.

For taking money, &c., from a foreign prince without giving an account for it. 8 May, 1701.

For selling goods, taken as admiral, for his own use, without accounting for a tenth to others. 8 May, 1701.

Lord Halifax, for obtaining grants of estates forfeited for rebellion. 9 June, 1701.

For obtaining grants of money when there was a war and heavy taxes. Ibid.

And grants out of the king's woods. Ibid." Comyn's Digest, Parliament L., 28-39.

Dr. Sacheverell was impeached for preaching a seditious sermon. Howell's State Trials, vol. xv, p. 1.

The Earl of Clarendon, for falsely affirming that Charles II was a papist, for introducing an arbitrary government into the king's plantations, and for giving bad advice concerning the manœuvres of the fleet. Ibid., vol. vi, pp. 346-393.

The Earl of Orrery, for raising money by his own authority from the king's subjects in Ireland. Ibid., p. 915.

Sir Adam Blair and others with him, for dispersing a seditious and treasonable paper. Ibid., vol. xii, p. 1207.

Lord Chancellor Macclesfield, for selling his appointments to mastership in chancery. Ibid., vol. xvi, p. 767.

Warren Hastings, for oppressive government in India, and extortion upon the natives there. (Burke's Works.)

Viscount Melville, for depositing the public funds with a private banker, where it was suspected that he used them in speculation. Howell's State Trials, vol. xxix, p. 949.

[20] The constitution of Alabama authorizes impeachment "for willful neglect of duty, corruption in office, habitual drunkenness, incompetency, or any offense involving moral turpitude while in office, or committed under color thereof, or connected therewith" (Art. VII, Sec. 1). That of Arkansas, "for high crimes and misdemeanors and gross misconduct in office" (Art. XV, Sec. 1). That of Colorado, "for high crimes or misdemeanors, or malfeasance in office" (Art. XIII, Sec. 2). That of Iowa for any misdemeanor or malfeasance in office" (Art. III, Sec. 20). That of Kentucky, "for any misdemeanors in office" (Art. LXVIII). That of Louisiana, "for high crimes and misdemeanors, for nonfeasance or malfeasance in office, for incompetency, for corruption, favoritism, extortion or oppression in office, or for gross misconduct, or habitual drunkenness" (Art. 196). That of Michigan, "for corrupt conduct in office, or for crimes and misdemeanors" (Art. XII, Sec. 1). That of Minnesota, the same (Art. XIII, Sec. 1). That of North Dakota, "for habitual drunkenness, crimes, corrupt conduct, or malfeasance or misdemeanor in office" (Art. XIV, Sec. 196). That of South Dakota, "for drunkenness, crimes, corrupt conduct,

An impeachable offense may consist of treason;[21] bribery;[22] or a breach of official duty by malfeasance or misfeasance, including conduct such as drunkenness,[23] when habitual or in

or malfeasance, or misdemeanor in office" (XVI, Sec. 3). That of West Virginia, "for mal-administration, corruption, incompetency, gross immorality, neglect of duty, or any high crime, or misdemeanor" (Art. IV, Sec. 9). The other State constitutions present in this respect substantial similarity to the Constitution of the United States. In Chili, cabinet officers may be impeached for "treason, corruption in office, misappropriation of public funds, subornation, violation of the constitution, impeding the execution of the laws or failure to execute the same, and for gravely compromising the safety and honor of the Nation" (Art. 92).

[21] Constitution, Article II, Section 4.

[22] Ibid.

[23] Pickering's Impeachment Trial, *supra*, § 90, *infra*, § 94. Cox' Impeachment Trial, *infra*, § 94, and Appendix to this volume; Botkin's Impeachment Trial, Appendix to this volume. In Botkin's Impeachment Trial, demurrers to the following Articles were overruled: —

"That the said Theodosius Botkin was, on the 13th day of January, 1890, ever since has been and still is judge of the thirty-second judicial district of the state of Kansas, and that the said Theodosius Botkin, while occupying the official position as judge of said judicial district, unmindful of the high duties of his office and the dignity and proprieties thereof, has been repeatedly intoxicated in public places throughout said judicial district, to the manifest scandal of the administration of justice, by means whereof the said Theodosius Botkin has brought his high office as judge as aforesaid, into contempt, ridicule and disgrace, to the great scandal of all good citizens; whereby said Theodosius Botkin, judge as aforesaid, was guilty of high misdemeanors in office, which are set forth in the several specifications hereinafter written, in substance and effect, that is to say:

"*Specification First:* In this, that on the streets and in public places in the city of Springfield, in the county of Seward, in said district, the said Theodosius Botkin was, on or about the first day of April, 1890, intoxicated, and under the influence of intoxicating liquors"; with nine similar specifications. (Botkin's Impeachment Trial, Art. I, pp. 31–32.)

"That the said Theodosius Botkin, judge as aforesaid, unmindful of the high duties of his office and the dignity and proprieties thereof, while engaged in holding throughout his said district, in the various counties thereof, the terms of his court, as required by law, and during the times of holding the same, has been repeatedly intoxicated and under the influence of intoxicating liquors, by means whereof the said Theodosius Botkin has brought his high office as judge as aforesaid into contempt, ridicule and disgrace, to the manifest scandal and danger of justice, and to the scandal of all good citizens; whereby the said Theodosius Botkin, judge as aforesaid, was guilty of high misdemeanors in office, which are set forth in the several specifications hereinafter written, in substance and effect, that is to say: —

"*Specification First:* In this, that the said Theodosius Botkin, while holding the January, 1890, term of the district court of Seward county, in said district, was intoxicated, and

the performance of official duties, gross indecency,[24] and pro-

[24] In Cox' impeachment trial in Minnesota, a demurrer to the following article was overruled:—

"That E. St. Julien Cox, being a Judge of the District Court of the State of Minnesota, in and for the ninth judicial district, unmindful of his duties as such judge, and of the dignity of his office, and in violation of the Constitution and the State of Minnesota, did, at the County of Ramsey, in said State, to wit: On the 14th day of October, A. D. 1881, demean himself in a lewd and disgraceful manner, in this, that he did then and there resort to a house of ill-fame, kept for the purposes of prostitution, in company with a prostitute, whose name is unknown to the House of Representatives, and did then and there lewdly, lasciviously cohabit and associate with said woman, whereby he, the said E. St. Julien Cox, was guilty of a misbehavior in office, and of crimes and misdemeanors in office" (pp. 24, 160).

In the same case a demurrer to the following article was at first also overruled:

"That E. St. Julien Cox, being a Judge of the District Court of the State of Minnesota, and for the ninth judicial district, unmindful of his duties as such judge, and of the dignity and proprieties of his said office, and in violation of the laws of the State of Minnesota, did at divers times since the 4th day of January, A. D. 1878, at sundry places in the said State, demean himself in a lewd and disgraceful manner in this, that he, the said E. St. Julien Cox, did then and there frequent houses of ill-fame, and consort with harlots, whereby he, the said E. St. Julien Cox, has brought himself and his high office into disrepute to the manifest injury of the morals of the youth and good citizens of the State of Minnesota, and disgrace of the administration of justice, and is thereby guilty of misbehavior in office; and of misdemeanors in office." (Ibid., pp. 24, 161, 164, 174, 527.) Upon the decision of the demurrer to this article specifications of the times and places where the offenses were committed were ordered by the Senate and furnished by the managers. It was further ordered that should no such specifications be furnished no testimony in support of the article should be received. After the specifications were furnished the Senate voted "that the objections of the respondent be sustained as to the twentieth article." (Ibid., p. 527.)

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under the influence of intoxicating liquors.

"*Specification Second:* In this, that the said Theodosius Botkin, while holding, during the first week in March, 1890, an adjourned term of the January, 1890, term of the district court of said Seward county, was intoxicated, and under the influence of intoxicating liquors"; with nine similar specifications. (Botkin's Impeachment Trial, Article II, pp. 33–34.)

"That the said Theodosius Botkin, judge as aforesaid, unmindful of the high duties of his office and the dignity and proprieties thereof, while engaged in holding, throughout his said district, in the various counties thereof, the terms of his court, as required by law, and while sitting on the bench as judge, has been repeatedly intoxicated, and under the influence of intoxicating liquors, by means whereof the said Theodosius Botkin has brought his high office as judge as aforesaid into contempt,

fanity, obscenity, or other language, used in the discharge ridicule and disgrace, to the manifest scandal and danger to the administration of justice, and to the great scandal of all good citizens; whereby said Theodosius Botkin, judge as aforesaid, was guilty of high misdemeanors in office, which are set forth in the several specifications hereinafter written, in substance and effect, that is to say:

"*Specification First:* In this, that the said Theodosius Botkin, while holding the June, 1890, term of the district court of Seward county, in said district, and while sitting on the bench as judge, was intoxicated, and under the influence of intoxicating liquors"; with three similar specifications. (Botkin's Impeachment Trial, Article III, p. 34.)

"That the said Theodosius Botkin, judge as aforesaid, unmindful of the high duties of his office and the dignities and proprieties thereof, has, since and during his said term of office, been an habitual user of intoxicating liquors to such an excess as to incapacitate him for a clear-minded discharge of his said judicial functions, by means whereof the said Theodosius Botkin has brought his high office as judge as aforesaid into contempt, and ridicule and disgrace, to the manifest scandal and great danger of the administration of justice, and to the great scandal of all good citizens; whereby the said Theodosius Botkin, judge as aforesaid, was guilty of a high misdemeanor in office." (Botkin's Impeachment Trial, Art. VII, p. 36; Ibid., pp. 245–265).

He was finally acquitted.

In the same case, demurrers to the following articles were sustained: —

"That the said Theodosius Botkin, judge as aforesaid, unmindful of the high duties of his office and the dignity and proprieties thereof, on the 29th day of August, 1890, on the streets and in public places in the city of Leoti, in Wichita county, was drunk and under the influence of intoxicating liquors, and was engaged in a drunken and boisterous quarrel on said streets and in said public places, and was then and there so disorderly that he had to be taken off said streets by the sheriff of said county to prevent a further disturbance of the peace; by means whereof the said Theodosius Botkin has brought his high office as judge as aforesaid into contempt and ridicule and disgrace, to the great scandal of all good citizens; whereby said Theodosius Botkin, judge as aforesaid, was guilty of high misdemeanors in office." (Trial of Theodosius Botkin, Art. IV, p. 34.)

"That the said Theodosius Botkin, judge as aforesaid, unmindful of the high duties of his office and the dignity and proprieties thereof, and notwithstanding his duty to enforce the laws to prohibit the sale of intoxicating liquors in this State, except for medical, scientific, and mechanical purposes, has during his said term of office knowingly and willfully frequented places within and throughout his said judicial district where intoxicating liquors were sold in violation of law; by means whereof the said Theodosius Botkin has brought his high office as judge as aforesaid into contempt, ridicule, and disgrace, and has encouraged the violation of law, to the great scandal of all good citizens; whereby said Theodosius Botkin, judge as aforesaid, was guilty of high misdemeanors in office, which are set forth in the several specifications hereinafter written, in substance and effect, that is to say:

"*Specification First:* In this, that the said Theodosius Botkin did, on or

of an official function, which tends to bring the office into dis-

about the 10th day of January, 1890, and on sundry, and divers other days thereafter, knowingly and willfully frequent the drugstore of Shortman & Tice, in the city of Springfield, in said district, he, the said Theodosius Botkin, then well knowing that the said Shortman & Tice were at the time selling intoxicating liquors in violation of law.

"*Specification Second:* In this, that the said Theodosius Botkin did, on or about the tenth day of June, 1890, and on sundry and divers other days thereafter, knowingly and willfully, frequently visit the drug store of J. A. L. Williams, in said city of Springfield, he, the said Theodosius Botkin, then well knowing that the said J. A. L. Williams was at the time selling intoxicating liquors in violation of law.

"*Specification Third:* In this, that the said Theodosius Botkin did, on or about the 10th day of April, 1890, and on sundry and divers other days thereafter, knowingly and willfully frequent and visit a certain disreputable place, or 'joint,' in the city of Ulysses, in said district, kept by one J. W. Maddox, otherwise called 'Bill' Maddox, he, the said Theodosius Botkin, then well knowing that the said Maddox was at the time selling intoxicating liquors in violation of law." (Ibid., Art. V, p. 35.)

"That the said Theodosius Botkin, judge as aforesaid, unmindful of the high duties of his office, and the dignities and proprieties thereof, and notwithstanding his duty to enforce the laws to prohibit the sales of intoxicating liquors in this state, except for medical, scientific and mechanical purposes, has frequently during his said term of office, knowingly, willfully, and illegally bought intoxicating liquors from persons selling the same in violation of law, by means whereof the said Theodosius Botkin has brought his office, as judge as aforesaid, into contempt, ridicule and disgrace, and has thereby knowingly and willfully encouraged the violation of law, to the great scandal of all good citizens; whereby said Theodosius Botkin, judge as aforesaid, was guilty of high misdemeanors in office, which are set forth in the several specifications hereinafter written, in substance and effect, that is to say:

"*Specification First:* In this, that the said Theodosius Botkin, at the city of Springfield, in Seward county, did, on or about the 10th day of January, 1890, and on sundry and divers other days thereafter, knowingly and willfully buy of Henry Shortman and J. H. B. Adams intoxicating liquors sold in violation of law, he, the said Theodosius Botkin then and there well knowing the same to have been sold in violation of law.

"*Specification Second:* In this, that the said Theodosius Botkin, at the city of Springfield, in Seward county, did on or about the 10th day of June, 1890, and on sundry and divers other days thereafter, knowingly and willfully buy of J. A. L. Williams intoxicating liquors, sold in violation of law, he, the said Theodosius Botkin, then and there well knowing the same to have been sold in violation of law.

"*Specification Third:* In this, that the said Theodosius Botkin, at the city of Ulysses, in Grant county, did on or about the 10th day of April, 1890, and on sundry and divers other days thereafter, knowingly and willfully buy of J. W. Maddox, otherwise called Bill Maddox, intoxicating liquors, sold in violation of law, he, the said Theodosius Botkin, then and there well knowing the same to have

repute,[25] or an abuse or reckless exercise of a discretionary

been sold in violation of law." (Ibid., Art. VI, pp. 35, 36.)

[25] A judge was convicted by the New York Senate on an article which charged that "while sitting on the bench and holding a term of his court, in the presence of suitors, counsel and officers of said court, and of other persons from time to time there present, he did repeatedly deport himself in a manner unseemly and indecorous; did repeatedly use language coarse, obscene and indecent; did repeatedly use language, justly causing those persons in his hearing, and other persons, to believe and understand that he, said George G. Barnard, in his official action as said justice, acted not with an honest intent faithfully to discharge the duties of his said office, and to use the process of said court for the purpose of doing justice, but with the wrongful and corrupt intent to aid and benefit his friends and favored suitors and counsel; did repeatedly when applications were made by counsel to him, the said George G. Barnard, in his judicial capacity, for divers writs, orders and processes, treat such counsel in a manner coarse, indecent, arbitrary and tyrannical, and calculated to intimidate, oppress and delay such counsel in the discharge of their sworn duty to their clients, and to deprive such clients of their right to appear and be protected in their liberty and property by counsel, and in the above and other ways was guilty of conduct unbecoming the high position which he held, and tending to bring the administration of justice into contempt and disgrace, to the great scandal and reproach of the said Court, and of the justice of the State of New York."

There were several specifications, of which only three were proven. Those proven were: —

"That in or about the month of October, 1871, upon the occasion of an application to him, the said George G. Barnard, while he was holding a special term of the Supreme Court in the city and county of New York, for the appointment of a referee, the party making the application suggested the appointment of one Gratz Nathan as such referee, whereupon the said George G. Barnard said in substance, 'Gratz Nathan — Gratz Nathan; I know no Gratz but one; that is, Gratz Coleman; he is my Gratz,' or 'he is my referee'; the said George G. Barnard thereby alluding to a notorious fact, that said Gratz Nathan was a person usually selected as a referee by Justice Cardozo, and meaning thereby that he had a like favorite in one James H. Coleman."

"That in the year 1870, an application was made, to the said George G. Barnard, while he was holding a special term of the said court, at the place last aforesaid, for the appointment of Thomas W. Clerke, Esq., then late a justice of said court, as referee, whereupon the said George G. Barnard said, in substance, that no man need offer that person's name to him as referee, the said person had lied about him and had been his enemy, and that he favored his friends and not his enemies; meaning thereby, that in his judicial capacity he acted with intent to favor his friends."

"That on or about the 24th day of March, 1869, while the said George G. Barnard was sitting on the bench and holding a special term of said court, at said place, one Thomas C. Durant, who was then vice-president of the Union Pacific Railway Com-

power,[26] as well as a breach or omission of an official duty imposed

pany, was being examined in said court as a witness, and said Durant, in the course of such examination, testified in reference to a remark that had been openly and publicly made by the said George G. Barnard in the lunch-room of the Astor House, at said city, being a place of general resort, in the words or to the effect following: 'I have driven one set of scoundrels out of New York, and I am going to drive out this set,' and on such remark being so testified to, said George G. Barnard, from his seat on the bench, in the presence of suitors, officers and counsel of the court, admitted that he had made said remark, at the place and under the circumstances testified to, thereby giving those present to understand that he, said George G. Barnard, as a justice of the said Supreme Court, used the process of said court, not for the purpose of doing justice between party and party, but for the purpose of prosecuting and harassing the Union Pacific Railroad Company and the officers thereof, said company being engaged in a litigation with James Fisk, Jr." (Barnard's Impeachment Trial, p. 2159.)

"That on or about the 13th day of February, 1872, the said George G. Barnard, while sitting on the bench and holding a term of said court at the city of New York, on an application being made to him to attend an order whereby Philo T. Ruggles, Esq., had been appointed referee, said in effect: 'I shall sign no order unless I can make it to a man I can rely upon. I am not going to appoint anyone even by consent, unless it is satisfactory to me. I did not appoint this referee.' And one of counsel in the case stated: 'This gentleman was not appointed by consent.' The said George G. Barnard further said, in effect: 'I don't care, I shall not do it; and if you don't like it, you can put it in for the 999th article of impeachment.'" (Barnard's Impeachment Trial, p. 2160.) See also Pickering's Impeachment Trial, *supra*, § 90; *infra*, § 94.

Judge Rapallo said (at p. 2172 of Barnard's Trial): "To treat the discretionary power of appointing referees, receivers, guardians, etc., which is incidentally vested in a judge, as an instrument of patronage, to be used by him for the benefit of his friends or his own advancement, necessarily destroys the perfect impartiality with which such powers should be exercised or their exercise refused, with the sole view to the rights and interests of the parties before him, and causes motives and interests of his own to intervene, which, if not actually leading to a corrupt violation of the rights of litigants, must at least destroy confidence in the integrity of the motive and action of the judge. In my judgment the public avowal of a principle of judicial action so destructive of confidence in the integrity with which a most important branch of the jurisdiction of the courts, in which the respondent sat, was exercised, does sustain the charge of bringing scandal and reproach upon the court."

[26] In the same trial (pp. 2037-2038) it was said by Judge Grover, with whom the rest of the Court of Impeachment seemed to agree: "The counsel of the respective parties agree substantially upon the law as to what constitutes an impeachable offense. They expressed it in somewhat different language, but the fundamental idea was the same, that an impeachable offense in a judicial officer con-

by statute or common law;[27] or a public speech when off duty

sisted of an intentional violation of duty on his part to the prejudice of public justice; or a reckless exercise of his functions, indifferent as to whether what he did was right or wrong; I think that these definitions will furnish a test."

"It is the duty of every judicial officer to investigate questions that are presented for his determination, and exercise his judgment, and when he has in good faith exercised his judgment, he is excusable for error; but if he does the act without regard to whether it is right or wrong, or if he does it conscious that he is violating the law, or if he act without having examined it at all, he is guilty of a violation of the duty of his office. This, in the language of the article, is 'mal and corrupt conduct in office,' and an impeachable offense."

On the same trial, Senator D. P. Wood said: "A right decision may be arrived at in such an oppressive manner by a judge as to be converted into a great wrong. I mean by that that he may arrive at what would be a just remedy, in the end, in a manner to commit so great a wrong as to render himself liable to conviction on an article of impeachment. I will suppose a case: A summons is drawn up accompanied by a complaint against me, showing upon its face that I owe an honest debt which I neglect or refuse to pay, and which, after a trial, must, if proved, entitle the plaintiff to a judgment against me, and an execution to be issued thereon, and my property to be seized and sold and the avails turned over to the plaintiff. Now, will he tell me that if upon those papers, a judge, without notice, issues an order to the sheriff to seize my property and pass it over to my creditors, or appoints a receiver of my property, and at the same time, and in the same manner, issues a writ of assistance to put that property into the hands of a receiver, and, if you please, goes still further, and inserts in that order appointing a receiver, a provision that when that property is placed in his, the receiver's hands, it shall be by him handed over to the plaintiff in the action; that the judge cannot be impeached for that act because the papers presented to him, on their face, made a *prima facie* case of indebtedness against me?" (Ibid., pp. 2095-2096.)

The judge was convicted by a two-thirds vote of guilty on Article XI, to which this reference was made, for granting ex parte an order appointing receivers and ordering them to take immediate possession of a railroad; although the papers on which the application was made alleged insufficient to sustain the jurisdiction, when the evidence showed that the judge left his mother's deathbed on a telegram from James Fisk on the morning when he granted the order, went to New York to the house of Fisk's mistress, and not finding him there, to the Grand Opera House, and thence to another house owned by James Fisk, and signed the order; having left Poughkeepsie at 6 o'clock and sent the receiver on the train to take possession of the railroad at 11 o'clock the same evening. (Ibid., pp. 2090-2103.)

[27] Pickering's Impeachment Trial; Humphreys' Impeachment Trial; Addison's Impeachment Trial; Prescott's Impeachment Trial; Holden's Impeachment Trial; Frazier's Impeachment Trial; Barnard's Impeachment Trial, vol. iii, pp. 2037-2203. In State *v.* George S. Hastings, Attorney-General and others, 37 Nebraska, 96; s. c. 55 N. W. Rep., 774, the court

which encourages insurrection.[28] It does not consist in an error in judgment made in good faith in the decision of a doubtful question of law,[29] except perhaps in the case of a violation of the Constitution.[30]

It includes such action by an officer when acting as a member *ex officio* of a board of commissioners;[31] and such action in the same or a similar office, at an immediately preceding term, in one case, it was so held, after his re-election in a campaign at which the charges were discussed upon the stump.[32] Otherwise, it seems an officer should not be impeached for an offense committed before his official term,[33] nor, except perhaps when the offense tends to bring the office into great disrepute,[34] for an offense committed

said that negligence so gross and flagrant as to warrant the inference that it was corrupt constituted a "misdemeanor in office" which was a ground of impeachment.

[28] Hardy's Impeachment Trial, *infra*, § 94; Humphreys' Impeachment Trial, *supra*, § 90, *infra*, § 96.

[29] The following definition by Ex-Judge William Lawrence had the approval of the managers of Johnson's Impeachment Trial: "An impeachable high crime or misdemeanor is one in its nature or consequence subversive of some fundamental or essential principle of government or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or of duty by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper purpose." (Johnson's Impeachment Trial, vol. i, p. 147.) See also the arguments in Chase's and Peck's Impeachment Trials, especially the arguments of Manager Charles A. Wickliffe and the respondent's counsel, William Wirt, in Peck's Trial, *supra*, § 90; Barnard's Impeachment Trial, vol. iii, p. 2038, per Grover, J., p. 2057. Peck's Impeachment Trial, per Manager, afterwards President James Buchanan, p. 428; per respondent's counsel, William Wirt, pp. 494–495; Chase's Impeachment Trial, *supra*, § 90, *infra*, § 94; Prescott's Impeachment Trial, per Manager, afterwards Chief-Justice, Shaw, p. 182; Jackson's Impeachment Trial; Hubbell's Impeachment Trial; Page's Impeachment Trial; Botkin's Impeachment Trial, *infra*, Appendix to this volume; State *v.* George H. Hastings, Attorney-General, and others, 37 Nebraska, 96.

[30] See Peck's Impeachment Trial, per Manager Charles A. Wickliffe, p. 312; Johnson's Impeachment Trial; Frazier's Impeachment Trial; Holden's Impeachment Trial, *infra*, Appendix.

[31] Butler's Impeachment Trial, *infra*, Appendix.

[32] Hubbell's Impeachment Trial; Barnard's Impeachment Trial; Butler's Impeachment Trial; State *v.* Bourgeois, 45 La. Ann., 1350; s. c., 14 So. Rep., 28. See the quotation from State *v.* Hill, Ex-Treasurer, 37 Neb., 80, 90; quoted *supra*, § 92, note 15.

[33] Trial of Henry W. Merritt, a Special Justice for preserving the peace in the city of New York. New York. Published by Gould, Barnes & Co., 1840. See § 95.

[34] *Supra*, notes 23, 24.

while holding office but not when exercising an official function;[35] until after conviction of an infamous crime or of a misdemeanor followed by a sentence which prevents his discharge of his official duties.[36] In case of such a conviction, an officer of the United States or of a State where the Constitution provides no other method of removal, may, in accordance with the analogies of the common law, undoubtedly be removed by impeachment.[37]

At least where there is another method of removal, an officer should not be impeached for physical or mental incapacity.[38] In Tyler's administration, John Quincy Adams in a report to the House of Representatives expressed the opinion that a President might be impeached for an abuse of the veto power.[39] In the Virginia Convention Madison said that if the President "got up" a treaty "with surprise" he would be impeached;[40] and that "incapacity, negligence or perfidy of the Chief Magistrate" should be a ground for impeachment.[41] Gouverneur Morris said: "The Executive ought, therefore, to be impeachable for treachery. Corrupting his electors and incapacity were other causes of impeach-

[35] *Supra*, note 23; *infra*, § 95, notes 1 and 2.

[36] *Infra*, § 95.

[37] See the argument of Charles A. Wickliffe, manager in Peck's Impeachment Trial, p. 309; Bagg's Case, 11 Coke, 99; Rex *v.* Richardson, 1 Burr, 517, 538; Commonwealth *v.* Jones, 1 Bush (Ky.), 725; State *v.* Humphries, 74 Texas, 466; Andrews *v.* King, 77 Maine, 224, 232.

[38] See, however, the language of Gouverneur Morris quoted *infra* over note 42. In the case of Ward Hunt, Justice of the Supreme Court, who was incapacitated by illness, and refused to resign unless pensioned, Congress passed a bill giving him a pension upon his resignation. A similar statute was passed in the case of a District Judge of the United States. The brief of Ex-Judge William Lawrence, adopted by the managers of Johnson's impeachment trial, says: that the power of impeachment "may reach officers who, from incapacity or other cause, are absolutely unfit for the performance of their official duties, when no other remedy exists and the public interest imperatively demands it." (Johnson's Impeachment Trial, vol. i, p. 147.) See also the proceedings on Pickering's impeachment trial.

[39] Report on the Veto of the Tariff Bill, House Reports, 27th Congress, 2d Session, vol. v, No. 998; Brief of William Lawrence in Johnson's Impeachment Trial, vol. i, p. 140. See, however, the minority report of James F. Wilson and Frederick G. Woodbridge upon the first proposition to impeach Andrew Johnson, House Reports, 40th Congress, 1st Session, No. 7, p. 94.

[40] Elliott's Debates, 2d ed., vol. iii, pp. 500, 516.

[41] Madison Papers, ibid., vol. v, p. 341.

ment. For the latter he should be punished not as a man but as an officer, and punished only by degradation from office." [42]

In the first debate in Congress on the right of removal from office, Madison said that "the wanton removal of meritorious officers would subject him to impeachment and removal from office." [43] If this construction had been adopted and enforced, few Presidents since John Quincy Adams would have escaped.[44]

§ 94. Convictions upon Impeachments in the United States.

Convictions on impeachments and removals in some cases with disqualification have occurred in the United States as follows: Pickering, a district judge of the United States, for ordering a ship with her contents, which had been seized for an alleged violation of the custom laws, to be delivered to the claimant without requiring a bond as provided by law; for refusing to hear any testimony offered by the United States in a proceeding to condemn the same vessel; for refusing to allow an appeal by the United States in the case; and for drunkenness and profanity on the bench.[1] Humphreys, a district judge of the United States, for a public speech inciting revolt and rebellion against the Constitution and government of the United States and a public declaration therein of the right of secession; for supporting, advocating and agreeing to the Ordinance of Secession; for organizing armed rebellion against the United States; for joining in a conspiracy to oppose by force the authority of the United States; for refusal to hold court; for unlawful acting as judge of the Confederate district court, and in such capacity making unlawful arrests and imprisonments.[2] Addison, a judge of a court of common pleas in Pennsylvania, for charging a petit jury in language disrespectful to an associate lay judge, and for refusing to permit his associate to charge a grand jury.[3] Sheriff Greenleaf, in Massachusetts, for

[42] Madison Papers, vol. v, p. 343.

[43] Elliott's Debates, 2d ed., vol. iv, p. 380. See also opinion of Senator Howe in Johnson's Impeachment Trial, vol. iii, p. 71.

[44] See the minority report of James F. Wilson and Frederick E. Woodbridge upon the first proposition to impeach Andrew Johnson (House Reports, 40th Congress, 1st Session, No. 7, p. 86.)

§ 94. [1] Pickering's Impeachment Trial, *supra*, § 90.

[2] Humphreys' Impeachment Trial *supra*, § 90.

[3] Addison's Impeachment Trial *infra*, Appendix to this volume.

the embezzlement of public money; for exhibiting false accounts and returns to the State treasurer; and for procuring an execution and a distress warrant for money which he had already collected.[4] Hunt, a justice of the peace in the same State, for making false entries in his records of appearances and proceeding by parties who had not appeared.[5] Vinal, another justice of the peace there, for bribery and extortion.[6] Prescott, a Massachusetts probate judge, for collecting illegal fees.[7] Richard S. Thomas, a circuit judge in Missouri, for unlawfully removing the clerk of his court and appointing his own son in his place; for signing as surety a bond upon an appeal by his son to his own court and then indefinitely postponing the trial; and for conspiring with a lawyer to release on bail, without taking testimony, the latter's client who was charged with murder.[8] Elliott, judge of the City Court of Lafayette County in Louisiana, for neglect of duty in failing to properly keep the records of naturalizations and permitting his clerk to issue false certificates.[9] Wickliffe, auditor of the public accounts of Louisiana, for issuing a warrant for the payment of a claim which he knew to be illegal.[10] Bates, treasurer of California, for misuse and waste of the State funds. Hardy, a district judge in California, for public language when off the bench expressing his sympathy with the Southern Confederacy.[11] Robinson, secretary of State, and George S. Hillyer, auditor, of Kansas, for selling bonds of the State at a less price than was authorized by law and at less than they might have obtained[12] for the same. Frazier, judge of a Criminal Court in Tennessee, for releasing by habeas corpus a member of the State house of representatives from the custody of the sergeant-at-arms.[13] Governor Holden of North Carolina, for refusing to obey a writ of habeas corpus, in imitation

[4] Appendix to Prescott's Impeachment Trial, pp. 212–214; see Appendix to this volume.

[5] Ibid., pp. 214–216. See Appendix.

[6] Ibid., pp. 216–217. See Appendix.

[7] Prescott's Impeachment Trial, *infra*, Appendix.

[8] See Jackson's Impeachment Trial, pp. 336–337; Appendix, *infra*.

[9] Elliott's Impeachment Trial, Appendix; *infra*.

[10] Wickliffe's Impeachment Trial, *infra*, Appendix.

[11] Bates' Impeachment Trial, *infra*, Appendix. Hardy's Impeachment Trial, *infra*, Appendix.

[12] Impeachment Trials of John W. Robinson and George S. Hillyer. See Appendix.

[13] Frazier's Impeachment Trial, *infra*, Appendix.

of President Lincoln, without legislative authority. Governor Butler of Nebraska for embezzling the public funds. Lieutenant-governor Davis of Mississippi, for selling a pardon to a convicted murderer during the absence of the governor from the State. Judge Osborne of Georgia for falsifying returns of an election to Congress. Goldsmith, comptroller-general of Georgia, for the illegal collection and appropriation to his own use of insurance fees and taxes and making false reports concerning his collections.[14] Judge Barnard of New York for unjust partiality to suitors to whom he gave illegal orders, and for language on the bench which brought the administration of justice into disrepute.[15] Seeger. treasurer of Minnesota, for improper investments of the State funds and concealment of the delinquency of his predecessor. Judge Cox of Minnesota for drunkenness on the bench and when in the discharge of official functions off the bench. Laverty, keeper of the New Jersey state prison, for licentious intercourse with female convicts; and Connelly, a New Jersey justice of the peace, for an assault upon a lawyer in his office.[16]

§ 95. Causes for which Public Officers may be Removed.

The following decisions as to the causes for which public officers who do not hold office at the pleasure of the appointing power may be removed, offer analogies that may be useful. A public officer cannot be removed for a crime which is not a violation of his official duty until after conviction by a court having jurisdiction of such crime.[1] After such a conviction he may be removed if the crime is infamous, or even if it is a mere misdemeanor, when he is sentenced to a term of imprisonment which will prevent him from discharging his official duties.[2]

[14] See their respective trials in the Appendix, *infra*.

[15] Barnard's Impeachment Trial; *supra*, § 93, notes 25, 26; *infra*, Appendix.

[16] See their respective trials in the Appendix, *infra*.

§ 95. [1] Bagg's Case, 11 Coke, 99; Rex *v.* Richardson, 1 Burr, 517, 538; Commonwealth *v.* Jones, 10 Bush (Ky.), 725; State *v.* Humphries, 74 Texas, 466; Andrews *v.* King, 77 Maine, 224, 232. But see Oliver *v.* City Council, 69 Ga., 165; People *v.* Board of Police, 11 Hun. (N.Y.), 403; People *v.* French, 32 Hun. (N.Y.), 112; s. c. 60 How. Pr. (N.Y.), 377; and other cases cited in American and English Encyclopædia of Law, vol. xix, p. 562, in Note 1.

[2] Ibid. But see Commonwealth *v.* Shaver, 3 Watts & S. (Pa.), 338.

The following acts have been held such breaches of official duty as to constitute a cause for removal from office: demanding and receiving illegal fees;[3] receiving bribes;[4] the persistent refusal by a county clerk to perform his duties as clerk of the board of county commissioners, although he believed that the action which they contemplated was illegal;[5] the persistent refusal by a county attorney to prosecute violations of the liquor law, although he based his refusal upon his belief that the sentiment of the community was opposed to the enforcement of the law;[6] the repeated removal of government landmarks by a county surveyor, although he claimed the right to do so for the purpose of rectifying the original survey;[7] the use by superintendents of the poor of their official power and the poor fund to compel the recipients of their favor to vote under their dictation;[8] the failure by the same officers to refund to the treasurer money repaid them by persons to whom they had given temporary relief;[9] the action of the same officers in drawing orders on the county treasurer in favor of persons named therein, collecting the drafts themselves and compelling the payees to take from them goods at exorbitant prices in payment of the drafts;[10] the act of a county clerk in knowingly permitting a material alteration of his official records;[11] the certification by a board of State canvassers of an erroneous statement of the votes upon a constitutional amendment prepared by their clerk and not examined by them,[12] and the false certification of fictitious records by a county clerk[13] without proof of corruption in either case; the false certification by a register of deeds over his official signature that he had examined a title and found it unencumbered although no statute authorized a certificate by him.[14] A statute providing for the removal of a public officer for habitual intoxication or for voluntary intoxication in business

[3] Brackenridge *v.* State, 27 Texas App., 513.

[4] State *v.* Jersey City, 1 Dutcher, N. J. Law, 536.

[5] State *v.* Allen, 5 Kansas, 213.

[6] State *v.* Foster, 32 Kansas, 14; s. c. 112 U. S., 201.

[7] Minkler *v.* State, 14 Nebraska, 181.

[8] Gager *v.* Board of Supervisors of Chippewa County, 47 Mich., 167.

[9] Ibid.

[10] Ibid.

[11] Commonwealth *v.* Barry, Hardin (Ky.), 229.

[12] Attorney-General *ex rel.* Rich *v.* Jochim (Mich.), 58 N. W. Rep., 611.

[13] Commonwealth *v.* Chambers, 1 J. J. Marsh (Ky.), 160.

[14] State *v.* Leach, 60 Maine, 58; s. c. 11 Am. Rep., 172.

hours was held constitutional as providing for a removal from office for incapacity.[15] Where an officer assumed duties which he was not required to perform, it was held that he might be removed for want of skill in their performance.[16] It has been said that it is "proper to separate the character of the man from the character of the officer"; that "a very honest man may make a very indifferent clerk, and a man despicable for his vices may make an excellent clerk."[17] It was held in Kentucky, that the intoxication of a county judge while in the performance of his official duties when issuing letters of administration was not misfeasance in office,[18] by a general term in New York, that the use of obscene and abusive language by a police-captain when off duty was not "illegal, corrupt or otherwise improper conduct" for which he could be removed;[19] but it has been held misfeasance in office for a policeman to attack with his official club a private citizen when off duty and seeking redress for a private wrong.[20] It has been held that an officer cannot be removed because he was ineligible or disqualified at the time of his appointment, the remedy being a quo warranto;[21] nor for an act previously performed, such as bribery of a voter before his election, which might be a ground for contesting the election,[22] unless the act was a breach of official duty committed while in the same office during an immediately precedent term;[23] nor for failure to execute a bond required by law;[24] nor in the case of a postman for failure to attend the great court on four occasional meetings, and a meeting upon a stated day.[25]

[15] McComas *v.* Krug, 81 Indiana, 327; s. c. 42 Am. Rep., 135. See also State *v.* Gilmore, 20 Kansas, 651; s. c. 27 Am. Rep., 189. But see Commonwealth *v.* Williams, 79 Ky., 42; s. c. 42 Am. Rep., 204.

[16] People *ex rel.* Campbell *v.* Campbell, 82 N. Y., 247.

[17] Commonwealth *v.* Chambers, 1 J. J. Marsh (Ky.), 108, 160, per Underwood, J.

[18] Commonwealth *v.* Williams, 79 Ky., 42; s. c. 42 Am. Rep., 204. *Contra*, King *v.* Mayor and Burgeses of Glocester, 3 Bulstrode, 189; King *v.* Taylor, 3 Salkeld, 231; Commonwealth *v.* Alexander, 4 H. & M. (Va.), 522.

[19] People *ex rel.* Lee *v.* Doolittle, 44 Hun. (N. Y.), 293.

[20] Oliver *v.* City Council, 69 Ga., 165; People *ex rel.* Hayes *v.* Carroll, 42 Hun. (N. Y.), 438.

[21] Commonwealth *v.* Lancaster, 5 Litt. (Ky.), 161; People *ex rel.* Clapp *v.* Board of Police, 72 N. Y., 415; Ellison *v.* Raleigh, 89 N. C., 125.

[22] Commonwealth *v.* Shaver, 3 Watts & S. (Pa.), 338. People *v.* Merritt, see *supra*, § 93, note 33.

[23] *Supra*, § 93, note 32.

[24] Hyde *v.* State, 52 Miss., 665; Commonwealth *v.* Slifer, 25 Pa. St., 23.

[25] Rex *v.* Richardson, 1 Burr, 517,

§ 96. Removal of Judges.

Analogous to impeachments are proceedings for the removal of judges. In England judges can be removed by the crown upon an address by both houses of Parliament.[1] There is no similar provision in the Constitution of the United States, which gives no remedy except impeachment for the misbehavior of a judge. The constitutions of several of the States have provisions similar or analagous to the English practice. In Massachusetts, judges may be removed by the governor and council or the address of both houses of the legislature.[2] It has been the usual practice in Massachusetts to give the petitioners for the removal and the respondent a hearing, with permission to be represented by counsel and to offer evidence before a joint committee of both houses. In New York, —

"Judges in the Court of Appeals, and justices of the Supreme Court, may be removed by concurrent resolution of both houses of the Legislature, if two-thirds of all the members elected to each house concur therein. All judicial officers, except those mentioned in this section, and except justices of the peace and judges and justices of inferior courts not of record, may be removed by the Senate, on the recommendation of the Governor, if two-thirds of all the members elected to the Senate concur therein. But no removal shall be made, by virtue of this section, unless the cause thereof be entered on the journals, nor unless the party complained of shall have been served with a copy of the charges against him, and shall have had an opportunity of being heard. On the question of removal, the yeas and nays shall be entered on the journal.[3]

Similar provisions exist in nearly all the other State constitutions, and a number of State judges have been thus removed. The proceedings are usually judicial in their nature;[4] but no case has

544. See on the subject of this section Mechem on Public Officers, book II, ch. vi.

§ 96. [1] 12 and 13 W. III.

[2] Constitution of Massachusetts, Ch. III, Art. 1.

[3] New York Constitution, Art. VI, Sec. 11. Similar provisions may be found in most State constitutions.

[4] An account of a number of these proceedings may be found in the Appendix to this volume, *infra*. The Pennsylvania Senate held by a party vote in 1891 that it had no jurisdiction to remove an officer for an impeachable offense before his conviction upon impeachment or indictment. See the proceedings against Boyer and Mc-

occurred where an attempt has been made by the courts to review them for irregularity by certiorari or otherwise.

The most remarkable cases were two removals by State legislatures of judges for obedience to the Federal Constitution: that of Judge Loring in Massachusetts for the enforcement of the Fugitive Slave Law; and that of Judge Hindman in West Virginia for following a decision of the Supreme Court of the United States which overruled a decision of the State court of appeals and held a statute unconstitutional which disqualified attorneys for participation in the Rebellion.[5]

§ 97. Preliminary Proceedings on Impeachments.

An impeachment is usually preceded by the presentment to the House of Representatives of charges against an officer, either by a message from the President,[1] the petition of a private citizen,[2] or the speech of a member of the House.[3] Thereupon a committee is usually appointed to consider and report upon the charges, which takes testimony concerning the same.[4] If the accused demands a hearing before the committee, that is usually accorded to him, although the committee has discretionary power in that respect. If the committee determines that the officer should be impeached, it makes a report containing a statement of the charges and a recommendation of a resolution that he be impeached therefor. On the adoption of the resolution by the House a committee is appointed to impeach him at the bar of the Senate, to state there that articles against him will be exhibited in due time and made good before it, and to demand that it take order for his appearance to answer to the impeachment. Thereupon, the Senate usually refers the resolution to a committee appointed for that purpose.[5] This committee reports a preamble reciting the proceedings on the part of the House before the Senate; and a resolution: "that the Senate will, according to its standing rules and

Camant. Compare John Quincy Adams' Diary, vol. I, p. 255. The weight of authority, however, supports such removals. See Appendix, *infra*.

[5] See Appendix, *infra*.

§ 97. [1] As in Pickering's Case, Annals of Congress, 1802-1803, p. 460.

[2] As in Peck's Case, p. 1.

[3] As in Chase's Case (Smith's ed.), p. 1.

[4] Attorney-General Charles Lee gave an opinion that this was necessary. 20 American State Papers, 151.

[5] Belknap's Impeachment Trial, pp. 7–8.

orders in such cases provided, take proper order therein, (upon presentation of the articles of impeachment), of which due notice will be given to the House of Representatives"; and that the Secretary of the Senate acquaint the House therewith; which is accordingly adopted.[6]

§ 98. Articles of Impeachment.

The articles, as the charges are termed, are then prepared by a committee of the House of Representatives, and after they have been reported to and approved by the House, they are presented in a like manner to the Senate. It is customary to have them signed by the speaker and attested by the clerk of the House.

In Edmonds' case, the constitution of Michigan provided that no impeachment should be tried by the State senate until after the final adjournment of the legislature.[1] A statute was passed authorizing the State house of representatives to empower the managers of an impeachment "to prepare and present articles of impeachment in accordance with the resolutions of said House."[2] It was held against the objection of the respondent, which was ably argued, that the statute was constitutional and that articles prepared and presented to the senate by the managers after the house had passed a resolution of impeachment were sufficient although not presented to the house.[3] In Barnard's case, the New York constitution provided that "The assembly shall have the power of impeachment by a vote of the majority of all the members elected."[4] The assembly journal showed that the resolution of impeachment passed by the constitutional majority, but was silent as to the number who voted to adopt the articles, and did not set forth the articles at length. The articles were not authenticated by the signature of the speaker. The respondent filed a plea, that the articles were not adopted by a majority of the members elected to the assembly, to which the managers replied traversing this allegation. Against the objection of the respondent, oral testimony was admitted to prove that the articles were adopted by a majority vote and to identify the articles pre-

[6] Belknap's Impeachment Trial, p. 8.

§ 98. [1] Constitution of Michigan, Art. XII, Sec. 3.

[2] Michigan, Act of March 30, 1872.

[3] Edmond's Impeachment Trial, pp. 86-184, 188, 1866, 1869-1879.

[4] New York Constitution of 1846, Art. VI, Sect. 1.

sented to the Senate with those adopted by the assembly; upon which the plea was overruled.[5]

On the trial of Judge Page in Minnesota, a plea to the jurisdiction contained in the respondent's answer set up that the journal of the house of representatives did not show the articles of impeachment had been approved by the vote of the majority of the members elected. The journal showed simply "That the articles were presented and duly adopted." Without taking testimony the senate overruled the plea.[6]

In Holden's impeachment trial in North Carolina, the house of representatives made an order amending an article of impeachment by substituting another person for the one originally named as innocent of the unlawful act charged against the respondent. An objection was made to this amendment upon the ground that it could not be allowed unless new witnesses were examined before the house, or a committee thereof, in support of this charge.[7] The amendment was allowed without this requirement. The answer was thereupon amended so as to meet this new article and a replication thereto made by the house.[8] In Hubbell's case in Wisconsin the managers were allowed to amend the articles by correcting an error in the name of a place mentioned in the specifications. A new plea and answer were then filed to the amendment; and the respondent's counsel claimed that the senate should be resworn.[9]

The New York court for the trial of impeachments held in Barnard's case that it had no power to grant a motion by the respondent to strike out part of an article or to compel an amendment of the same.[10] The supreme court of Nebraska held that the legislature could not delegate to the managers the power to make such a substantial amendment as amounted in effect to a new article.[11]

[5] Barnard's Trial, pp. 66, 67, 97–146.

[6] Page's Impeachment Trial, pp. 101–110; *infra*, Appendix.

[7] Citing opinion of Attorney-General Charles Lee, American State Papers, vol. xx, p. 101.

[8] Holden's Impeachment Trial, pp. 61–72, 100, 101, *supra*, § 94; *infra*, Appendix. See the argument of Montgomery Blair, counsel for the respondent in Belknap's Impeachment Trial, p. 100.

[9] Hubbell's Impeachment Trial, pp. 187–188, 241, 533.

[10] Barnard's Impeachment Trial, pp. 192, 193.

[11] State *v.* Leese, Ex-Attorney-General, 37 Neb., 92, 94.

In Page's impeachment trial the counsel for the respondent moved to quash one of the articles as insufficient, because indefinite. The motion was denied, with a provision that no evidence should be received under the article unless the managers should on or before a certain date furnish and file in the case a bill of particulars to that article. The counsel for the respondent objected to this upon the ground, that it amounted to a permission to the managers to amend the article without any action of the house of representatives thereupon, and was in effect a permission to the managers to present a new article of impeachment, which power even the house itself could not have delegated to them; but the objection was overruled.[12]

The articles need not pursue the strict form of an indictment.[13] Great looseness is allowed in their construction; and it is customary to mingle rhetoric as well as arguments with the statements of fact which they contain. In England, no demurrer to an article of impeachment has ever been admitted;[14] but our American practice affords more safeguards to the accused.[15] The articles must contain sufficient certainty to enable the respondent to properly pre-

[12] The article was as follows: —

"Article X. Throughout the term of office of said Sherman Page as Judge of the district court in and for said county of Mower, to wit: since or or about January 1st, 1873, he, the said Sherman Page, as such judge, has habitually demeaned himself towards the officers of said Court and towards the other officers of said county of Mower, in a malicious, arbitrary and oppressive manner and has habitually used the power invested in him as such judge to annoy, insult and oppress such officers, and all other persons who have chanced to incur the displeasure of him the said Page." (Page's Impeachment Trial, pp. 20, 163, 172, 232.)

[13] Lord Wintown's Impeachment Trial, Howell's State Trials, vol. xv, pp. 875-891; Report on the Lords' Journals, Burke's Works, Little & Brown's ed., vol. xi, pp. 13-41; Woodeson's Lectures, vol. ii, pp. 605, 606; Comyn's Digest, *Parliament*, L. 21; Foster's Crown Law, pp. 389, 390; Story on the Constitution, 5th ed., § 808; Manager George Frisbie Hoar, Belknap's Impeachment Trial, pp. 73-75. In Barnard's Impeachment Trial, Judge Allen said (at p. 2041): "If he has been guilty of mal or corrupt administration of his office of Judge of the Supreme Court, and the facts constituting the alleged malfeasance, and the actions or proceedings on which the orders were made or judgments given are set forth distinctly and clearly in the articles, he can be convicted, although the particular intent with which the acts were done or the particular inducement by which he was led to act are not alleged."

[14] Report on the Lords' Journals, Burke's Works, Little & Brown's ed., vol. xi, p. 13.

[15] *Infra*, § 103.

pare his defense and to avail himself of an acquittal thereupon as a bar to another impeachment.[16] It is usual, when the article charges a course of conduct, to include therein a number of specifications of such conduct. In Cox' case, before the Minnesota senate, demurrers to certain articles were overruled, but the board of managers were required to furnish the respondent with specifications as to them. The senate ruled that if no such specifications should be furnished no evidence should be received under those articles; and after the specifications were filed excluded all evidence in support of one of such articles, and dismissed the same.[17]

§ 99. Service of Process on Impeachment.

As soon as the articles are thus presented, the Senate issues a process summoning the party to appear before it to answer the articles at a given day. This process is in the form of a summons, reciting the articles and notifying him to appear before the Senate at a time and place named therein, which is fixed by it, to file his answer to the articles, and to abide the orders and judgment of the Senate thereon.[1] A precept for the writ naming the time before the return-day allowed for the service is issued to the sergeant-at-arms of the Senate, who serves the writ either in person or by deputy.[2] In Johnson's case the return-day of the summons to the President was one week after its issue was ordered.[3] In Belknap's case the return-day was twelve days after the order.[4] In the earlier impeachments, when the accused lived a long distance from the place of trial and the means of travel were more difficult and slow than now, more time was allowed. The summons is served either by the delivery of an attested copy to the person accused; or if that cannot conveniently be done, by leaving

[16] Story on the Constitution, 8th Am. ed., § 808.

[17] Impeachment Trial of Judge Cox, pp. 161, 520, 527, 1002. See *supra*, § 93, note 23.

§ 99. [1] Senate Rules for Impeachments, VIII.

[2] Ibid., VI.

[3] Johnson's Impeachment Trial, p. 16.

[4] Belknap's Impeachment Trial, p. 16. In Minnesota service of a copy of the impeachment must be made on the respondent at least twenty days before the trial (Art. XIII, Sec. 5). The rule is the same in North Dakota (Art. XIV, Sec. 200); South Dakota (Art. XVI, Sec. 7). In New Hampshire service of a citation must be made at least fourteen days before the trial (Art. 38).

such a copy at his last known place of abode, or at his usual place of business in some conspicuous place therein; or if such service is in the judgment of the Senate impracticable, notice to the accused to appear may be given in such other manner, by publication or otherwise, as the Senate deems just. If the writ cannot be served on time, it does not abate, but further service may be made in such manner as the Senate directs.[5]

In Humphreys' case the process was served by leaving a copy of the same at the residence of the respondent, who could not be found in that vicinity. On his failure to appear in pursuance of the summons, a proclamation for his appearance was served, by order of the Senate, by publication in three newspapers in Washington at least forty days successively, and one newspaper published at his residence for five days successively.[6]

The old English custom was to cite the party by a writ directed to himself or to require the sheriff to summon him, and if he could not be found to proclaim throughout the realm that if he did not attend on the day fixed he would be attainted.[7] In later times, when the accused could not readily be apprehended, the king was addressed in order that the ports might be stopped, that he might be prevented from taking shelter in the royal palaces, and at the same time all persons were prohibited under certain penalties from harboring and concealing him.[8] There is no provision or authority under the Constitution of the United States for the arrest of the accused by the Senate or his suspension from office pending the impeachment.[9] Blount, who, however, was a member of the Senate, was arrested and held to bail until the termination of his

[5] Rules for Impeachments, VIII.

[6] Humphreys' Impeachment Trial, Congressional Globe, 2d Session, 37th Congress, part iv, p. 2942.

[7] Woodeson's Lectures, vol. ii, p. 604; citing 4 Inst. 38–39; 3 Selden's Works, 1621.

[8] Ibid., vol. ii, p. 604; citing 2 St. Tr., 573, 732 (ed. 1730); Com. Journ., April, 1679.

[9] See Professor Dwight's Lecture on Trial by Impeachments in American Law Register, N. S., vol. vi, pp. 276–278; Von Holst's Constitutional Law, pp. 162–163. Tiffany in his Treatise on Government and Constitutional Law, p. 354, argues that Congress may arrest an impeached president or other officer and suspend him from office pending the proceedings. Pomeroy, in his Constitutional Law, § 128, that this cannot be done to an officer whose term is fixed by the Constitution, but that it might be when his term of office is merely statutory.

trial.[10] Several State constitutions have provisions authorizing a suspension from office in such a case.[11] In the State of Arkansas, the impeachment of Governor Clayton began by several members of the house locking the governor in the executive chamber.[12]

§ 100. Managers of Impeachment and Counsel for Prosecution.

A committee of managers is also appointed by the House to conduct the impeachment. These managers are always members of the House, and usually lawyers. In no case has the House of Representatives of the United States employed counsel to assist the managers upon a trial of an impeachment. In some States the houses of representatives have employed counsel to assist the managers.[1] It was decided by the senate of California in Hardy's case that this might be done.[2] On Barnard's trial, the New York assembly was represented by a committee of the New York City Bar Association as well as by the managers, and the former had full control of the proceedings.[3]

§ 101. Swearing of the Senate.

The Constitution provides that the Senate, when sitting for the purpose of impeachment, "shall be on Oath or Affirmation."[1] The members of the House of Lords are not sworn, but give their votes upon their honor.[2] It was natural that in a country where no privileged caste among white men was recognized, the senators

[10] Wharton's American State Trials, pp. 201–202, 250; *supra*, § 90.

[11] In Louisiana (Art. 198), North Dakota (Art. XIV, Sec. 198), South Dakota, Art. XVI, Sec. 5), an officer cannot perform his official functions after impeachment and before his acquittal. So in Michigan (Art. XII, Sec. 24), and New Jersey as regards judicial officers (Art. VI, Sec. 3); and in New York as to judicial officers after the articles "have been preferred to the Senate" (Art. VI, Sec. 13). See In the Matter of the Executive Communication, 12 Fla., 653; and Appendix, *infra*.

[12] Atlantic Monthly, vol. xxix, p. 386; *supra*, § 38, over note 167; § 88, over notes 16 and 17. See Appendix, *infra*.

§ 100. [1] In Addison's Case and that of McKean and his associates in Pennsylvania; Hubbell's Case in Wisconsin and Hardy's Case in California; *infra*, Appendix.

[2] Hardy's Impeachment Trial, pp. 26, 167–173. In Hubbell's Case the State paid one of its counsel $3,000 (Ibid.).

[3] See Appendix, *infra*.

§ 101. [1] Constitution, Article I, Section 3.

[2] Blackstone's Commentaries, vol. i, p. 402.

should be bound in the same way as judges and jurors for the administration of justice. The oath or affirmation is administered to the senators by the presiding officer for the time being of the Senate.[3] When the Chief-Justice presided the oath was administered to him by one of the associate justices of the Supreme Court.[4] When the Vice-President presided it was customary under the former rules to have him sworn by the secretary of the Senate.[5] If the respondent wishes to exclude a member of the Senate from the trial, the safer practice is for one of the other senators to object to his being sworn.[6]

§ 102. Appearance of the Accused.

On the return day of the process, after the senators have been sworn, the person impeached is called in their presence to appear and answer the articles. If he fails to appear in person or by attorney, his default is recorded and the Senate proceeds *ex parte* in the trial of impeachment in the same manner as if a plea of not guilty had been filed.[1]

On the trial of Judge Pickering, although the judge did not appear, the Senate received a petition from his son which alleged his insanity, and prayed a postponement and leave to defend for him. This was presented by counsel for the petitioner, who disclaimed any appearance for the judge. Against the protest of the managers and after their withdrawal to take the opinion of the House upon the subject, the counsel was allowed to present evidence of the judge's insanity in the form of depositions; but the managers returned and the trial went on in the same manner as if the petition and the depositions in support thereof had not been presented.[2]

[3] 19 St. at L., 34; Rules for Impeachment, III; Belknap's Impeachment Trial, pp. 14, 15, 21, 24, 29, 229, 233.

[4] Johnson's Impeachment Trial, p. 11.

[5] Chase's Impeachment Trial, Smith's ed., p. 12; Peck's Impeachment Trial, p. 58.

[6] See, however, Johnson's Impeachment Trial, vol. iii, pp. 360–400.

§ 102. [1] Senate Rules for Impeachment, VIII, X; Pickering's Impeachment Trial, Annals of Congress for 1803–1804, pp. 315–367; Humphreys' Impeachment Trial, Congressional Globe, 2d Session, 37th Congress, 1862, part iv, pp. 2942–2953. As to the necessity of an appearance in person, see *supra*, § 90, note 36.

[2] Pickering's Impeachment Trial, Annals of Congress for 1803–1804, pp. 328–367.

Upon Humphreys' trial no appearance was made on benalf of the respondent, and all the proceedings were consequently *ex parte*.[3] The accused may appear in person or by attorney. In every trial before the Senate of the United States, where there has been no default, the accused has appeared by counsel. In several of the State impeachment trials, notably those of Addison[4] and Jackson,[5] the accused has conducted his own defense. The senates of several States have assigned counsel to the respondent at his request, and in such a case a law may be passed providing for their payment by the State.[6] On the impeachment trial of John W. Robinson, Senator Ingalls objected to the further appearance of one of the respondent's counsel because he had publicly declared out of court that the Senate was a jury packed against his clients. The counsel thereupon withdrew.[7]

§ 103. Pleadings of the Respondent.

On the appearance of the respondent upon an impeachment he is entitled to be furnished with a copy of the articles, and time is allowed him to prepare his answer thereto. If he fails to plead, the trial proceeds as if a plea of not guilty had been made, and he may be allowed to defend by counsel notwithstanding.[1]

No demurrer to an article of impeachment has been filed or sustained in the House of Lords.[2] In the Senate of the United States no demurrer has ever been sustained, although in the cases of Blount and Belknap, pleas and replications thereto which were analogous to demurrers were filed and argued. In the case of Sheriff Greenleaf in Massachusetts, demurrers general and special to the several articles of impeachment were incorporated in the

[3] Humphreys' Impeachment Trial, Congressional Globe, 2d Session, 37th Congress, 1862, part iv, pp. 2942–2953; Senate Rules for Impeachments, X.

[4] *Infra*, Appendix.

[5] *Infra*, Appendix.

[6] Botkin's Impeachment Trial, p. 72; *infra*, Appendix.

[7] Impeachment Trial of John W. Robinson, pp. 248–249.

§ 103. [1] Belknap's Impeachment Trial, *supra*, § 90. But see Bates' Trial, *infra*, Appendix.

[2] Report on the Lords' Journals, Burke's Works, Little & Brown's ed., vol. xi, p. 13. On Suffolk's impeachment, when the respondent failed to answer but placed himself on the king's disposal, it was held that as to one article he was "neither declared nor charged." (Stubbs' Constitutional History, vol. iii, p. 148.)

respondents' answer, but were overruled.[3] On the trial of Judge Cox before the senate of Minnesota, demurrers to several articles were filed and argued. The Senate in two or three cases overruled the demurrer, but directed that a bill of particulars of the articles should be furnished to the accused, and in the case of one article after the bill of particulars had been furnished, determined to hear no further evidence in support of the charge.[4] On the impeachment trial of Judge Botkin, the Kansas senate sustained demurrers to several articles.[5]

A plea analogous to a plea at common law may be filed to the articles. This was done in the cases of Blount and Belknap.

The usual course, however, is for the accused to answer. No strictness of form is required by the answer. An answer stating simply that the accused is not guilty of each charge is sufficient.[6] A party may, however, offer affirmative reasons as well as facts against the charges, and for the purpose of influencing public opinion, which has more weight with the tribunal in this class of cases than any other, that is the usual practice. The answer usually begins with a reservation of all exceptions to the insufficiency of each article and to the jurisdiction of the court; then separately traverses each allegation in each article; and also pleads separately in justification or excuse of the alleged offenses, all the circumstances attendant upon each case. The answer may be accompanied by exhibits of public documents or court records in support of the defenses pleaded.

On Belknap's impeachment trial the respondent was allowed, after his plea to the jurisdiction had been overruled by a majority of less than two-thirds, to file a protest against further proceedings. Thereupon it was ordered that the trial proceed as if a plea of not guilty had been filed.[7] On the impeachment trial of John W. Robinson, the Kansas senate refused to allow the respondent to file a protest against its jurisdiction on the ground that the

[3] Prescott's Impeachment Trial, Appendix, pp. 213–214; *supra*, § 94, *infra*, Appendix.

[4] Cox' Impeachment Trial, p. 527; *supra*, § 93, note 24.

[5] Botkin's Impeachment Trial, pp. 245–265; *supra*, § 93, note 23.

[6] Hopkinson's Impeachment Trial, Nicholson's Impeachment Trial, Addison's Impeachment Trial, *infra*, Appendix.

[7] Belknap's Impeachment Trial, pp. 530–542; *supra*, § 90. See, however, Bates' Trial, *infra*, Appendix.

lower house had adjourned without a day; but allowed the question to be raised by a motion that no action be taken.[8] On Governor Warmoth's impeachment in Louisiana his triers refused to permit him to file exceptions to the jurisdiction upon the ground that neither they nor his impeachers were a lawful legislative house.[9] Upon Bates' impeachment trial, the California senate refused to allow any objection to the jurisdiction before the respondent pleaded to the articles.[10]

§ 104. Replication.

After a plea or answer is prepared and filed, the next regular proceeding is for the House of Representatives to file a replication to the same in writing. In case of a plea, the replication may be in the nature of a demurrer.[1] In the case of an answer, the replication usually denies the truth and validity of the defense therein stated and avers the truth and sufficiency of the charges and the readiness of the House to prove them at such time and place as shall be appointed for that purpose by the Senate. The replication must be authorized by the House of Representatives and cannot be filed by the managers on their own responsibility, at least in the absence of a statute authorizing such a practice.[2] The practice in the United States upon that subject is the same as prevailed before the House of Lords; although on the trial of Lord Strafford, no replication was filed by the Commons, which, according to a learned commentator, was "a mark probably of contemptuous insult and disdain."[3]

§ 105. Proceedings on the Trial of an Impeachment.

A time is then assigned for the trial, and the Senate at that time or before adjusts the rules of its proceedings. The Senate of the United States has adopted twenty-five "standing Rules of Procedure and Practice in the Senate when sitting on the Trial of Impeachments."[1] "The presiding officer is ordinarily the Vice-

[8] Impeachment Trial of John W. Robinson, pp. 107–133.

[9] Warmoth's Impeachment Trial, *infra*, Appendix.

[10] Bates' Impeachment Trial, *infra*, Appendix.

§ 104. [1] Blount's Case, Wharton's American State Trials, p. 261; Belknap's Case, pp. 79–80.

[2] *Supra*, §§ 98, 100.

[3] Woodeson's Lectures, vol. ii, p. 607.

§ 105. [1] Senate Manual, pp. 165–173.

President, or in his absence the President *pro tempore* of the Senate."[2] When the President of the United States is tried, the Chief-Justice of the United States presides.[3] Who should preside when the Vice-President is tried has not been determined;[4] probably the president *pro tempore* of the Senate. Chief-Justice Chase had doubts as to whether the rules of procedure previously adopted by the Senate were binding unless re-enacted after he had opened the session of the Court of Impeachment, and out of abundant caution the rules were then readopted.[5] Such a course was considered needless on the subsequent trial of Belknap, where no new element was added to the Senate.[6] The rules provide that —

"the presiding officer on the trial may rule all questions of evidence and incidental questions, which ruling shall stand as the judgment of the Senate, unless some member of the Senate shall ask that a formal vote be taken thereon, in which case it shall be submitted to the Senate for decision; or he may at his option, in the first instance, submit any such question to a vote of the members of the Senate. Upon all such questions the vote shall be without a division, unless the yeas and nays be demanded by one-fifth of the members present, when the same shall be taken."[7]

On President Johnson's trial the power of the Chief-Justice to do anything except put the question was disputed by Senator Charles Sumner and others; but the Senate voted that he had the full power given by the rule and Constitution to the president of the Senate: and he exercised this throughout the trial, ruling preliminarily upon questions of evidence and practice, and in two such cases giving the casting vote; but did not vote on the final question which he put.[8]

[2] Constitution, Article I, Section 3.

[3] Ibid.

[4] In Montana (Art. V, Sec. 6), North Dakota (Art. XIV, Sec. 195), South Dakota (Art. XVI, Sec. 2), and Michigan (Art. XII, Sec. 2), it is provided that when the governor or lieutenant-governor is tried, the Chief-Justice of the Supreme Court shall preside. In Georgia (Art. III, Sec. 5), Florida (Art. III, Sec. 29) and West Virginia (Art. V, Sec. 9); the president of the highest court always presides, except of course when he himself is tried, or is otherwise disqualified.

[5] Johnson's Impeachment Trial, p. 12.

[6] Belknap's Impeachment Trial, pp. 19, 20; *supra*, § 90.

[7] Senate Rules for Impeachments, VII.

[8] Johnson's Impeachment Trial, vol. i, pp. 185–187, 276; vol. ii, p. 480, 488, Sumner's opinion on the subject is reported in vol. iii, pp. 281–294. At the trial of Lord Melville, Lord Chan-

On the day appointed for the trial, the House of Representatives appears at the bar of the Senate either in a body or by managers selected for that purpose. Before that time, at the request of either party, subpoenas to secure the attendance of the witnesses may be issued and served by the officers of the Senate in accordance with its rules. Several States have constitutional provisions authorizing or requiring the trial of impeachments by the senate after the adjournment of the lower house.[9] In their absence — and none such exists in the Constitution of the United States — the power of the Senate to try an impeachment after the final adjournment of the House is extremely doubtful.[10] The Senate of the United States has never assumed such power, and in Belknap's case voted that it did not exist.[11]

Whether an impeachment abates by the expiration of the terms of the members of the House of Representatives that voted it has never been decided in the United States. In Warren Hastings' trial in 1791, it was determined by Parliament, most of the lawyers voting in the minority, that an impeachment did not abate by a dissolution, and might be continued by the next Parliament. The previous precedents were conflicting.[12]

Although this position has been disputed,[13] it is settled by precedent that the Senate on the trial of an impeachment sits as a court and not as a legislative body; and the proceedings are entitled

cellor Erskine, who was, however, a peer, decided all questions of evidence without dispute.

[9] By the constitution of West Virginia (Art. VI, Sec. 9): "The Senate may sit during the recess of the legislature, for the trial of impeachments." By that of Michigan (Art. XII, Sec. 3), impeachments must be tried by the senate, after the final adjournment of the legislature.

[10] Constitution, Article I, Section 5; Belknap's Impeachment Trial, pp. 537, 538, 542–544; Johnson's Impeachment Trial, pp. 26–30, 32. In New York and Kansas impeachments have been tried after the adjournment of the lower houses. See Impeachment Trials of John W. Robinson, George S. Hillyer and Charles Robinson; Barnard's Impeachment Trial; Mather's Impeachment Trial, Appendix, *infra*.

[11] Belknap's Impeachment Trial, p. 542.

[12] History of the Trial of Warren Hastings, published by J. Debrett, London, 1796. Introduction to part iv. For the former precedents, see ibid., pp. 42–44, note; Hallam's Constitutional History, Middleton's Am. ed., vol. ii, pp. 397–400.

[13] See the arguments of the managers in Chase's Impeachment Trial and Johnson's Impeachment Trial, *passim;* and the opinion of Senator Sumner in Johnson's Impeachment Trial, vol. iii, pp. 247–281.

"In the Senate of the United States sitting as a Court of Impeachment." [14] The proceedings are conducted substantially as upon ordinary trials, in regard to the admission or rejection of testimony, the examination and cross-examination of witnesses, the rules of evidence and the other questions of law incidentally arising, although there is great liberality and freedom from technicality in all these respects.[15] The presumption of the innocence of the accused is recognized as in ordinary courts of law.[16] He has the right to be confronted with the witnesses against him, [17] and has in general all rights guaranteed by the Constitution to persons charged with crime except those which require an indictment and jury trial and which regulate the place of trial.[18]

§ 106. Evidence upon Impeachment Trials.

On the trial of Warren Hastings it was determined by the Lords that all the evidence of the Commons in support of all the articles should be taken before the respondent's witnesses were examined.[1] This has been the universal rule in the United States, except when depositions were admitted. On some of the earlier English impeachments, including those of Middlesex [2] and Stafford,[3] the evidence for and against each article was taken up separately. On the impeachment of Middlesex the evidence was taken by the depositions of witnesses who were examined secretly on written interrogatories, after the manner of the canon law, which was then followed in chancery; and the accused was not allowed

[14] Chief Justice Chase, in Johnson's Impeachment Trial, vol. i, p. 12; and the proceedings in that case, and Belknap's Impeachment Trial, *passim*, pp. 19–34. In State *v.* George H. Hastings, Attorney-General and others, 37 Neb., 96; it was held, that the Supreme Court acted judicially upon the trial of impeachments and had not succeeded to any political functions that might have been vested in the Senate.

[15] Story on the Constitution, 5th ed., § 811; Report on the Lords' Journals, Burke's Works, Little & Brown's ed., vol. xi, pp. 60–122; Senator Sumner's Opinion in Johnson's Impeachment Trial, vol. iii, pp. 253–256.

[16] Manager Hoar in Belknap's Case, p. 82; State *v.* Hastings Attorney-General, 37 Neb., 96. See State *ex rel.* Attorney-General *v.* Buckley, 54 Alabama, 599, 617–621.

[17] State *ex rel.* Attorney-General *v.* Buckley, 54 Alabama 599, 617–621.

[18] State *ex rel.* Attorney General *v.* Buckley, 54 Alabama, 599, 617–621.

§ 106.[1] History of the Trial of Warren Hastings, published by J. Debrett, London, 1796, p. 10.

[2] Howell's State Trials, vol. ii, pp. 1183–1254.

[3] Howell's State Trials, vol. iii, 382–1526.

to see their testimony before his answer.[4] Upon an impeachment trial before the Supreme Court of Alabama, it was held that the accused had the constitutional right to be confronted with the witnesses against him in court, and that a statute was void which sought to authorize proof by depositions of which he had notice with the right of cross-examination.[5]

In the trials before the Senate of the United States no testimony has been admitted on either side when the witness was not examined in the presence of the Senate. On Pickering's trial, depositions taken before a justice of the peace were submitted and read before the Senate on behalf of the petition of the respondent's son, but no action was taken thereupon by either the Senate or the House.[6] Upon two State impeachment trials rules were made (in Kansas by the consent of both parties,[7] in Michigan without objection[8]) by which depositions were admitted taken outside of the State, in accordance with the State practice in ordinary trials. In two Pennsylvania impeachment trials, depositions of witnesses who were too ill to attend were admitted without objection.[9] In two Kansas impeachment trials testimony taken on a former impeachment trial was by consent considered as read in evidence.[10]

In Belknap's impeachment trial, an order was made, —

"that the managers furnish to the defendant, or his counsel, within four days, a list of the witnesses, as far as at present known to them, that they intend to call in this case; and that, within four days thereafter, the respondent furnish to the managers a list of the witnesses, as far as known, that he intends to summon." [11]

In no case before the Senate of the United States has the testi-

[4] Howell's State Trials, vol. ii, pp. 1183–1254.

[5] State *ex rel.* Attorney-General *v.* Buckley, 54 Alabama, pp. 599, 617–621.

[6] Pickering's Trial, Annals of Congress, A. D.,1803–1804, pp. 334, 342; *supra*, § 90.

[7] John W. Robinson's Impeachment Trial, p. 65.

[8] Hubbell's Impeachment Trial.

[9] Hopkinson's Impeachment Trial and Nicholson's Impeachment Trial.

[10] Hillyer's Impeachment Trial, p. 350; Charles Robinson's Impeachment Trial, p. 397.

[11] Belknap's Impeachment Trial, pp. 524–529. In Hubbell's Impeachment Trial, the Wisconsin Senate denied a motion on behalf of the respondent. that the managers furnish him a copy of the testimony taken before the Assembly committee on the subject. (Hubbell's Trial, pp. 80–81. See Appendix.)

mony of the respondent been taken. It was claimed in Belknap's case by Ex-Senator Matthew H. Carpenter, who was counsel for the respondent, that the respondent and his wife had no right to testify.[12] This was denied by the managers.[13] On Barnard's trial the testimony of the accused was admitted without question;[14] and in other cases he has been allowed to make a statement in his defense not under oath,[15] in accordance with the practice on impeachments before the House of Lords.[16]

In Hubbell's case, one of the managers asked the senate to draw an inference unfavorable to the respondent from his failure to testify in his own defense.[17] For this the manager was rebuked by the respondent's counsel, but the senate took no action in the matter.[18]

In Belknap's case, the counsel for both sides conceded that a journalist had the privilege of refusing to disclose the source of news which he had published.[19] On the impeachment trial, before the senate of Massachusetts, of Vinal, a justice of the peace, by the consent of the respondent the record of his conviction by the Supreme Court of the offenses charged against him was admitted in evidence and held sufficient.[20] On the proceedings for the removal of Sargent and Vinal, judges of the common pleas in the same State, the only evidence was a certificate of their conviction made by the solicitor of the Commonwealth. The legislature held this sufficient against the protest of John Quincy Adams.[21]

§ 107. Arguments of Counsel.

Each side opens its own evidence. At the conclusion of the testimony, the parties have the right to be heard by counsel upon the

[12] Belknap's Impeachment Trial, pp. 978, 995.

[13] Manager Scott Lord in Belknap's Impeachment Trial, p. 1039.

[14] Barnard's Impeachment Trial, p. 1630.

[15] Addison's Impeachment Trial, p. *101; Jackson's Impeachment Trial, pp. 251-275. Hubbell's Impeachment Trial, p. 781. See Appendix, *infra*.

[16] Strafford's Impeachment Trial, Howell's State Trials, vol. iii, pp. 1382-1526.

[17] Manager Huston, in Hubbell's Impeachment Trial, p. 1726.

[18] John B. Chipman, counsel for the respondent in Hubbell's Impeachment Trial, pp. 1772, 1773; *infra*, Appendix. See Wilson *v.* U. S., 149 U. S., 60.

[19] Belknap's Impeachment Trial, p. 667.

[20] Prescott's Impeachment Trial, Appendix, p. 217.

[21] *Infra*, Appendix.

whole case. In a Missouri impeachment trial, the defendants' counsel were allowed to make a motion, in the nature of a demurrer to the evidence, for judgment whether the respondent should make further answer. The senate, after the argument of the motion, refused to allow the managers to withdraw the articles without the permission of the court. Such permission was, however, subsequently granted before the decision of the motion and apparently without any action by the house which presented the impeachment; a most irregular proceeding.[1] The House of Commons has the right to reply on every incidental as well as on the principal question involved in the case.[2] This right, although claimed on the trial of Johnson, Belknap and Barnard, has been overruled in the United States, and on incidental questions the party on the affirmative side of the question has the right to open and reply;[3] although the managers have the right to open and close the final arguments.[4]

§ 108. Decision upon Impeachment.

There can be no conviction upon an impeachment before the Senate of the United States or any of the State senates without a concurrence of two-thirds of the members present. In this, the American differs from the English practice, where a majority of the House of Lords, provided at least twelve concur, is sufficient.[1] The requirement of a vote of two-thirds for a conviction was first made in the New York Constitution of 1777,[2] which in this respect was usually followed in the early constitutions of the other States. That constitution, as did some others, also required the vote of two-thirds of the lower house, which is not required by the

§ 107. [1] Lucas' Impeachment Trial, pp. 278, 288, 312-314. In Hardy's Trial in California the presiding officer said (pp. 260-261): "No doubt the counsel for the prosecution have the right to withdraw any one, or the entire list of the Articles of Impeachment, that they choose." See § 98 and Appendix, *infra*.

[2] Lord Melville's Impeachment Trial, 29 Howell's State Trials, 762-763.

[3] Johnson's Trial, vol. i, p. 77; Belknap's Trial, pp. 64-65, 71-87; Barnard's Trial, *infra*, Appendix.

[4] Senate Rules for Impeachments, XXI. Hardy's Impeachment Trial. p. 465. See Appendix, *infra*.

§ 108. [1] Comyn's Digest, Parliament, L. 17.

[2] Art. XXXIII. Penn's Form of Government in 1696 required the presence of a quorum of two-thirds, a majority of whom might convict. (Poore, Charters and Constitutions, p. 1535.)

Constitution of the United States, where a majority of a quorum of the House of Representatives can impeach an officer. The object of the provision clearly was to interpose a barrier against removals for reasons purely partisan.[3]

At the conclusion of the evidence and after both parties have been heard, the Senate proceeds to the consideration of the case. The debates are usually secret, but each Senator may be allowed to file a written opinion concerning his vote on a final or any incidental question.[4] No senator can be challenged because he has voted for the impeachment before his election to the Senate, while a member of the lower House, or for opinions expressed elsewhere, in public, or because he has become a member of the Senate after the greater part of the testimony has been taken, or because a conviction will make him President of the United States, or otherwise.[5] A senator may be excused from voting upon such a ground at his own request, but it is not usual to grant such permission.[6] The usual form of voting is as follows:—

"Mr. Blount, how say you, is the respondent guilty, or not guilty of a high crime and misdemeanor as charged in the Article of Impeachment?"

This form of voting was settled on Judge Pickering's trial, when five senators refused to vote, and retired from the Court, —

"not because they believed Judge Pickering guilty of high crimes and misdemeanors, but because they did not choose to be compelled to give so solemn a vote upon a form of question which they considered an unfair one, and calculated to preclude them from giving any distinct and explicit opinion upon the true and most important point in the case; viz., as to the insanity of Judge Pickering, and whether the charges

[3] See Story on the Constitution, § 779.

[4] Johnson's Impeachment Trial, vol. ii, p. 476; Belknap's Impeachment Trial, p. 1049. This practice was criticised in Barnard's Impeachment Trial, vol. iii, pp. 2033–2034.

[5] Pickering's Impeachment Trial, Annals of Congress, 1803–1804, p. 367; Johnson's Impeachment Trial, vol. iii, pp. 360–400; Addison's Impeachment Trial, pp. 20–28; 326–345. On Hardy's Trial (pp. 458–459), a senator was allowed to take the oath after the conclusion of the testimony and to vote although he had heard no part of the proof.

[6] Ibid. Addison's Impeachment Trial, pp. 20–28. But see Barnard's Impeachment Trial, pp. 69, 78–82, 2049–2058; Impeachment Trial of John W. Robinson, p. 345.

contained in the Articles of Impeachment, if true, amounted in him to high crime and misdemeanors, or not." [7]

In the House of Lords the vote is on all the articles, but in the Senate of the United States and the senates of the several States, it is customary to vote on each article separately,[8] and in some cases to vote separately upon each specification in the article.[9] In President Johnson's case the Senate of the United States refused to order that a vote be taken separately on the specifications in any article.[10] In a case where the result was not thereby changed, a senator was allowed, by unanimous consent, to change his vote on the following day.[11] After the conviction of John W. Robinson, he moved for a new trial upon the ground that one or more senators, in pronouncing him guilty, based their decision upon an erroneous principle of law.[12] No attention was paid to this motion.

An interesting question was discussed on the trial of Belknap. As has been told above, more than one-third of the senators voted, upon a plea to the jurisdiction at the opening of the trial, that they had no jurisdiction of the respondent. Upon the final vote, it was contended by the managers and by a large number of the Senate that the decision of this incidental question by a majority vote was conclusive, and that all senators were bound to vote guilty if they believed the facts charged in the articles were proved, even though they doubted the jurisdiction or believed that the acts committed did not amount to an impeachable crime.[13] The arguments in support of this proposition were substantially as follows: —

The only question to determine against the defendant which requires a two-thirds vote is whether the respondent should be convicted.[14] All other matters are to be decided by the same vote

[7] Pickering's Impeachment Trial, Annals of Congress, 1803–1804, p. 366.

[8] Senate Rules for Impeachment, XXII.

[9] Barnard's Impeachment Trial, vol. iii, pp. 2154–2176; Hubbell's Trial, pp. 789–819.

[10] Johnson's Impeachment Trial, vol. ii, pp. 478–481.

[11] Jackson's Impeachment Trial, p. 465; *infra*, Appendix.

[12] Impeachment Trial of John W. Robinson.

[13] For a discussion as to whether it requires a vote of two-thirds to fix the penalty, see Barnard's Trial, vol. iii, pp. 2184–2193.

[14] Constitution, Article I, Section 3.

that is required to decide any other parliamentary question, a majority. The word conviction, as defined in the dictionaries, means a determination of guilt.[15] All other questions are preliminary to this and may be decided by a majority. A majority vote, it must be admitted, will decide all questions of evidence, no matter how vital to the success of the prosecution or defense.[16] The question of jurisdiction is no different in principle from this. When a senator is asked to vote on the question: "Is the respondent guilty or not guilty as charged in the first," and in the succeeding, articles? his oath obliges him to vote guilty if in his opinion the evidence proves the offenses charged.[17] On Barnard's trial, several New York judges and senators voted against the jurisdiction as to certain articles when that question was raised; but on the final vote, considering that the jurisdiction had been settled, voted guilty of the charges which those articles contained.[18]

The arguments on the other side were these: The senators are judges of both the law and the fact. No senator can be justified in voting for a conviction unless he is satisfied that the court has jurisdiction of the person of the respondent, and that the facts charged amount to an impeachable crime. In the courts of the United States every question affecting the jurisdiction over the person and the subject-matter, except questions as to the service of the process, cannot be waived, and may be raised at any time even on appeal.[19] If the question of jurisdiction should not be raised preliminarily, but reserved for determination on the final vote; it would hardly be claimed that a senator who believed the court had no jurisdiction could conscientiously vote guilty. It cannot be that his obligation may be changed or the respondent

[15] Manager Scott Lord in Belknap's Trial, pp. 1026; Manager William P. Lynde, ibid., p. 906.

[16] Rule VII; Manager William P. Lynde in Belknap's Trial, p. 905. See Ex-Judge Jeremiah S. Black, counsel for respondent, ibid., p. 965.

[17] Manager George A. Jenks in Belknap's Trial, p. 358; Senator Booth, ibid., p. 1079.

[18] Chief-Judge Church, Judges Folger and Rapallo, Senators Foster, Hammer, Lewis Lord, Murphy and O'Brien in Barnard's Trial, pp. 2122–2129, 2144–2149.

[19] Rhode Island *v.* Massachusetts, 12 Peters, 657, 718; Dred Scott *v.* Sandford, 19 Howard, 393; and other cases cited by Ex-Senator Matthew H. Carpenter, respondent's counsel in Belknap's Trial, pp. 1014–1017. See Foster's Federal Practice, § 93.

prejudiced in his constitutional rights because of the time or order of raising the question. [20]

"The Constitution provides that 'no person shall be convicted [on impeachment] without the concurrence of two-thirds the members present.' *Concurrence* means more than occasional union of minds. The word signifies *running along with each other*. That is, no person can be convicted without the agreement of two-thirds of the members present upon every point necessary to and included in the conviction." [21]

All but three of the senators who voted that they had no jurisdiction, voted not guilty, most stating at the time of the vote that they did so for want of jurisdiction.[22] That has been the usual practice in the senates of the different States.[23]

§ 109. Imposition of Penalty upon Conviction.

After the respondent has been voted guilty, the Senate proceeds to fix the punishment to which he shall be subjected. The House of Lords has unlimited power to punish upon impeachments. It may and has sentenced upon conviction, to death, exile, fine, forfeiture, imprisonment, or simply removal from office or disqualification from specified offices, according to the nature of the offense.[1]

The Constitution of the United States provides that, —

"Judgment in Cases of Impeachment shall not extend further than to Removal from Office, and Disqualification to hold and enjoy any Office of Honor, Trust or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." [2]

Most State constitutions are similar in this respect.

When the President, Vice-President or an officer of the United States is convicted upon impeachment, he must be removed from office according to the express language of the Constitution.[3] The Senate has discretion whether to add to this penalty disquali-

[20] Senator Conkling in Belknap's Trial, pp. 909, 910.

[21] Ex-Senator Matthew H. Carpenter, counsel for respondent, in Belknap's Trial, p. 1017.

[22] Belknap's Impeachment Trial, pp. 1049-1059; *supra*, §§ 90, 92.

[23] Botkin's Impeachment Trial, pp. 1379-1400. But see Barnard's Impeachment Trial, pp. 2122-2129, 2144-2149.

§ 109. [1] Comyn's Digest, Parliament, L. 44.

[2] Constitution, Article I, Section 3.

[3] Constitution, Article II, Section 4.

fication to hold any office under the United States. In the case of Pickering, removal from office was the sole penalty imposed.[4] In Humphreys' case, disqualification to hold any other office of honor or trust under the United States was also imposed.[5] The Senate has no power to disqualify the respondent from holding office under any State. It may be that disqualification to hold office under the United States would prevent the party accused from practicing as an attorney and counsellor at law in any of the Federal courts.[6]

In impeachment trials before the State senates, those convicted have been sentenced to suspension from office for a short term;[7] to removal without any disqualification,[8] to removal with disqualification to hold the office in which the offense was committed,[9] to removal with disqualification to hold any judicial office for a term of three years,[10] to removal, disqualification for thirty years, and a fine of six hundred dollars to pay the costs,[11] and to removal with perpetual disqualification.[12]

A discussion took place upon the trial of Humphreys' impeachment as to the form in which the penalty should be determined. It was believed by some senators that the proper method was to first vote whether the convict should be removed from office, and then whether he should also be disqualified. It was feared lest the adoption of the first question might be considered to amount to a judgment imposing a sentence which would prevent the imposition of any further penalty, and lest its rejection might be considered as a judgment of acquittal. So the division was taken upon an amendment adding disqualification to the motion for a removal.[13] It seems that although a vote of two-thirds is essen-

[4] Pickering's Trial, Annals of Congress, 1803-1804, pp. 366-367.

[5] Humphreys' Trial, Congressional Globe, 2d Session, 37th Congress, 1861, 1862, part iv, pp. 2942-2953.

[6] See Addison's Trial, pp. 152-154; *Ex parte* Garland, 4 Wall., 333, 378.

[7] In one case a year. Hunt's Impeachment Trial; Appendix to Prescott's Impeachment Trial, p. 216; *infra*, Appendix.

[8] Trials of Robinson and Hillyer, Hardy's Trial, Greenleaf's Trial, Butler's Trial; *infra*, Appendix.

[9] Addison's Trial, *infra*, Appendix.

[10] Cox' Trial, pp. 2985-2989; *infra*, Appendix.

[11] Osborne's Trial, *infra*, Appendix.

[12] Barnard's Trial, Davis' Trial, Holden's Trial, Frazier's Trial, Goldsmith's Trial; *infra*, Appendix.

[13] Humphreys' Trial, Congressional Globe, 2d Session, 37th Congress, 1861, 1862, part iv, pp. 2951-2953.

tial to a conviction, a bare majority may impose the sentence.[14] In the Senate of the United States the secretary of that body is usually directed to enter the judgment; and a certified copy thereof is deposited by him in the office of the Secretary of State.[15]

§ 110. Pardons to Impeachments.

The Constitution expressly excepts cases of impeachment from those in which the President of the United States has power to grant reprieves and pardons.[1]

In England, after the conflict in Lord Danby's case, it was provided in the Act of Settlement that the king should have no power to grant a pardon which might be pleaded in an impeachment, but that he might, after conviction, by a pardon relieve the convict from the punishment thereby imposed.[2]

"The difference is very important, for the pardon is not to be allowed till after judgment; it then comes too late to clear away the consequences of attainder; the blood ceases to be inheritable and cannot be completely restored but by act of Parliament; the king may indeed

[14] Barnard's Impeachment Trial, vol. iii, pp. 2184–2193.

[15] Senate Rules for Impeachments, XXII. In Holden's Impeachment Trial, pp. 2558–2559, the following judgment was made by the Senate:—

"The State *vs.* William W. Holden.

"Whereas, the house of representatives of the State of North Carolina did, on the 26th day of December, 1870, exhibit to the Senate articles of impeachment against William W. Holden, governor of North Carolina, and the said Senate, after a full hearing and impartial trial, has, by the votes of two-thirds of the members present, this day determined that the said William W. Holden is guilty as charged in the 3d, 4th, 5th, 6th, 7th and 8th of said articles;

"Now, therefore, it is adjudged by the senate of North Carolina sitting as a court of impeachment, at their chamber, in the city of Raleigh, that the said William W. Holden be removed from the office of governor and be disqualified to hold any office of honor, trust or profit under the State of North Carolina.

"It is further ordered, that a copy of this judgment be enrolled and certified by the chief justice as presiding officer, and the principal clerk of the senate, and that such certified copy be deposited in the office of the secretary of state." In Cox' Impeachment Trial, pp. 2985–2989, the judgment recited at length the articles on which the respondent had been convicted. It has been said that a court of common law upon the trial of an indictment is not bound by the rulings on an impeachment for the same offense. State *v.* Town Council (R. I.), 27 Atl. Rep., 599, 602.

§ 110. [1] Article II, Section 2.

[2] Howell's State Trials, vol. xi, pp. 725–804; 13 W. III, ch. 2; Hallam's Constitutional History, Widdleton's ed., vol. ii, pp. 392–396.

release forfeitures and confer new titles, but cannot revive the family honours in their antient state of precedence." [3]

Moreover, as was shown in the case of Strafford, the king would be less likely to face the storm of public opinion after a conviction, at the end of a public trial in which the proof and the enormity of the offenses had been spread abroad, than before, when it might well be claimed that the pardon was granted to protect an innocent party from the expense of a defense against unjust charges.

If an officer of the United States cannot resign his office without the consent of the power that appointed him, and the doctrines supported by the minority in Belknap's case be finally upheld, the President may indirectly, by the acceptance of a resignation, accomplish what he cannot do directly by a pardon.[4] The Georgia Constitution of 1798 pardoned all previous convictions on impeachments.[5] In England a judgment of conviction upon an impeachment can be reversed by an act of Parliament. Whether such a power exists in Congress remains undecided.[6]

[3] Woodeson's Lectures, vol. ii, p. 615.

[4] Belknap's Impeachment Trial, *supra*, §§ 90, 92.

[5] Art. IV., Sec. 8.

[6] See the proceedings as to the persons impeached by the Good Parliament (Stubbs, Constitutional History, 2d ed., vol. ii, p. 156), and on the bill to reverse Strafford's attainder, which failed to pass (Howell's State Trials, vol. vii, pp. 1571–1576). Attainders upon convictions before juries and on bills of attainder have been often thus reversed; *e. g.* in Lord Russell's case (Howell's State Trials, vol. ix, p. 695); in Strafford's case (ibid., vol. iii, p. 1525); Bolingbroke's case (ibid., vol. xv, p. 1004); and others, in Hatsell's Precedents, 3d ed., vol. ii, pp. 337–338, vol. iii, pp. 47–48, 62. Dr. Birch says, in his Life of Sir Walter Raleigh: "Mr. Carew Raleigh mentions that on his addressing himself to the Parliament to be restored in blood, King Charles the First sent to him and told him plainly, that on the obligation of 10,000*l.* he had promised the Earl of Bristol to secure his title to Sherburne Castle, and the estate belonging to it, against the heirs of Sir Walter Raleigh; that now, being King, he was bound to make good his promise, and therefore, unless Mr. Raleigh would quit all his right and title to Sherburne, he neither would nor could pass his Bill of restoration. Whereupon he, Mr. Raleigh, being then twenty years of age, left friendless and fortuneless, was prevailed on, by the promise of a subsistence, to conform to the King's will." The truth of this story is confirmed by the title of the Bill: "An Act for Restitution in Blood of Carew Raleigh, son of Sir Walter Raleigh, late attainted of High Treason; and for confirmation of certain Letters Patent made by our late Sovereign, Lord King James, to John, Earl of Bristol, by the name of John Digby, Knight." (Hatsell's Precedents, 3d ed., vol. iii, p. 62, note.) The Massa-

§ 111. Concluding Observations upon Impeachments.

Jefferson, in his disappointment at the acquittal of Chase, termed impeachment the scarecrow of the Constitution.[1] A better metaphor is that of Somers, who called it the sword of Goliath, which is kept in the temple and brought out only on great occasions.[2] To a superficial observer the former term may seem appropriate. Yet even that homely object, which we moderns have put in the place formerly occupied by the god Priapus, has its uses. The fear of the disgrace has caused the resignation of many corrupt judges, State and Federal, who shall here be nameless. It has caused many others to observe a certain respect for public decency which, had it not existed, they would have undoubtedly thrown off. It has made at least one President, Andrew Johnson, obey laws which he considered unconstitutional, but which had been passed over his veto, and in some State courts at least has caused judges to respect statutes of doubtful constitutionality which they would otherwise have disregarded.[3] Now that nearly all the State constitutions permit the removal of judges by the votes of two-thirds or less of the members of a legislature, this simpler remedy is usually applied.[4] But no such proceeding by Congress is authorized by the Constitution, and impeachments have proved efficacious in the United States. Although there have been many acquittals where the guilt charged seems to have been flagrant; yet the Federal judiciary has thus been purged in one case of a drunkard,[5] and in another of a man who was waging war against the Union while retaining the legal power to free by habeas corpus any of his allies who were arrested for treason or made prisoners of war.[6] In the State senates the convictions of Addison, Davis, Barnard and Cox[7] have been

chusetts legislature in 1711 reversed the judgments of conviction for witchcraft. The Rhode Island legislature in 1854, after his pardon, reversed the conviction of Dorr for treason, against the protest of the judiciary of that State. (Opinion of Judges, 3 R. I. Supp., 299. See Burgess, Political Science, vol. ii, p. 337.

§ 111. [1] Jefferson's Works, 1st ed., vol. vii, p. 192.

[2] Howell's State Trials, vol. xv, p. 1394; Grey's Debates, vol. x, p. 206.

[3] *Supra*, § 38.

[4] *Supra*, § 98; *infra*, Appendix.

[5] Pickering's case, *supra*, § 90.

[6] Humphreys' case, *supra*, § 90.

[7] *Supra*, § 94, *infra*, Appendix.

well needed and salutary examples. Were the power absent, we should have no check to executive or judicial tyranny. The necessity for its existence and for caution in its exercise is one of the strongest arguments in favor of the perpetuation of the Senate.[8]

[8] Woodeson says in his Lectures, vol. ii, pp 369–370: "For the last century and a half, private persons impeached by the Commons have either sunk under the unequal struggle with the guardians of the public purse, or have been only preserved by large fortunes from absolute ruin."

Judge Stephen says of parliamentary impeachments: "It is hardly probable that so cumbrous and unsatisfactory a mode of precedure will ever be resorted to again. The full establishment of popular government and the close superintendence and immediate control exercised over all public officers whatever by parliament, make it not only entirely unlikely that the sort of crimes for which men used to be impeached should be committed, but extremely difficult to commit them." (Stephen, History of the Criminal Law, vol. i, p. 160.)

APPENDIX TO VOLUME I.

STATE IMPEACHMENT TRIALS.

THE preceding text contains a history of all impeachment trials before the Senate of the United States.[1] All of the important English impeachments, except that of Warren Hastings, may be found in Howell's State Trials. The early ones which are not in that collection are described by Stubbs in his Constitutional History, and a list which is nearly complete may be found in Stephen's History of the Criminal Law.[2] The impeachment trials before the senates of the different States are, however, very little known. Some of them were not reported except in the journals; and the reports of most of the rest are rare and hard to find. The author has found but one library,[3] except his own, where any attempt to collect them has been made; and he believes that no complete collection exists at any place. Yet none of them is uninteresting; and they abound with material of great value to the student of the manners and local history of the people of the United States, as well as to those who are interested in constitutional history and law. For this reason, an account of all the writer has been able to examine is here inserted.

COLONIAL IMPEACHMENTS.

The earliest colonial proceeding that bears any analogy to an impeachment was the suspension by the proprietors of North Carolina of Governor Seth Sothell, in a letter dated December 2d, 1689, upon charges by inhabitants of the colonial county of Albemarle which had been approved by the Assembly, who had made him abjure the colony for twelve months: —

That he seized two persons coming into Albemarle from Barbadoes, pretending that they were pirates, although they produced "cockets" and clearance of their goods from the governors of Barbadoes and

[1] *Supra*, § 90.

[2] Vol. I, pp. 145-155.

[3] The New York State Library at Albany.

Bermudas. That he kept these persons imprisoned without attempting to bring them to trial, and one of them died of ill usage. That he who died left a will naming a Pollock his executor, but Sothell would not let him prove the will nor suffer the court to attest that Pollock had offered to prove it, but took all this man's land and converted it to his own use. That when Pollock asserted his intention to come to England to complain of this injustice, Sothell imprisoned him without any reason. That he withdrew for bribes accusations for felony and treason. That he unlawfully imprisoned one Robert Cannon, besides other charges of unlawfully seizing land and cattle and other unjust actions.

He was ordered to come to England, and if he did not come the proprietors said they would obtain a mandamus from the king, to compel him. To investigate these matters they told their emissary to send them depositions and to see that justice was done to those injured by Sothell.[4]

The first proceeding that closely resembles an impeachment by a colonial assembly seems to have occurred in Massachusetts in 1706, upon the charge against William Rouse, Samuel Vetch, John Borland, and Roger Lawson, of furnishing military supplies to the Acadians while they were at war with England and the colonies. On June 25th the house sent a message to the council, asking "that such proceedings, examinations, trials and judgments might be had and used, upon and relating to the said persons, as were agreeable to law and justice." The council determined that the proceedings should be taken at the next session by a bill of attainder. At the following session, in August of the same year, at a conference between the two houses, the form of a bill of attainder was determined. A copy of the charges was delivered to the accused, to whom John Phillips and Ebenezer Coffin had been added, and they were successively arraigned and tried before both houses in joint session. A vote of the houses in joint session convicted all, and a joint committee reported on the punishments. A separate act was passed fining each. The fines varied from eleven hundred to sixty pounds. These acts were in the following year annulled by the Queen in council, upon the ground that "the crimes in the said several acts mentioned" were "in no wise cognizable before the general assembly, in regard they have no power to proceed against criminals, such proceedings being left to the courts of the law there." The Queen further ordered that the fines should be repaid.[5]

[4] N. C. Colonial Records, vol. i, pp. 359-370.

[5] Palfrey, History of New England, 1689-1727, pp. 277-281. See also Chalmers, Introduction to the History of the Revolt of the Colonies, book vii, ch. iii.

In 1711, the House of Delegates of North Carolina impeached Carey, the Deputy-Governor, for rebellion, and sent him to England for trial for treason, where the proceedings seem to have been dropped.[6]

In 1717, the Assembly of South Carolina impeached Chief-Justice Trot on the charge "of having engrossed the whole judicial power, by acting as Judge of the King's bench, the common pleas, and the admiralty." He was found guilty by the council and removed from office.[7]

In the same colony, in 1727, Chief-Justice Allen was impeached by the house for denying the writ of habeas corpus to a man named Smith, who had been committed for high treason, pending a revolt. No trial seems to have ever taken place.[8]

In 1774, the Massachusetts House of Representatives impeached before the council Chief-Justice Peter Oliver, for accepting a salary from the Crown out of the revenue duties, instead of depending upon the General Court for his compensation, as had been the previous law. The proceedings are thus described by John Adams with his characteristic egotism: —

"The public had long been alarmed with rumors and predictions that the King, that is the ministry, would take into their own hands the payment of the salaries of the judges of the supreme court. The people would not believe it; the most thinking men dreaded it. They said: 'With an executive authority in a governor possessed of an absolute negative on all the acts of the legislature, and with judges dependent only on the Crown for salaries as well as their commissions, what protection have we? We may as well abolish all limitations and resign our lives and liberties at once to the will of a prime minister at St. James'. . . . The dispatches at length arrived, and expectation was raised to its highest pitch of exultation and triumph on one side, and of grief, terror, degradation, and despondency on the other. The legislature assembled, and the governor communicated to the two Houses His Majesty's commands.

"It happened that I was invited to dine that day with Samuel Winthrop, an excellent character and a predecessor in the respectable office you now hold in the supreme court. Arrived at his house in New Boston, I found it full of counselors and representatives and clergy. . . . All expressed their detestation and horror of the insidious ministerial plot, but all agreed that it was irremediable. There was no means or mode of opposing or resisting it.

"Indignation and despair, too, boiled in my breast as ardently as in any of them, though as the company were so much superior to me in age

[6] Chalmers, Introduction to the History of the Revolt of the Colonies, book vii, ch. xi.

[7] Ibid., book vii, ch. xi.

[8] Ibid., book vii, ch. xi.

and station I had not said anything ; but Dr. Winthrop, the professor then of the council, observing my silence and perhaps my countenance, said: 'Mr. Adams, what is your opinion? Can you think of any way of escaping this snare?' My answer was, 'No, sir ; I am as much at a loss as any of the company. I agree with all the gentlemen that petitions and remonstrances to King or Parliament will be ineffectual. Nothing but force will succeed, but I would try one project before I had recourse to the last reason and fitness of things.' The company cried out almost or quite together, 'What project is that? What would you do?' Answer, 'I would impeach the judges.' 'Impeach the judges! How? Where? Who can impeach them?' Answer, 'The house of representatives.' 'The house of representatives! Before whom? Before the House of Lords in England?' Answer, 'No, surely ; you might as well impeach them before Lord North alone.' 'Where then?' Answer, 'Before the governor and council.' 'Is there any precedent for that?' Answer, 'If there is not, it is now high time that a precedent should be set.' 'The governor and council will not receive the impeachment.' Answer, 'I know that very well, but the record of it will stand upon the journals, be published in pamphlets and newspapers, and perhaps make the judges repent of their salaries and decline them ; perhaps make it too troublesome to hold them.' 'What right had we to impeach anybody?' Answer, 'Our house of representatives have the same right to impeach as the House of Commons has in England, and our governor and council have the same right and duty to receive and hear impeachment as the King and House of Lords have in Parliament. If the governor and council would not do their duty, that would not be the fault of the people ; the representatives ought nevertheless do theirs.' Some of the company said that the idea was so new to them that they wished I would show them some reasons for my opinion that we had the right. I repeated to them the clause of the charter which I relied on, the constant practice in England, and the necessity of such a power and practice in every free government.

"The company dispersed and I went home. Dr. Cooper and others were excellent hands to spread a rumor, and before nine o'clock half of the town and most of the members of the general court had in their heads the idea of an impeachment. The next morning early Major Hawley, of Northampton, came to my house under great concern and said he heard that I, yesterday, in a public company suggested a thought of impeaching the judges ; that report had got about and had excited some uneasiness, and he desired to know my meaning. I invited him to my house, opened the charter, and requested him to read the paragraphs that I had marked. I then produced to him that volume of Selden's works which contains his treatise on Judicature and Parliament. Other authorities in law were produced to him, and the State Trials and a profusion of impeachments with which that work abounds. Major Hawley, who was one of the best

men in the province, and one of the ablest lawyers and best speakers in the legislature, was struck with surprise. He said: 'I know not what to think. This is, in a manner all new to me. I must think of it.' . . .

"Major Hawley, always conscientious, always deliberate, always cautious, had not slept soundly. What were his dreams about impeachment, I know not. But this I know: he drove away to Cambridge to consult Judge Trowbridge, and appealed to his conscience. The charter was called for; Selden and the state trials were quoted, Trowbridge said to him what I had said before, that the power of impeachment was essential to a free government; that the charter had given it to our house of representatives as clearly as the constitution in the common law or immemorial usage had given it to the House of Commons in England. This was all he could say, although he lamented the occasion of it.

"Major Hawley returned full in the faith; an impeachment was voted; a committee was appointed to prepare articles. . . .

"The articles were reported to the house, discussed, accepted, the impeachment voted and sent up in form to the governor and council; rejected," that is, never tried, "of course, as everybody knew beforehand that it would be; but it remained on the journals of the house, was printed in the newspapers, and went abroad into the world. And what were the consequences? Chief-Justice Oliver and his superior court, your supreme judicial court, commenced their regular circuit. The chief-justice opened his court as usual. Grand jurors and petit jurors refused to take their oaths. They never could, as I believe, prevail on one juror to take the oath. I attended at the bar in two counties, and I heard grand jurors and petit jurors say to Chief-Justice Oliver to his face, 'The chief-justice of this court stands impeached by the representatives of the people of high crimes and misdemeanors and of a conspiracy against the charter privileges of the people; I cannot serve as a juror or take the oath.' The cool, calm, sedate intrepidity with which these honest freeholders went through this fiery trial filled my eyes and my heart.

"In one word, the royal government was from that moment laid prostrate in the dust, and has never since revived in substance, though a dark shadow of the hobgoblin haunts me at times to this day."[9]

MAINE.

In the State of Maine no impeachments have been had. The annual election of the governor and other State officers has made it easier to punish their misconduct by action at the polls; while the provision for the removal of civil officers by the governor upon an

[9] John Adams' Works, vol. ix, pp. 236–241. See also Hutchinson, Life of Thomas Hutchinson, pp. 136–141; and Colonial Records, House Journal for 1773–1774, pp. 86–88, 94, 113, 117, 118, 134–135, 146, 147, 167, 182, 183, 205, 232–236, 241.

address by a simple majority of both houses of the legislature[10] has been found a more efficacious means of turning out of office an obnoxious judge. In 1856, Woodbury Davis, a justice of the supreme court, was removed by the governor of the State of Maine upon an address of both houses of the legislature. The causes assigned for the removal were: his refusal to recognize the official authority of a sheriff who had been duly appointed, commissioned and qualified; his denial of the lawful and actual validity of the sheriff's commission, which was under the hand of the governor and the seal of the State; his removal of the prisoners from jail by proceedings not warranted by law, and disregard of their custody by the sheriff; his recognition as sheriff of another person who had been previously lawfully removed; and his undertaking to issue the orders and precepts of the court to that other person for execution.

The judge answered the petition for his removal, admitting that he had refused to recognize the person named in the petition as sheriff, but claiming that he did so because the latter had not been lawfully appointed, and the preceding sheriff had not been lawfully removed; and denying that the legislature had authority under the constitution of the State to determine for any other department of the government the question who was sheriff. The judge was defended by Henry W. Paine and Rufus Choate. The proceeding was partisan in its character, since the legality of the removal of the former sheriff was an open question; and Judge Davis was reappointed upon the election of a governor of his own political faith.[11]

NEW HAMPSHIRE.

In 1790, Woodbury Langdon, a judge of the Superior Court, was impeached by the New Hampshire house of representatives. The articles charged that he had willfully and corruptly in various instances misbehaved in his office, and neglected to attend to the duties thereof, by means whereof the courts had not been holden at the times and places by law established, and the administration of justice delayed, to the great injury of the good citizens of said State; with specifications of the times when the respondent failed to attend. The State senate postponed the trial until the following year. Meanwhile, President

[10] Art. IX, Sec. 5.

[11] The only report of this proceeding outside of the journals is a pamphlet containing the arguments of Rufus Choate, Henry W. Paine, and Francis O. J. Smith, on the removal of Judge Davis, pp. 1-77, which may be found in the New York State Library.

Washington appointed him one of the three commissioners to settle the revolutionary accounts between the United States and the individual States. Langdon accepted the appointment, and addressed a letter to the president of the State, resigning his office of judge as being incompatible with that of commissioner. In his letter he stated freely the importance of the office of the judge of the highest court of the State, the inadequacy of the salary, and the encroachments of the legislature upon the judiciary by passing bills to annul their judgments. He also vindicated his official conduct as a judge, answered the charges made in the articles of impeachment, and requested that the president communicate the letters and papers to the two houses of the legislature. When these papers were read in the house of representatives, they voted that as the judge was under an impeachment he ought not to be permitted to resign, and that he was guilty of a contempt in writing the letter and the papers therein enclosed. A few days later, however, they ordered the managers to enter a *nolle prosequi* to the impeachment, which was immediately done. At the same time they passed an address to the president and council requesting them to remove the judge from the office he had resigned, which address the senate unanimously rejected.

Jeremiah Smith was appointed by the house one of the managers of the impeachment, although he had voted against it. He was obliged to go to Worcester, Massachusetts, to find forms to assist him in drawing up the articles. Since that time no impeachments have been attempted in New Hampshire, where judges may be removed by the governor and council upon the address of a majority of both houses of the legislature, as has been done in five cases.[12]

MASSACHUSETTS.

The first impeachment trial in the State of Massachusetts was that of William Greenleaf, sheriff of Worcester County, in 1788. The articles charged that the respondent "hath, illegally and unjustly, from time to time, detained, in his own hands, for his private use, public monies, when the Commonwealth had a right to, and was in great want of the same." That he "had exhibited to the treasurer of this Commonwealth, in order to be laid before the House of Representatives, false and dishonest accounts of monies, which he, as Sheriff, aforesaid, had collected in payment of public taxes." That he "had, from to time,

[12] Batchellor, New Hampshire State Papers, vol. xxi, pp. 812–815; vol. xxii, pp. 749–756; Life of Governor Plumer, p. 108; Life of Jeremiah Smith, p. 38.

and for the space of more than two years together, illegally detained in his own hands, and for his own private use, certain monies belonging to the aforesaid inhabitants of the town of Petersham, for which he never accounted to them." That on a certain day "he did procure from the treasury of the Commonwealth, an execution for money, which money he had then already received on a former execution." That he "had falsely returned to the Treasurer, as unsatisfied, a certain execution which he had in part collected." That on a day named he did "unjustly procure a warrant of distress to be served on the inhabitants of Petersham aforesaid for a large sum of money, which he then well knew they had long before paid."

The respondent demurred specially to each of the articles, and joined to these demurrers a plea of not guilty. The demurrers and pleas were tried together. At the conclusion of the testimony and arguments the question was put generally to each member of the court: "Is William Greenleaf, sheriff of the County of Worcester, guilty of misconduct and maladministration in that office, charged upon him by the impeachment of the House of Representatives, or not guilty?" He was pronounced guilty by a vote of twenty to three, and sentenced to removal from office.

In 1794, N. Hunt of Watertown, a justice of the peace for the county of Middlesex, was impeached upon three charges: that he had falsely entered upon his records the appearance of two plaintiffs who did not appear, and the default of a defendant who had appeared. The respondent pleaded not guilty, but was convicted by a vote of twenty to seven, and sentenced to suspension from office for one year.

The next impeachment was of John Vinal, one of the justices of the peace for the county of Suffolk in 1800. The articles charged generally that it appeared by the records of the Supreme Judicial Court, certified copies of which had been laid by the attorney-general before the house, that the respondent had been "convicted of extortions, bribery and corruption in his office, aforesaid, whereby it is manifest that the said John Vinal, Esq., a justice of the peace, as aforesaid, is guilty of gross misconduct and mal-administration in that office." The separate articles then followed, setting forth with precision specific charges of collecting an extortionate fee for taking bail, and of receiving bribes for voting to grant licenses to retail spirituous liquors. The respondent pleaded not guilty, but "consented to allow the record of the Supreme Judicial Court as conclusive evidence against him in support of the articles contained in the impeachment." He was unanimously pronounced guilty and sentenced to removal from office and a perpetual disqualification.

The next was in 1807, the impeachment of Moses Copeland, one of the justices of the peace for the county of Lincoln. The articles charged that he had brought suit and entered judgment in his own court for $12.24 damages and $5.15 costs upon a promissory note owned by him, in the name of a fictitious endorsee. That he had issued two writs returnable before himself on a certain day and hour, and defaulted the defendant before the hour named in the writs, "which default, although the defendant appeared in due season, he refused to take off, and afterwards issued execution upon these judgments"; and finally that he had corruptly taken a bribe of $1.50 "to bias his opinion" in an action then pending before him.

The respondent pleaded specially to the first article that the suit had been brought in his court without his knowledge, by an attorney to whom he had given the note for collection, and to the other articles a general plea of not guilty. He was acquitted by a vote of twenty-five not guilty to seven guilty on the first and third articles, and a unanimous vote on the second article.[18]

In 1821, James Prescott, a judge of probate for the county of Middlesex, was impeached and tried before the senate of Massachusetts. The articles charged him with extortion in the collection of exorbitant fees in excess of the amount authorized by statute. They were fifteen in all; but he was acquitted on all but two; the third, on which he was convicted on a vote of sixteen to nine, and the twelfth, on which the vote against him was fifteen to six.

The third charged that he did willfully and corruptly demand and receive greater fees than were by law allowed, to the amount of $39.02, for issuing a warrant to appraise an estate, receiving an inventory and entering a decree granting a commission of insolvency upon the same estate. The twelfth article charged that upon the presentment of an account of the guardianship of a person *non compos mentis*, he overheard a conversation between the guardian and an overseer of the poor of the town concerning the ward's estate; and that thereupon he offered his advice concerning the subject of the conversation, and after the overseer had refused to pay a counsel fee of $5.00 for the advice, procured the same from the guardian, under the promise that he would allow the same to him on his account, which he did by inserting it by interlineation, telling the guardian that the overseer need know nothing about it.

The articles upon which he was acquitted related principally to

[18] These four trials are briefly reported in the appendix to Prescott's Impeachment Trial, *infra*, note 14.

charges for counsel fees for advice and other services concerning estates which were administered in his office. One of the managers for the house of representatives was Lemuel Shaw, afterwards the celebrated chief-justice of Massachusetts. Among the respondent's counsel were Samuel Hoar and Daniel Webster. The trial is an excellent illustration of the manner in which Webster was accustomed to browbeat a court. The respondent was sentenced to removal from office without disqualification.[14]

In 1826, Samuel Blagge, a justice of the peace, was impeached and tried before the Massachusetts senate. The articles charged that he had made false certificates that negroes and Indians had appeared before him, and declared that they were free and resided in free States, and that depositions as to such facts had been taken before him in other cases. He pleaded not guilty to the charges, and was acquitted.[15]

The following proceedings for removal have taken place before the Massachusetts legislature: In 1803, Theophilus Bradbury was removed from the bench of the supreme court, because he had become incapacitated by palsy. In the same year Paul D. Sargent and William Vinal, judges of the court of common pleas in Hancock County, were also removed. They had been convicted before the supreme court of the crime of willful extortion in their office. The only evidence was a certificate of their conviction from the solicitor of the Commonwealth. John Quincy Adams, who was then a member of the senate, entered on the journal his protest against this proceeding, upon the grounds: that judicial officers could only be removed for official misdemeanors; that no judicial officer should be removed from office by the mode of an address of the two houses on account of offenses for the trial of which the constitution has expressly provided the mode of impeachment, because he considered the independence of the judiciary as materially affected by the mode of procedure, which in effect must make the tenure of all judicial officers dependent upon the verdict

[14] Report of the Trial by Impeachment of James Prescott, Esq., Judge of the Probate of Wills, &c., for the County of Middlesex, for misconduct and maladministration in office, before the Senate of Massachusetts, in the year 1821, with an Appendix containing an account of former impeachments in the same State. By Octavus Pickering and William Howard Gardiner of the Suffolk Bar. Published at the office of the "Daily Advertiser," 1821; pp. 225.

[15] A pamphlet containing the pleadings and the rules of trial before the Senate, may be found in the library of the Bar Association of the city of New York. My information as to the result is due to the courtesy of Mr. Isaac H. Edgett, Deputy Secretary of the Commonwealth of Massachusetts.

of a jury in any one county of the Commonwealth; and that the decision of the Senate ought not to have been taken without giving the accused an opportunity to be heard in their own defense.[16]

In 1854, Edward Greely Loring, judge of probate, as a United States commissioner had incurred the hostility of the abolitionists by his action in enforcing the Fugitive Slave law in the case of Anthony Burns. An address was thereupon passed in 1855 by the legislature requesting his removal. Governor Gardner refused to remove him. Subsequently, after the election of Governor Banks, a new address for his removal was passed, and Governor Banks removed him in 1858. No grounds for the removal were stated in the address. The petition to the legislature was prosecuted by Wendell Phillips from the bar, and John Andrew took charge of the proceedings in the house. Richard H. Dana, Jr., who had been Burns' counsel, opposed the removal.[17]

In 1877, Abraham Jackson and another justice of the peace were removed by the governor and council upon the address of the legislature. In one case upon a conviction of perjury; and in the other when the party was a fugitive from justice after indictment.

In 1881 an application was made to the legislature for the removal of Joseph M. Day, judge of probate and insolvency for the county of Barnstable, upon the grounds that he had acted as counsel for an executor appointed within his jurisdiction, in a suit brought against the latter in his representative capacity; that he had charged illegal fees; that he had made a wrongful decision in an insolvent proceeding when he had been counsel for the insolvent in another matter; that he had acted as counsel for other parties who had cases pending in his court; that he had been guilty of improper conduct and bearing towards parties in his court; and that he was accused of having been intoxicated and thus incapable to do his work. His counsel claimed that he could not be removed for impeachable offenses. He resigned pending the proceedings, which then were dropped.[18]

[16] Diary of John Quincy Adams, vol. i, p. 255.

[17] Wendell Phillips' speech was republished in his Speeches and Lectures, 1st Series, p. 154, as well as in pamphlet form. Dana's was republished in a pamphlet, Boston, 1855, pp. 28. See C. F. Adams, Life of Dana, vol. i, pp. 341-347.

[18] Arguments of Counsel in the Matter of Joseph R. Johnson and others, Petitioners for the removal from office of Joseph M. Day, Judge of Probate and Insolvency for the County of Barnstable, before a Joint Special Committee of the Massachusetts Legislature, A. D. 1881. For Petitioners, George S. Boutwell, George A. King. For Respondent and Remonstrants, D. W. Gooch, T. H. Talbot, E. W. Burdett. Boston: Rand, Avery & Co., Printers to the Commonwealth, 117 Franklin Street, 1881.

RHODE ISLAND.

In 1786, under the Confederation, an information of John Trevett against John Weeden for refusing to receive the State paper currency as an equivalent to silver or gold in payment for meat, was brought before the superior court of judicature of the State of Rhode Island in pursuance of an act of the General Assembly. The case was clear under the statute. The defendant's counsel, James M. Varnum, however, argued that the act was void for repugnancy to the constitution. "The court adjourned to next morning, upon opening of which, Judge Howell, in a firm, sensible, and judicious speech, assigned the reasons which induced him to be of the opinion that the information was not cognizable by the court — declared himself independent as a judge — the penal law to be repugnant," according to another authority "obnoxious,"[19] "and unconstitutional, and therefore gave out as his opinion that the court could not take cognizance of the information! Judge Devol was of the same opinion. Judge Tillinghast took notice of the striking repugnancy of the act — without trial by jury, according to the laws of the land — and on that ground gave his judgment the same way. Judge Hazard voted against taking cognizance. The chief-justice declared the judgment of the court without giving his own opinion."[20] Rhode Island was then governed under the colonial charter and had adopted no constitution. The General Assembly in the following week required the immediate attendance of the judges, "to render their reasons for adjudging an act of the General Assembly unconstitutional and so void." The hearing of the judges was postponed until the October session. After three of them had been heard, the house voted upon the question "whether the Assembly was satisfied with the reasons given by the judges in support of their judgment"; and determined it in the negative. A motion was then made to dismiss the judges from their offices. They were, however, afforded a hearing, when Varnum appeared as their counsel and argued on their behalf. The Assembly then voted to take the opinion of the attorney-general and other members of the bar, "whether constitutionally and agreeably to law the General Assembly can suspend, or remove from office, for a mere matter of opinion without a previous charge and statement of criminality, due process, trial and conviction thereon."

[19] American Museum, vol. v, p. 336.

[20] Providence Gazette, Oct. 7, 1786, quoted by Cox, Judicial Power and Unconstitutional Legislation, p. 245; Thayer's Constitutional Cases, vol. i, p. 73; Chandler's Criminal Trials, vol. ii, pp. 269–326, which contains a reprint of the arguments of Varnum taken from the pamphlet published by himself at Providence in 1787.

The attorney-general and three other lawyers concurred in the opinion that the judges could not be suspended or removed from office "for a mere matter of opinion without a charge of criminality." Two of them expressed the opinion that a regular impeachment was essential for that purpose. The legislature then resolved, by a very large majority, "that as the judges are not charged with any criminality in rendering the judgment upon the information, Trevett against Weeden, they are therefore discharged from any further attendance upon this Assembly on that account." The judges, whose terms were annual, were not, however, re-elected, but the obnoxious law was subsequently repealed.[21]

NEW YORK.

The first New York impeachment seems to have been that of John C. Mather, a canal commissioner, in 1853. The articles charged that he had entered into a corrupt combination with his associates so to let the work in completing the Erie Canal enlargement, the Black River and Genesee Valley Canals, and the locks of the Oswego Canal, that "a large proportion of said canal work, amounting to a large amount of money, to wit: six millions of dollars, was to be corruptly distributed among some of the members of the two political parties known as the whig and democrat parties, and the relations and personal favorites of the said John C. Mather and his associates," and that in pursuance of this conspiracy he and his associates awarded contracts for this work "without having due regard to price, the ability of the parties, and the security for the performance thereof, and did not, as was his duty, contract with the lowest bidder for said work," when the lowest bidder in their judgment had the ability to perform the contract and furnish satisfactory security. Other articles repeated this charge with specifications. That he had negligently bought supplies and materials, some of

[21] Chandler's Criminal Trials, vol. ii, pp. 269-350. The Case of Trevett against Weeden: On Information and Complaint, for refusing Paper Bills in Payment for Butcher's Meat in Market, at Par with Specie. Tried before the Honorable Superior Court, in the County of Newport, September Term, 1786. Also, The Case of the Judges of said Court, Before the Honorable General Assembly, at Providence, October Session, 1786, on Citation, for dismissing said Complaint. Wherein the Rights of the People to Trial by Jury, &c., are stated and maintained, and the Legislative, Judiciary and Executive Powers of Government examined and defined. By James M. Varnum, Esq., Major-General of the State of Rhode Island, &c., Counsellor at Law and Member of Congress for said State. Providence: Printed by John Carter, 1787. pp. 60. See also the other authorities cited *supra*, note 20.

which were not needed for the canals, at exorbitant prices, without written contracts as required by law. That he had expended money on work in excess of the sum authorized by the canal board. That he had changed a plan of work adopted by the board, thus doubling the expense of the State. That he had neglected to inspect the canals and to give notice of his visitation of the same as required by law. That he had collected $800 for mileage and alleged travelling expenses when he had not travelled those miles nor expended that sum of money. And that, although duly notified, he had failed to appear upon the hearing of claims before the Board of Canal Appraisers for canal damages. The respondent answered by a general denial. John K. Porter, who was afterwards for a short time judge of the Court of Appeals, and who terminated a brilliant professional career by his management of the prosecution of Guiteau, was associated with the managers as counsel. The celebrated James T. Brady and Rufus W. Peckham, afterwards the first judge of that name on the Court of Appeals, were among the respondent's counsel. They moved at the opening of the case to quash or strike out the first five articles, on the ground that the alleged violations of statute which had been held to be unconstitutional and consequently stated as impeachable offense. The motion was denied by the Court of Impeachment by votes of seventeen to thirteen, eighteen to thirteen and seventeen to fourteen as to the articles separately; more than one-third in each case being in favor of the respondent, who was finally acquitted.[22]

In 1868, Robert C. Dorn, a canal commissioner, was impeached and tried before the New York Court of Impeachment. The articles charged that there had been a conspiracy by the contractors for repairs of the canals to buy up and obtain possession of all bids or proposals made at rates reasonable and advantageous to the State, and to interline and erase and otherwise make them so informal as to be rejected, which conspiracy had been carried into effect. That with the full knowledge of this conspiracy, the respondent had unlawfully and corruptly voted to award the contracts to the highest bidders, who were parties to said con-

[22] The Trial of the Hon. John C. Mather, one of the Canal Commissioners of the State of New York, in the Court for the Trial of Impeachments, held at the Capitol in the City of Albany, commencing Wednesday, July 27th, 1853. Richard Sutton, Short Hand Writer to the Court of Impeachments, Albany. Van Dyke, Printer—Atlas Steam Press: 1853; pp. 65, with appendix, pp. 7. This may be found in the library of the N. Y. City Bar Association. It terminates with the adjournment of the Court on August 20th. The remaining proceedings are reported in the Journal of the Court of Impeachment, which is in the office of the N. Y. Secretary of State.

spiracy, and to reject bids which were lower and more advantageous to the State. That he had knowingly and corruptly rejected a bid for repairs of a section of the Erie Canal, on terms safe and advantageous to the State, and voted to award the work to another bidder at an exceptional and excessive price. That after a contract to repair a section of the Champlain Canal had been duly awarded to the lowest legal bidder, he had moved corruptly with the intent to defraud the State for a reconsideration of the award, and used his official influence to procure the award of the same contract to another at an excessive and exorbitant price of nearly double the amount of the bid first accepted.

"That the said Robert C. Dorn, Canal Commissioner and member of the Board of Canal Commissioners and Contracting Board, did, at divers times during the years 1866 and 1867, wrongfully, corruptly, and unlawfully, and with the intention to defraud and cheat the State, let large and valuable contracts for the repairs of said canals so under his charge, and for the furnishing of materials for the repairs as aforesaid, to various and divers persons or parties, at rates and prices for the work and repairs to be performed exorbitant and disadvantageous to the State, and did unlawfully and corruptly let said contracts to personal favorites, with the view and intention of sharing in the profits to be realized from said contracts, and did so let and award said contracts to said parties, and did execute said contracts on the part of the State, without having advertised and given the notice required by law to be given and made prior to the letting of contracts for the repair of said canals. That by reason thereof the State was defrauded of a large sum of money, to the great wrong and injury of the people of the State of New York, and in contempt of their laws and authority."

This article was quashed as too indefinite.

That he had wrongfully and negligently allowed the canals under his charge to become out of repair and unfit for use; had failed to examine them as his official duty required; failed to enforce the faithful execution of contracts for their management and repair; failed to protect and defend the rights and interests of the people, by a diligent and assiduous attention to the duties enjoined upon him by law and the regulations of the canal and contracting boards; failed to contract for labor, materials and repairs on the best terms; and otherwise neglected his official duty. That he had wrongfully and corruptly allowed private persons and personal favorites of himself to appropriate large quantities of public property, lumber, timber, logs, fence-posts, pickets and wood without any compensation to the State, and allowed men, teams, transportation and machinery, used and employed by the State and under

pay of the State, to be used and employed for the use and benefit of private parties. That he had wrongfully and corruptly made contracts for work, labor and materials without public notice as required by law; and after the work and repairs had been completed and the materials furnished and delivered he had wrongfully and corruptly advertised, that the work so completed would be let pursuant to law to the lowest bidder, and thus deceived the contracting board and procured the contracts which he had previously made to be duly and formally awarded. That after the award of a contract to one man who was ready and willing to enter into it, he had corruptly and wrongfully awarded the same contract to another and permitted the assignment of the latter contract to a third person, at an enhanced price. The accused was defended by William A. Beach and Henry Smith. He was acquitted on all these articles by a majority vote, the largest minority against him being eight out of twenty-eight.[23]

The next New York impeachment was that of George G. Barnard, a justice of the supreme court for the County of New York in 1874. The proceedings were instituted at the instigation of the Bar Association of New York City, members of which acted as counsel for the Assembly upon the trial. He was convicted upon the following charges:

He had assisted the counsel of James Fisk and Jay Gould in keeping the control of the Erie Railway Company by a number of illegal ex parte orders. In one of these he had ordered the corporation by an injunction to close its books and not to transfer certain shares of stock owned or represented by the defendants, in which the plaintiff did not have or claim any legal or equitable interest, for the purpose of preventing the defendants from voting upon the stock at the ensuing election. In another suit he had thus enjoined these defendants and others from transferring or attempting to transfer any stock of the railroad stamped with the name of Heath & Co., or Raphael & Sons, and from stamping or permitting to be stamped with such stamp, or any other or similar distinctive stamp, any stock of the corporation not already stamped, and from interfering with any of such stock, and from removing or attempting to remove any of such stamped stock in the custody of one of the defendants, or otherwise presented for transfer, or which might thereafter be presented for transfer for the same purpose. He had also appointed a receiver of so much of this stock as was left

[23] A Journal of the Court for the Trial of Impeachments in the Case of Hon. Robert C. Dorn, a Canal Commissioner of the State of New York. Albany: Van Benthuysen and Sons' Steam Printing House. 1868. pp. 1181, with Appendix, pp. 128.

with the corporation for transfer; and of all similar stock that might hereafter be presented for transfer; and authorized the receiver to take possession and control and management of the stock, and "of all moneys paid on account thereof for the stamping of the same," for the use and benefit of the Erie Railway Company and of all the stockholders beneficially interested therein. The stock comprehended within the order, of which the receiver obtained possession under it, was of the par and actual value of many millions of dollars, and the papers failed to show that the plaintiffs had any interest in it or that it did not belong to the defendants, or any other legal ground for any of these orders. Another ex parte order appointed another receiver of all the shares of stock of the defendant which had at any time been delivered by any stockholder to Heath & Raphael or to the Erie Stockholders' Protection Committee, and was endorsed to Heath & Raphael, with a power of attorney on the back. This was the same stock of which the previous receiver had been appointed. The former action had previously been removed to the Circuit Court of the United States, and the Circuit Court had made, or was about to and did presently thereafter order the former receiver to deliver up the stock to the defendants.

He had aided the same persons in attempts to secure the control of the Union Pacific Railroad Company, and had succeeded in compelling the removal of the principal office of that railroad company out of the State of New York. He had made an ex parte order enjoining its directors from holding an election then about to be held pursuant to law until the right of the plaintiff, James Fisk, Jr., to the stock described in the complaint was determined. He had made an ex parte order appointing William M. Tweed, Jr., receiver, amongst other things, of all the bonds of the United States, and all the bonds of the Union Pacific Railroad Company, which were in the possession or under the control of said company, or of any officer or agent thereof, or held in trust for it; and the proceeds of all such bonds then in the possession or control of the railroad company, which bonds and proceeds were of the value of many millions of dollars. He had subsequently, on an unverified written paper called a report, by the said Tweed as receiver, made an ex parte order authorizing and directing the receiver to open the safe of the said Union Pacific Railroad Company, either by picking the lock or cutting or blowing open the same as the receiver might think best. He was acquitted on the charge of maintaining jurisdiction of this suit after it had been removed into the Circuit Court of the United States, because the law on the point did not appear to be clearly settled at that time.

Another series of charges related to the Albany and Susquehanna Railroad Company, in which the opposite parties claiming the control of that railroad resorted to arms and compelled the governor of the State to order out the militia and to take possession of the railroad in order to keep the peace. He had left the bedside of his mother, who was then dangerously ill at Poughkeepsie, and gone to New York at the request of Fisk, to Fisk's house, and had granted in the house of Fisk's mistress, Josephine Mansfield, an ex parte order upon insufficient grounds, appointing Fisk and Charles Courtier receivers of that railroad. In another order he had directed the issue of a writ of assistance to the sheriff of New York County to put said receivers into possession of the railroad, authorized them to employ force to resist any attempt to oust them from possession, and enjoined the sheriff of Albany County, the police commissioners of the city of Albany and the directors of the railroad company from disturbing or interfering with the said receivers. In another, he had stayed proceedings under an injunction granted in the same litigation by another justice of the Supreme Court in Albany County, pending an application before him to set the same aside, meanwhile directing the issue of said writs of assistance, the execution of which had been enjoined by the Albany injunction. He had made a similar order in regard to another injunction. Both of these orders were granted by him ex parte, in violation of a section of the New York Code of Procedure. In another ex parte order he had appointed a receiver of three thousand shares of the capital stock of the same railroad which was the lawful property of the defendants, although it did not appear that the plaintiff had a right or interest in any of said shares; and further directed the issue of a writ of assistance to the sheriff of the city and county of New York, commanding him to put the receiver in possession of them. He had granted an order for the arrest of the president, secretary, counsel and other directors and stockholders of said railroad company, directing that their bail should be $25,000, for the purpose of preventing their attendance at the election.

He had granted without authority of law, an order, out of favoritism, to the attorney and counsel for the plaintiff, enjoining the Milwaukee and St. Paul Railway Company and its directors from building, constructing, purchasing or operating any railroad or railway other than the road or property described in mortgages referred to in the complaint, and from removing from the State any books, papers, documents or property belonging to or in the possession of certain directors. The only security upon the grant of said order, was an undertaking by

the plaintiff in the sum of $250. It did not appear in the papers upon which the order was granted that the defendants or either of them threatened to commit, or had committed, or were about to commit any act which could produce any injury to the plaintiff, or in violation of the plaintiff's rights, or tending to render ineffectual any judgment which might be rendered in the said action. No part of the railroad was situated in the State of New York. The corporation was incorporated under the laws of another State, and its railroad was more than eight hundred miles in length, of which between one hundred and two hundred miles were then in process of construction, and ran through the States of Wisconsin, Iowa and Minnesota. He had also for the same purpose and with no more authority, appointed a receiver of the corporation and of the property described in a certain mortgage and trust deed, described in said complaint.

In the course of certain proceedings supplemental to execution for the purpose of compelling the application to the satisfaction of a judgment of certain moneys due from the defendant to the Pacific Mail Steamship Company, in which another judge of the same court had enjoined the debtor from payment, he had vacated the latter order ex parte, and signed the following notice: —

"Supreme Court.
William W. Goddard, agst. Jacob Stanwood.

If the money is not paid under my order of this day, I shall imprison the parties charged with contempt, on Monday morning, at the opening of the court.

GEORGE G. BARNARD,
February 26, 1870. J. S. C.
To Pacific Mail Steamship Company."

He had granted an allowance to counsel in excess of the statutory amount.

He had assisted persons who desired to obtain the control of the New York Pier and Warehouse Company by granting without authority an ex parte order, before inspectors of the corporate election had been appointed, which directed John Doe and Richard Roe, inspectors of election of the corporation, to receive certain proxies according to the terms thereof; and after the inspectors had been appointed, he had directed them by name to make their report of the election forthwith, and return the vote of one of the holders of said proxies at sixty thousand shares before three o'clock of the same day, appointed a receiver, and directed the sheriff to arrest and hold without bail under a false pretense of contempt of court, one of the inspectors of election for the purpose

of compelling the said inspector to receive and count the vote of sixty thousand shares of stock under the said proxy, which the said inspector knew ought not to be voted, and which the said judge subsequently decided ought not to be voted.

He had repeatedly used on the bench language coarse, obscene and indecent, and "justly causing those persons in his hearing, and other persons, to believe and understand that he, said George G. Barnard, in his official action as said justice, acted not with an honest intent faithfully to discharge the duties of his said office, and to use the process of said court for the purpose of doing justice, but with the wrongful and corrupt intent to aid and benefit his friends and favored suitors and counsel." He was convicted on the following specifications under this charge: —

In the month of October, 1871, when an application was made to him on the bench for the appointment of a referee, and the applicant suggested the appointment of Gratz Nathan as such referee, the respondent had said in substance: "Gratz Nathan — Gratz Nathan; I know no Gratz but one; that is Gratz Coleman; he is my Gratz," or, "he is my referee"; thereby alluding to a notorious fact, that "said Gratz Nathan was a person usually selected as a referee by Justice Cardozo, and meaning thereby that he had a like favorite in one James H. Coleman. When an application was made to him on the bench for the appointment of Thomas W. Clerke, a former justice of that court, referee, the respondent had said in substance "that no man need offer that person's name to him as referee, that said person had lied about him, and had been his enemy, and that he favored his friends and not his enemies." In the course of the examination before him of the vice-president of the Union Pacific Railroad Company, the witness testified in reference to a remark by the judge in the lunch-room of the Astor House, that, "I have driven one set of scoundrels out of New York, and I am going to drive out this set." The respondent from his seat on the bench admitted that he had made said remark, thereby giving those present to understand that he "used the process of his court not for the purpose of doing justice between party and party, but for the purpose of prosecuting and harassing the Union Pacific Railroad Company, and the officers thereof, said company being engaged in a litigation with James Fisk, Jr."

When an application was made to him on the bench "to attend an order whereby Philo T. Ruggles had been appointed referee," he said: "I shall sign no order unless I can make it to a man I can rely upon. I am not going to appoint any one, even by consent, unless it is satis-

factory to me. I did not appoint this referee." One of the counsel in the case stated: "This gentleman was not appointed by consent." The respondent then said in effect: "I don't care, I shall not do it; and if you don't like it, you can put it in for the 999th article of impeachment."

He was acquitted on an article charging the receipt of bribes. His sentence was removal and perpetual disqualification from office.[24]

In 1866, George W. Smith, county judge of Oneida County, was removed from office on charges presented to the senate. The charges on which he was removed were: That he drew for pay as attorney the necessary papers to secure exemption from service in the State militia. That he allowed his law partner to do the same and shared the fees paid his partner for such services. That he discharged a prisoner held in the county jail on the charge of grand larceny; under an arrangement by which the prisoner was thereupon mustered into the military service of the United States, his bounty paid to the respondent's law-partner, and the bail-bond kept by the respondent instead of being filed in the county clerk's office or delivered to the district attorney as the law required. That he had been a party to a corrupt conspiracy to aid in bounty-jumping accompanied by bribery of an officer of the army, and that he had endeavored to procure the suppression of the evidence of the misconduct of that officer.[25]

In 1872, John H. McCunn, a justice of the Superior Court of the city of New York, was removed by the State senate upon charges presented in a message from Governor Hoffman. The charges were: That he acted as counsel for the plaintiff in an action pending in his court; and that in the course of this action he illegally granted an ex parte order, appointing an insolvent, without requiring security, receiver of funds to the amount of $4,000; vacated an order of another judge of

[24] Proceedings in the Court of Impeachment in the Matter of the Impeachment of George E. Barnard, a Justice of the Supreme Court of the State of New York. Albany: Weed, Parsons & Company, Printers. 1874. 3 volumes, pp. 2203, and Index, pp. xv. See also Charges of the Bar Association of New York against Hon. George H. Barnard and Hon. Albert Cardozo, Justices of the Supreme Court, and Testimony thereunder taken before the Judiciary Committee of the Assembly of the State of New York, 1872. New York: John Polhemus, Printer, 102 Nassau Street, 1872. 3 volumes, pp. 1488, and a separate volume containing Index, pp. 88. See *supra*, § 93, note 25.

[25] Journal of the Proceedings of the Senate in the Matter of George W. Smith, Judge of Oneida County, in relation to charges submitted to the Senate by the Governor. Albany: Van Benthuysen & Sons, Printers, 1866; pp. 580.

the same court which enjoined a sale, and granted other orders the result of which was to deprive the parties of property to an amount in excess of $200,000. That he conspired with his brother-in-law to enable the latter to make unlawful profits out of the property of parties to an action pending before him, and in pursuance of such conspiracy appointed his brother-in-law receiver of certain co-partnership property, although no application for a receivership had been made, without requiring proper security, although he knew the receiver "to be a man without pecuniary responsibility and unfit for such trust and dependent upon him for support," and that he illegally and without jurisdiction ordered the receiver to pay fees out of the funds in his custody, to the counsel for plaintiff, and others, which the receiver did in pursuance of said orders. That he illegally appointed his own agent and brother-in-law to collect the money due from boarders at a boarding-house which was maintained by his tenant, a party to the action. That in a case in which none of the parties wished a receivership, he appointed, without security, an improper person receiver of a fund of $12,000 owned by defendants, without any motion for the order; and that when the action had been discontinued and the receivership vacated by the consent of all the parties, he had summarily appointed another receiver of the same money in the same action and directed the payment of the same to the latter for the purpose of enabling these receivers and their counsel to secure fees out of the defendant's property. That he illegally appointed another receiver of the sum of $16,000 in gold coin of the United States; ordered the defendants to an action to pay that amount to the receiver, and by threats of illegal imprisonment compelled payment of the same. That he illegally and corruptly granted an order of arrest, and held the defendant in bail in the sum of $40,000, although the papers showed no cause for the arrest. And that in another case he illegally appointed a referee and a receiver of his own motion for the purpose of enabling them to obtain illegal profits from a fund which was the subject of litigation before him.[26]

[26] Proceedings in the Senate on the investigation of the charges preferred against John H. McCunn, a Justice of the Superior Court of the City of New York, in pursuance of a message from his excellency the Governor, transmitting the charges and recommending his removal. Albany: Weed, Parsons and Company, Printers, 1874; pp. 617. See also Charges of the Bar Association of New York against Hon. John H. McCunn, a Justice of the Supreme Court of the City of New York, and Testimony thereunder taken before the Judiciary Committee of the Assembly of the State of New York, 1872. New York: John Polhemus, Printer, 102 Nassau Street, 1872; pp. 256.

In 1872, Governor Hoffman presented to the New York senate, charges against Horace G. Prindle, county judge and surrogate of Chenango County, and proceedings were taken and a hearing had with a view to his removal. The charges were: the corrupt and unlawful collection of fees unauthorized by law, a conspiracy with the clerk of the surrogate's office, by which the clerk collected fees unauthorized by law, and the surrogate kept for himself the salary paid by the county for the clerk's services; the appointment of the same clerk as guardian *ad litem* and payment by him as compensation for his services as such, when the respondent knew the clerk was collecting unlawful fees as previously charged; the refusal to perform the duties of his office by drawing petitions and papers for the proof of wills and for the final settlement of accounts; acting as attorney for the executor of an estate upon which he had issued letters testamentary, and corruptly extorting from him excessive compensation for his services; taking compensation for using his influence to induce an executor to resign his trust in order that another might be appointed administrator of the estate; taking unlawful compensation for his services as county judge; neglect of his duties as county judge; refusing to produce papers relating to his office as surrogate before the board of supervisors, when subpœnaed by them to do so; granting excessive compensation to counsel in cases before him as surrogate and especially to his clerk when acting as counsel; permitting his clerk to practice before him, and extorting from parties excessive fees for the services of said clerk; neglecting to keep a book of fees, as required by law; refusing to furnish the board of supervisors with an itemized account of his fees; furnishing the board with a fraudulent account of his fees which was not itemized, and which omitted fees that he had collected; fraudulently persuading the executor of an estate, in settlement before him, to sell him United States bonds at less than their market value; extorting excessive and illegal fees in several instances specified; permitting his clerk to collect excessive fees in several instances specified; appointing his clerk guardian *ad litem* in a case in which the clerk was previously employed as attorney for a party with conflicting interest; corruptly adjudicating that a majority of the tax-payers of a town who represented the majority of the taxable property had assented to the bonding of the town in aid of a railroad; taking a counsel fee for services in a proceeding which he knew was to be brought before him as county judge; accepting employment as counsel in suits for and against executors, administrators, guardians and minors in several actions when as county judge and surrogate he had the jurisdiction over the accounts of such parties. The charges were

fifty-four in all. The senate voted that the charges that he had accepted employment as attorney for an executor in a suit in the Supreme Court where he had jurisdiction of an estate and collected an excessive fee; that he had refused to produce books before the Board of Supervisors when requested; that he had refused to keep a fee-book as required by law; that he had refused to furnish the Board of Supervisors with an itemized account of his fees; that the unitemized account which he furnished the Supervisors omitted fees which he had collected; and that he had taken counsel-fees for drawing papers for use upon application before him as county judge, had been proved. The senate, however, refused to remove him, by a vote of seventeen to seven.[27]

In 1872 and 1873, charges against George M. Curtis, judge of the Marine Court of the city of New York, were heard before the New York senate. The charges were: that he was a member of a firm which practiced law in his own court, had shared the fees received by it for trying cases before him, had appointed one of the firm referee and shared the referee's fees; that he had willfully, corruptly and unlawfully granted a new trial; that he had used grossly improper conduct and scandalous and indecent language on the bench, tending to bring the administration of justice in his court into contempt, with specifications of such language, which was charged to have been in one case so vulgar that his associates in consequence thereof adjourned the General Term which they were holding with him; and that his conduct "upon the bench of the said Marine Court, while acting as justice thereof, has been of such a character as to degrade the judicial office in the esteem, to impair the respect and confidence, of suitors, of the bar, and of the people generally, in the impartiality, purity and trustworthiness of the court." The senate voted that the charges were not proven upon the principal charges by a majority nearly the same as that in Prindle's case.[28]

In 1877, Governor Robinson presented to the senate of New York

[27] Proceedings in the Senate on the investigation of the charges preferred against Horace G. Prindle, County Judge and Surrogate of Chenango County. In pursuance of a message from his excellency the Governor, transmitting the charges and recommending his removal. Albany: Weed, Parsons and Company, Printers, 1874. 2 volumes, pp. 1319, besides Index, pp. 16.

[28] Proceedings in the Senate on the Investigation of the Charges preferred against George M. Curtis, a Justice of the Marine Court of the city of New York, in pursuance of a Message from his Excellency the Governor, transmitting the Charges and recommending his Removal. Albany: Weed, Parsons & Company, Printers. 1874. pp. 748.

charges against De Witt C. Ellis, superintendent of the banking department, of negligence in the discharge of his duties, by failing to take measures to close certain banks after he had notice of their insolvency, and in other cases. The senate refused to remove him after a trial, by a vote of 10 in his favor and 21 against him.[29]

In 1878, Governor Robinson presented to the senate of the same State charges against John F. Smyth, superintendent of the insurance department. The charges were: the extortion from insurance companies of exorbitant fees of attorneys and appraisers for the paid examination of their assets made under his supervision. The senate acquitted him by a vote of 19 in his favor to 12 against him.[30]

NEW JERSEY.

In 1830, Henry Miller, a justice of the peace, was impeached and tried before the legislative council of New Jersey. The articles charged: the trial of two cases in which the respondent was personally interested, the prosecution and collection for his own benefit before another justice of the peace of a note which had been placed in his hands for prosecution and collection before himself for the benefit of the true owner thereof; an attempt to intimidate a defendant from appealing by telling him that if he intended to appeal from the judgment about to be rendered the respondent would render judgment for $25 or at least $20, but if he would not appeal the judgment would be for $12.50 only; and a failure to keep an accurate docket of the proceedings in his court and also altering entries that had been made in the docket upon the first article which charged the trial of a case in which he was personally interested. The respondent was convicted upon a single article and upon the other charges was acquitted. He was sentenced to dismissal from his office.[31]

[29] Testimony taken before the Senate Committee on Banks, and the Senate of the State of New York, in reference to charges preferred by William J. Best, Receiver, etc., Edward Mallon and John Mack against De Witt C. Ellis, Superintendent of the Banking Department of the State of New York. Also Journal of the Senate. Printed under the direction of the Clerk of the Senate, pursuant to resolution of the Senate, passed at Saratoga, Aug. 17, 1877. Albany: Weed, Parsons and Company, Printers, 1875. 3 volumes: vol. i, pp. 688, Index, pp. xvii; vol. ii, pp. 689–1400, Index, pp. xvii; vol. iii, pp. 1401–2048, Index pp. xvii.

[30] The proceedings are reported in a public document, containing the testimony and arguments, of 526 pages, accompanying the journal of the Senate in 37 pages.

[31] Minutes of the Proceedings of the Legislative Council of the State of New Jersey, sitting as a High Court

In 1837, Daniel C. Cozens, a justice of the peace, was impeached and tried before the legislative council of the same State. The articles charged: the issue of two summons, the entry of judgment, and the issue of execution without the knowledge or consent of the plaintiff named therein, although the execution was afterwards withdrawn; a subsequent issue of a summons against the same defendant without the knowledge or consent of the person named as plaintiff; the statement, when the defendant applied to know who the plaintiff was, that the respondent was not bound to know; on the trial day when the defendant appeared, a delay of an hour, and when, after the expiration of that time, the defendant asked if the respondent were ready for trial, the reply: "No, damn you, I'll give you a nonsuit." The respondent was acquitted by a majority vote in his favor.[82]

In 1886, Patrick Laverty, principal keeper of the state prison, was impeached by the assembly and tried and convicted by the Senate of Jersey and punished by removal and disqualification from all offices. The articles charged him with adultery and fornication with female convicts in his custody. The respondent answered denying the charges and was defended by counsel.[83]

On March 15th, 1895, Patrick W. Connelly, a justice of the peace, was convicted and sentenced to removal from office by the senate of New Jersey, upon impeachment for assaulting a lawyer who had called upon him upon official business in his office, and continuing the assault upon the street outside. The articles of impeachment were presented on March 4th. They also charged as an offense the falsification and alteration by the respondent of the docket of a judgment after it had been rendered, so as to make it a judgment of non-suit instead of a judgment for the defendant. The respondent was acquitted on the latter charge. The trial began on March 14th.[84]

PENNSYLVANIA.

In Pennsylvania in 1780, under the Confederation, Francis Hopkinson, the State judge of admiralty, was impeached by the house of as-

of Impeachment, at the City of Trenton. In the year of our Lord, one thousand eight hundred and thirty, and of the Independence of the United States the fifty-fourth. 1830.

[82] Minutes of the Proceedings of the Legislative Council of the State of New Jersey, sitting as a High Court of Impeachment, at the City of Trenton, in the year of our Lord one thousand eight hundred and thirty-seven, and of the United States the sixty-first. 1837.

[83] Senate Journal of New Jersey, in 1886, pp. 905–959.

[84] Journal of the 51st Senate of the State of New Jersey, Trenton, New Jersey, 1895, pp. 336–340, 961–1068.

sembly and tried before the president and council. The articles charged him with a proposal to appoint a man agent for unrepresented shares of prizes belonging to absent seamen and others upon condition that the person appointed should make him a present of a suit of clothes; and the threat to appoint others in his stead if this condition was not complied with; with issuing a writ for the sale of a cargo of the prize, which falsely declared that it had been testified to him, that the cargo was in great danger of waste, spoil and damage, when there had been in truth no such testimony; and with continually charging and receiving excessive fees. The answer admitted that the judge had said to the marshal, who had applied to him for the appointment of Blair McClenachan, "that a thought had just occurred which he would in confidence mention, requesting his opinion thereupon, and declaring he would be bound by it. And then observed to the marshal that he was about to throw into Mr. McClenachan's hands, many thousand pounds, by giving him the agency. . . That Mr. McClenachan had wrought him much trouble in his office, had never shown civility of any kind, and even neglected the common compliment of his hat, when they met. That he heard much of Mr. McClenachan's politeness and generosity to other persons and submitted it, whether it would not be as proper, if Mr. McClenachan should make him a present of a suit of cloaths, as well as to other persons who had not been as beneficent to him or done him such substantial favours, and finally observed that this was a matter of delicacy and doubt. To which the marshal replied, that in common justice Mr. McClenachan ought to make some acknowledgment for so considerable a favour — that there was no impropriety or indelicacy in the judge's receiving such a present, should it be offered; the appointment to an agency not being a judicial act, but a voluntary favour of the Court; no more conversation of any importance passed at that time on the subject. Some days after, the judge asked the marshal whether he had ever mentioned anything of this affair to Mr. McClenachan, who replied that he had not had favorable opportunity, and these were the only times in which the matter was touched upon; excepting that some short time after the judge, thinking on further consideration that the thing was improper, declared his better sentiments to the marshal, and absolutely forbid him proceeding in it. But told the marshal he should expect Mr. McClenachan would at least ask the Judge for the agency, a ceremony he never dispensed with — as he thought the favour worth asking for, if worth possessing; and declared he would never make the favours of his office so cheap as to force them on persons who would not condescend to request them." The answer further said that

McClenachan neglected to ask for the agency in question, and in the meanwhile other reasons occurred to the judge for not appointing him as agent, and he consequently appointed other persons; and that the bills of costs which he had charged were in accordance with the custom of his office.

James Wilson, afterwards justice of the Supreme Court of the United States, and who played an important part in the framing of the Constitution, appeared as attorney for the defendant together with Jared D. Ingersoll. The council dismissed the charges for lack of proof as regards the solicitation of the bribe, and because they were of the opinion that the judge acted in good faith as regards the other matters, but concluded their decision with an opinion expressing their disapproval of the acceptance of presents by public officers.[35]

In 1793, the house of representatives of that State impeached and the senate tried John Nicholson, the comptroller-general. The articles charged him with improper recognition of the new loan certificates, which had been issued in pursuance of a previous act of the legislature and had been subsequently annulled by a later act; with presenting them and declaring them "to be subscribable, as debts due and owing by the State of Pennsylvania, to a certain loan, opened and proposed, on the part of the United States, to the creditors of the respective States"; with certifying that they were redeemable; and in his reports concerning the same so confounding them with other valid loans as to make it impossible for the governor to know that they were there included; with purchasing such certificates himself and then presenting them in subscription to said loans; and in certain cases, after he had allowed such new loan certificates to be exchanged for certificates of debts by the United States, with appropriating them to his own use and again subscribing them to the loan in his own name and for his own benefit. The answer was a general plea of not guilty. The defense rested principally on a claim that the law authorized the action of the respondent in recognizing these new loan certificates; that he had as much right as any other citizen to purchase and deal in them; and that there was no proof of the last charge. The respondent was acquitted by a majority vote in his favor on all the articles but two, and upon

[35] The Pennsylvania State Trials, containing the Impeachment Trial and Acquittal of Francis Hopkinson and John Nicholson, Esquires, the former being Judge of the Court of Admiralty and the latter the Comptroller-General of the Commonwealth of Pennsylvania. Vol. i, Viresques Acquirit Eundo Virg. Philadelphia. Printed by Francis Bailey at Yorick's Head, No. 116 High St. For Edmond Hogan, M,DCC,XCIV. pp. 776.

those two by a vote of less than two-thirds against him. Pending the discussion by the senate, after the testimony and arguments had been closed, a resolution for his removal by the governor passed the house. Immediately upon the announcement to the respondent of his acquittal, he resigned his office. The senate upon the same day passed a resolution concurring with that of the house and addressed to the governor for his removal. The governor notified them that the respondent had superseded the removal by resigning his office, and his resignation had been already accepted.[86]

In 1788, the Supreme Court of Pennsylvania punished Eleazer Oswald by a fine of ten pounds and a month's imprisonment on account of his publication in the Independent Gazette of an article attacking the conduct of the plaintiff in a suit instituted against him and insinuating prejudice on the part of the court. A few weeks after his discharge, Oswald presented a memorial to the general assembly of the State calling upon the house to determine "whether the judges did not infringe the Constitution in direct terms in the sentence they had pronounced, and whether they had not made themselves proper objects of impeachment." Lewis, one of the leaders of the house, defended the judges in an elaborate argument, the points of which are still preserved. The house finally resolved, "That this house, having, in a committee of the whole, gone into a full examination of the charges exhibited by Eleazer Oswald, of arbitrary and oppressive proceedings in the justices of the Supreme Court against the said Eleazer Oswald, are of opinion, that the charges are unsupported by the testimony adduced, and, consequently, that there is no just cause for impeaching the said justices."[87]

Meanwhile the arrogance and aristocratic tendencies of the Federalist party swept it from power in the State of Pennsylvania as well as throughout the greater part of the Union. The Democrats, who had previously been excluded from judicial as well as other offices in the North, attempted in many States as well as in the United States to remove Federal judges in order to substitute good Democrats in their place. Amongst these was Alexander Addison, president of the Court of Common Pleas in the Fifth District of Pennsylvania. He was a Presbyterian preacher, who had abandoned the pulpit for the bench, and was accustomed in his charges to grand juries to take every opportunity to denounce the Democrats and all who sympathized with the French revolution. He had even gone so far as to instruct a grand jury that a

[86] Ibid.

[87] Respublica *v.* Oswald, 1 Dallas, 319, 329, and notes.

liberty pole was a nuisance. One of his associates was John Lucas, a Frenchman, of mild manners and little education. On one occasion when Lucas charged the jury after the conclusion of a charge by Addison, Addison instructed them "that the address delivered to them by the said John Lucas, otherwise John B. Lucas, had nothing to do with the question before them, and that they ought not to pay any attention to it." Upon another occasion, Addison refused to allow Lucas to charge the grand jury after his own charge which contained a bitter denunciation of the French, and the Democratic party. Lucas acquiesced at the time, but consulted his friends; amongst others, Judge Brackenridge, and prepared to resist upon the next occasion. He then prepared a mild and temperate address to the grand jury in which he said amongst other things: —

"For my part, I cannot expose myself so much as to forget that I stand here as a judge, and not as a speculatist or historian; that this present time is at the disposal of the laws, and not at that of my fancy or imagination. God forbid, above all, that I should single out any set of men among fellow-citizens, and insinuate that they are a ramification of such German and French illuminees and jacobins, and that the mean course of the last general election throughout the United States evinces that this ramification is growing powerful and influential."

"Had I ever denounced parties to a jury, I could not help thinking that I should have perverted the use of judicial power to a wrong and dangerous end. It is with deep regret that I have now spoke upon the topic of parties; it is not from choice, but from necessity; not to act, but to counteract. May this circumstance be the only one in my life wherein I feel myself under the obligation of addressing to a jury, upon so delicate and perplexing a subject."

Addison interrupted Lucas, telling him that the proceeding was extraordinary and not usual, and that he must desist. Lucas said it was his right and would proceed. The presiding justice then adjourned the court until the afternoon. When the court reopened in the afternoon, Judge Lucas again began to charge the jury, when Addison commanded him to be silent, and informed him that the court would, and knew how to enforce obedience.

A motion was thereupon made by the attorney-general before the Supreme Court for leave to file an information against Judge Addison on account of his misbehavior in this case. The court dismissed the proceeding on the ground that no crime was charged. The chief-justice said: "We will not hear the right questioned; there can be no doubt of the right. The right of every judge is equal as to expressing him-

self to a jury grand or petit; whether supporting or dissenting. Nay, if he dissents in opinion, he is guilty of a breach of trust, if he does not express it. The affidavit does not state malice. It would seem to be a mistake of right. Unless a crime is stated the court cannot take cognizance. There may be another remedy. It does not lie with us to say what that is. The proceeding was arbitrary, unbecoming, unhandsome, ungentlemanly, unmannerly and improper; but there not being an imputation of wilful misbehaviour and malice, it is not indictable, or the subject of an information."

Addison was thereupon in the following year, 1802, impeached, and in 1803, convicted and removed from office upon articles charging these offenses. The prosecution was conducted by Alexander J. Dallas and M'Kean as counsel for the house of representatives. Addison defended himself in person with great vigor and ability.[38]

Emboldened by their success, the Democratic party then attacked the whole supreme court of the State, with the exception of Judge Brackenridge, who was a Democrat.

A dispute had arisen in 1802, between Thomas Passmore and Andrew Bayard, concerning the liability of Bayard and other underwriters upon a policy of marine insurance. The arbitrators to whom the matter had been referred decided in favor of Passmore, but Bayard was advised by counsel that the decision was illegal for irregularity in the proceedings, and consequently instituted proceedings in the Supreme Court to set aside the judgment entered upon the award. Thereupon Passmore abused him and his firm in a public coffee-house as "quibbling underwriters" who had basely kept from the subscriber the money included in the award; stigmatized their conduct "as a mean, dirty action," publicly declared Bayard to be "a liar, a rascal, and a coward," and offered "2½ per cent to any good person or persons to insure the solvency of Pettit and Bayard, for four months from this date."

The Supreme Court held this to be a contempt, and committed Passmore in consequence to jail for thirty days, with a fine of fifty dollars. The articles of impeachment, which were voted in 1804, charged that the commitment was wrongful and illegal, inasmuch as the alleged contempt was not committed in the presence of the court.

[38] The Trial of Alexander Addison, Esq., President of the Courts of Common Pleas, in the Circuit Consisting of the Counties of Westmoreland, Fayette, Washington, and Alleghany. On an Impeachment by the House of Representatives. Before the Senate of the Commonwealth of Pennsylvania. Taken in Shorthand by Thomas Lloyd. Second edition, with additions. Lancaster, printed by George Helmbold, Jr., for Lloyd and Helmbold, Jun., 1803. (Copyright secured.)

The bar of the State of Pennsylvania stood by the justices of the court, and so did Judge Brackenridge, the only Democratic member. The assembly was consequently obliged to retain Rodney of Delaware to conduct the prosecution. He was assisted by a layman, Boileau, one of the managers of the house of representatives, who argued against the justices in a speech that displayed great wit and fancy. Jared Ingersoll and Alexander J. Dallas, two leaders of the Pennsylvania bar, appeared for the impeached justices, at the trial in 1805. The respondents were acquitted by a vote of thirteen of guilty and eleven not guilty; less than two-thirds being consequently against them. An act was subsequently passed which has been copied in most States and also by Congress, making it unlawful to punish for contempt an act not committed in the presence of a court or tending to obstruct the execution of its decrees.[39]

In 1816, Walter Franklin, the president, and Jacob Hibshman and Thomas Clark, associate judges of the Court of Common Pleas of Lancaster County, were impeached and tried before the senate of Pennsylvania. A single article was presented. This charged that the respondents had improperly refused to compel certain attorneys to pay to their clients moneys which they had collected and unjustly retained. The judges were all acquitted.[40]

The same Judge Franklin, who was then president judge of the second judicial district of Pennsylvania, was again impeached, tried and acquitted in 1825. The articles charged: a delay of the administration of justice in many cases to an extent commensurate with a denial thereof, "viz. The decision of that description of causes which are to be decided by the court without the intervention of a jury, and which in his courts are included under the denomination of causes on the argument list, is by him habitually deferred unnecessarily, under pretence of holding under advisement for a time, totally inconsistent with

[39] Report of the Trial and Acquittal of Edward Shippen, Esq., Chief-Justice, and Jasper Yeates and Thomas Smith, Esquires, Assistant Justices of the Supreme Court of Pennsylvania. On an Impeachment, before the Senate of the Commonwealth, January, 1805. By William Hamilton, Editor of the Lancaster Journal. Lancaster: printed by the Reporter. pp. 491. With an Appendix, pp. 96.

[40] (Appendix.) Journal of the Proceedings of the Senate of Pennsylvania, sitting as the High Court of Impeachment, on the trial of an article of accusation and impeachment preferred by the House of Representatives, against Walter Franklin, President, and Jacob Hibshman and Thomas Clark, Associate Judges of the Court of Common Pleas of Lancaster County. pp. 12. Appendix to Senate Journal for 1816, Harrisburg: printed by Christian Gleim, 1816.

a due administration of justice, although, in many instances, the cases have not required any extraordinary exertion of intellect or of legal knowledge, insomuch, that conformably to his practice, but little facility is afforded to a party in obtaining a prompt decision of a cause, in consequence of its being plain and not involving any intricacy of testimony or of law; all being equally involved in the general habit of procrastination;" similar action upon the return of writs of certiorari to review the proceedings of justices of the peace in violation of an act of the general assembly; a fraudulent tampering with the records of the court so as to enter a decision different from that previously made by him; leaving the court during a criminal trial so that a verdict of guilty was returned and recorded in his absence, and when a motion for a new trial was made on this ground, in consideration of the withdrawal of such motion, the sentence of the prisoner to a nominal penalty. The respondent was acquitted by a majority vote of not guilty upon all the articles.[41]

In the same year, 1825, Robert Porter, president judge of the third judicial district, was also impeached and acquitted. The articles charged a refusal to furnish his reasons for a report which he had made as referee, and a dismissal of exceptions taken to such report for the reasons assigned by the party in whose favor the report was made; the public insult of three inn-keepers in open court, by charging them with keeping disorderly houses and allowing gambling in their inns; unlawful attempts, one of which was successful, to procure the suppression and compounding of a felony; improperly attempting by intimidation to persuade a jury to bring in a verdict contrary to that which they proposed to render; the falsification of a record and a bill of exceptions after the case had been removed to a court of review on writ of error; a refusal to comply with a request to reduce his opinions to writing in compliance with the statute in several cases; unlawfully reducing an assessment for road-taxes; insulting, threatening and intimidating one of his associate judges on the bench in open court when the judge hesitated to concur in a decision which he rendered; similar indecent conduct towards the same judge in several other cases, and in one case thus preventing him from addressing a jury. The acquittal was in some cases unanimous, in the rest by a large majority vote of not guilty.[42]

[41] Journal of the Court of Impeachment, for the trial of Walter Franklin, Esquire, President Judge of the second judicial district of Pennsylvania, for Misdemeanors in office, before the Senate of the Commonwealth of Pennsylvania. Harrisburg: printed by Mowry & Cameron, 1825.

[42] Journal of the Court of Impeachment for the trial of Robert Porter, Esquire, President Judge of the Third Judicial District of Pennsylvania, for

In 1826, Seth Chapman, president judge of the eighth judicial district of Pennsylvania, was impeached. The articles charged an illegal arrest without any verified complaint; a violation of a statute by the issue of a writ of certiorari to set aside a judgment of a justice of the peace more than twenty days after it was rendered; a refusal to file an opinion and his charge to the jury in a case which the unsuccessful party desired to review by writ of error; and the exercise of undue partiality and favoritism by his rulings on the admission of evidence and his charge to the jury in two cases. He was acquitted by a unanimous vote on two of the charges and by a large majority in favor of the respondent on the remainder.[42]

The senate of Pennsylvania has also addressed the governor for the removal of Edward Rowan, high sheriff of Philadelphia, and Judge John M. Kirkpatrick of Pittsburg — the latter in 1885, both for physical and mental incapacity.

On October 13th, 1891, Governor Pattison convened the Pennsylvania senate on executive business to consider charges against the State treasurer, Henry K. Boyer, and auditor-general Thomas McCamant, of wasting the State funds by permitting John Bardsley, the city treasurer of Philadelphia, in consideration of bribes paid them by him, to retain in his hands State taxes collected by him, which he embezzled to an amount in excess of a million dollars; and in the case of the auditor-general, of approving bills for advertising a list of fictitious names of alleged delinquent tax-payers. Philadelphia city officers were also affected by the latter charge. The counsel for all the officers objected to the jurisdiction of the senate upon the grounds that the governor had no power to institute charges, that the proceedings upon such charges were not "executive business," and consequently could not be considered at an extraordinary session of the senate, and that no officer could be removed for an impeachable offense without a previous conviction upon an impeachment or indictment.

By a party vote of twenty-eight yeas to nineteen nays the following resolutions were adopted: —

"*Whereas*, the Senate of Pennsylvania having been convened in extraordinary session, for executive business, on October 13th, A. D. 1891, His

Misdemeanors in Office, before the Senate of the Commonwealth of Pennsylvania. Harrisburg: printed by Cameron & Krause, 1825.

[42] Journal of the Court of Impeachment for the trial of Seth Chapman, Esquire, President Judge of the Eighth Judicial District of Pennsylvania, for Misdemeanors in Office, before the Senate of the Commonwealth of Pennsylvania. Harrisburg: printed by Cameron & Krause, 1826.

Excellency the Governor did thereupon transmit to this body his message, wherein it appears that the business for which it was convened as aforesaid, was the investigation of certain charges of official misconduct, fully set forth in said message, against Henry K. Boyer, State Treasurer, Thomas McCamant, auditor-general; and against certain magistrates of the city of Philadelphia, with a view to addressing the Governor asking for the removal of said officers; *And whereas*, each of said accused officers did appear and make answer denying the jurisdiction of the Senate to investigate any of said charges, and to address the Governor as aforesaid for or by reason of anything in said proclamation and message contained, and also denying each and every of said charges; *And whereas*, this body, having postponed the consideration of the question of jurisdiction in the premises, did proceed to make a full and complete investigation of said charges against said Henry K. Boyer, State Treasurer, being assisted throughout its said investigations by the Attorney-General of the Commonwealth; *And whereas*, The Senate has now heard full argument upon said question of jurisdiction and has fully considered the same; therefore, *Resolved*, That as the said charges preferred by the Governor in manner aforesaid against said officers, are charges of misdemeanor in office, for which said officers could be proceeded against, both by impeachment and by indictment, and if convicted thereof, in either of said ways, could be removed; the Senate has no jurisdiction, under Section 4 of Article VI of the Constitution in this proceeding, to inquire into, hear and determine said charges of official misconduct, and to address the Governor asking for the removal of said officers by reason thereof, and thereby to deprive said officers of the right to trial by jury, guaranteed to them under Article I, or to a trial in regular proceedings by impeachment in accordance with Sections 1, 2, and 3, of Article VI of the Constitution."

"*Whereas*, the Senate has already decided in the case of Henry K. Boyer State Treasurer, that it has no jurisdiction under the Constitution, in this proceeding, to inquire into, hear and determine the charges of official misconduct preferred against him, and to address the Governor asking for his removal from said office of State Treasurer, for or on account of anything in the proclamation or message of the Governor contained; *And whereas*, The charges against all the other officers named in said message are also charges of official misconduct, and said ruling of the Senate on the question of jurisdiction in the said case of the said Henry K. Boyer applies with equal force and effect to the cases of all the other officers named in said message; *And whereas* it having been decided by the senate in manner aforesaid that it is without jurisdiction in the premises, no good end would be accomplished by further protracting this session; therefore, *Resolved*, That when the Senate adjourns to-day it shall adjourn *sine die*." [44]

[44] Journal of the Senate of the Commonwealth of Pennsylvania for the Extraordinary Session Begun at Harrisburg on the 13th Day of October, 1891. Harrisburg: Edwin V. Meyers, State Printer. 1891. pp. 734.

WEST VIRGINIA.

In West Virginia, in 1868, Judge William L. Hindman of the eighth judicial circuit was removed from office by the legislature for admitting to the bar Samuel A. Miller and Samuel Price, former officers under the Confederate government, without requiring from them the test-oath prescribed by the State law of February 14th, 1866,[45] which the State Court of Appeals had held to be constitutional,[46] but which was similar to a Federal statute which the Supreme Court of the United States had held to be unconstitutional as an *ex post facto* law.[47] The respondent was ill and on that account requested a postponement of the hearing till the summer session. His request was refused. The hearing proceeded before the senate in his absence and without any defense by him. The facts charged were proved and he was removed from his State office for his obedience to the Constitution of the United States.[48]

In 1875 and 1876, John S. Burdett, the treasurer, and Edward A. Bennett, the auditor, were impeached and tried before the senate of the same State.

The articles against Burdett charged: in various forms, a corrupt agreement with a bank by which, in consideration of money paid him and his son, he kept an average deposit of $40,000 of the State funds there upon which the State should have received interest; a similar agreement with another bank by which he kept an average deposit of $8000 there in return for a loan of $2500 made to his son, and renewed as long as the deposit was maintained; a similar agreement with a third bank; a failure to keep accounts and make semi-annual reports of the moneys received and disbursed by him, showing the amount of money on deposit in each designated depositary, the rate and amount of interest received thereon, and the amount and character of the security given by each depositary; concealment from the board of public works, of which he was a member, of his knowledge that they could collect a greater rate of interest on deposits than was demanded by them; the retention

[45] West Virginia Laws of 1866, ch. xxx, p. 19.

[46] *Ex parte* Hunter, 2 W. Va., 122, A. D. 1867; *Ex parte* Quarrier, 2 W. Va., 569, A. D. 1866; cf. *Ex parte* Quarrier, 4 W. Va., 210, A. D. 1870; *Ex parte* Stratton, 1 W. Va., 305, A. D. 1866; *Ex parte* Faulkner, W. Va., 269, A. D. 1866.

[47] *Ex parte* Garland, 4 Wall., 333.

[48] See the House Journal of West Virginia for 1868, in the New York State Library. Appleton's Annual Encyclopædia for 1868, pp. 763-764, erroneously describes this as an impeachment. Subsequent to, if not in consequence of this proceeding, the West Virginia Court of Appeals refused to follow the decision of the Supreme Court of the United States. (*Ex parte* Quarrier, 4 W. Va., 210, A.D. 1870.)

and collection of gratuities from the depositaries for such concealment; the so negligent and careless conduct of the business of his office that his son, who was employed therein, was able to make corrupt arrangements with certain State depositaries whereby the patronage, favors and official influence of the respondent were made and became a source of private and personal revenue and profit to his son.

The respondent was convicted upon two articles which charged him with making a proposition to a bank through its president to secure to it a certain average amount of State funds upon condition that it would allow and pay him for his own personal use, interest of one or two per cent per annum upon an average amount which he kept on deposit; and an executed conspiracy with his son under which he kept an average deposit of State funds to the amount of $40,000 in another bank under an agreement by which the bank paid him and his son three per cent per annum upon the amount thus deposited. The penalty imposed was removal from office and disqualification from holding that office during the remainder of his official term.[49]

Edward A. Bennett, the auditor, was charged with a failure to keep an account of moneys received and disbursed by him, neglect and refusal to make a semi-annual report thereof, and the receipt of money from insurance companies for which he did not report or account to the State; the embezzlement of the money thus collected; the deposit of State funds in a bank in consideration of a payment to him for such deposit; the extortion of illegal fees from foreign insurance companies transacting business in the State; the collection of interest due the State and the retention of the same to his own use for several months; the corrupt solicitation of a bank-president to pay him a commission for a deposit of State funds, and a successful corrupt combination with the treasurer to extort $1000 from a bank in consideration of the promised use of the power and influence which they claimed to possess over the deposit of State funds to cause and secure an average deposit of $40,000 in said bank for the year 1872. The respondent was acquitted.[50]

NORTH CAROLINA.

The Fourteenth Amendment and the Reconstruction Acts deprived for a long time nearly all the tax-payers of the South from participation

[49] Proceedings of the Senate sitting for the trial of the impeachment of John S. Burdett, Treasurer of the State of West Virginia. Wheeling: John W. Gentry, printer, 1875; pp. 101.

[50] Proceedings of the Senate sitting for the trial of the impeachment of Edward A. Bennett, Auditor of the State of West Virginia. Wheeling: John W. Gentry, Printer, 1875; pp. 84.

in the government of their respective States. They were consequently subjected to the rule of the ignorant and illiterate blacks, who were usually led by adventurers from the North known as carpet baggers. The result was frequent pillage of the public treasury and robbery of the tax-payers under the forms of law.[51] To counteract this, and to intimidate the negroes from exercising their political rights, a secret organization known as The White Brotherhood or the Ku-klux Klan was formed in many of the Southern States. The members of this, who were divided into different camps, paraded through the villages at night disguised in white garments and masks for the purpose of striking terror into the hearts of the blacks. Many of their members, either with or without the authority of the organization, committed crimes in similar disguise. Blacks and whites were dragged from their houses at night and whipped; others were hung; others were ordered to leave and driven out of the neighborhood through fear of death. When complaints were made to the public authorities, in many instances they were dismissed by the committing magistrates. In others, grand juries filled with members of the Klan, refused to find indictments, and prosecuting attorneys failed to push the proceedings.

In North Carolina, a law was passed making the act of going masked, disguised or painted a felony.[52]

Notwithstanding this, in the counties of Alamance and Caswell, of that State, a number of whippings and murders by bands of men armed and disguised took place, and the public authorities failed to find any indictments in consequence thereof. The governor of North Carolina, William W. Holden, under an act of the legislature, proclaimed those counties to be in a state of insurrection, and sent troops of militia to enforce order in the counties. The officer in command of those troops, Colonel George W. Kirk, arrested and imprisoned many civilians, and tortured some of them in order to obtain evidence as to the perpetrators of these murders. The civil courts in those counties were still open. An application for a writ of habeas corpus was made to the chief-justice of the State by some of these prisoners. Colonel Kirk, acting under the orders of the governor, refused to obey the writs. The governor justified him in this course. Chief-Justice Pearson, who during the Civil War had taken a bold stand by the frequent issue of this writ against the Confederate authorities, then wrote the governor, enclosing copies of these writs, together with affidavits setting out that Colonel Kirk refused to make return thereto, and said that he had made the arrests at the governor's orders; and asked for information whether Colonel Kirk acted under the orders of Holden when making the arrests. The governor

[51] *Supra*, § 38.

[52] Act of April 12, 1869.

replied, stating that the arrests and detention were made by his order, and that "I am satisfied that the public interest requires that these military prisoners shall not be delivered up to the civil power. I devoutly hope that the time may be short when a restoration of peace and order may release Alamance County from the presence of military force and the enforcement of military law. When that time shall arrive I shall promptly restore the civil power." The chief-justice held that the writ of habeas corpus could only be suspended by the legislature, which had not authorized such suspension. He refused to commit the colonel for contempt of court in the use of insolent language upon his refusal to obey the writ. He denied a motion for the issue of a precept directing the sheriff of the county to execute the writ, saying in his opinion : —

"The petitioner is entitled to this writ; the only question is, to whom shall it be directed. The motion is that it should be directed to the sheriff of some county. I have considered the matter fully, and have come to the conclusion not to direct it to a sheriff. The act gives a discretion. In the present condition of things, the counties of Alamance and Caswell declared to be in a state of insurrection and occupied by military forces, and the public mind feverishly excited; it is highly probable, nay, in my opinion, certain, that a writ in the hands of a sheriff (with authority to call out the power of the county), by which he is commanded with force, if necessary, to take the petitioner out of the hands of the military authorities, will plunge the whole state into civil war. If the sheriff demands the petitioner of Col. Kirk, with his present orders, he will refuse, and then comes war. The country has had war enough. But it was said by the counsel of the petitioner 'if in the assertion of civil liberty, war comes, let it come. The blood will not be on your hands or on ours; it will be on all who disregard the sacred writ of *habeas corpus*. Let justice be done if the heavens fall.' It would be to act with the impetuosity of youth and not with the calmness of age, to listen to such counsels. 'Let justice be done if the heavens fall,' is a beautiful figure of speech, quoted by every one of the five learned counsel. Justice must be done, or the power of the judiciary be exhausted, but I would forfeit all claims to prudence tempered with firmness, should I, without absolute necessity, add fuel to the flame and plunge the country into civil war, provided my duty can be fully discharged without that awful consequence. Wisdom dictates if justice can be done 'let heaven stand.' Unless the governor revokes his orders, Col. Kirk will resist; that appears from the affidavit of service.

"The second branch of the motion, that the power of the county be called out if necessary, to aid in taking the petitioner by force out of the hands of Kirk, is as difficult of solution as the first. The power of

the county or '*posse comitatus*,' means *the men of the county in which the writ is to be executed;* in this instance Caswell, and that county is declared to be in a state of insurrection. Shall *insurgents* be called out by the person who is to execute the writ to join in conflict with the military forces of the state? It is said a sufficient force will volunteer from other counties; they may belong to the association, or be persons who sympathize with it. But the '*posse comitatus*' must come from the county where the writ is to be executed; it would be illegal to take men from other counties. This is settled law; shall illegal means be resorted to in order to execute a writ? Again; every able bodied man in the state belongs to the militia. The governor is, by the constitution, 'Commander-in-Chief of the militia of the State,' art. 13, sec. 8. So the power of the county is composed of men who are under the command of the governor; shall these men be required to violate with force the orders of their commander-in-chief, and do battle with his other forces that are already in the field? In short the whole physical power of the state is by the constitution under the control of the governor; the judiciary has only a moral power; by the theory of the Constitution there can be no conflict between these two branches of the government. The writ will be directed to the marshal of the Supreme Court with instructions to exhibit it, and a copy of this opinion, to his excellency, the governor. If he orders the petitioner to be delivered to the marshal, well; if not, followiug the example of Chief-Justice Taney, in Merriman's Case (Annual Cyclopædia for the year 1861, page 555), I have discharged my duty; the power of the judiciary is exhausted, and the responsibility must rest on the executive."[53]

Governor Holden replied as follows: —

"To the Honorable R. M. Pearson, Chief-Justice of the Supreme Court of North Carolina:

"Sir: — I have had the honor to receive, by the hands of the Marshal of the Supreme Court, a copy of your opinion in the matter of A. G. Moore; and the Marshal has informed me of the writ in his hands for the body of said Moore, now in the custody of my subordinate officer Col. George W. Kirk.

"I have declared the counties of Alamance and Caswell in a state of insurrection and have taken military possession of them — this your Honor admits I have the power to do 'under the constitution and laws,' and not only this, but 'to do *all* things necessary to suppress the insurrection,' including the power to 'arrest all *suspected* persons' in the above

[53] *Ex parte* Moore, 64 N. C., 802. See the personal explanation of the Chief-Justice and the approval of his conduct by his associates, 65 N. C., 349; and see also The Green Bag, vol. iv, pp. 536–537.

mentioned counties. Your Honor has thought proper also to declare that the citizens of the counties of Alamance and Caswell are *insurgents*, as the result of the constitutional and lawful action of the Executive, and that, therefore, you will not issue the writ of *habeas corpus* for the production of the body of Moore to any of the men of the said counties, and the *posse comitatus* must come from the county where the writ is to be executed, and that any other means to enforce the writ would be illegal. I have official and reliable information that in the counties above named during the last twelve months, not less than one hundred persons 'in the peace of God and the State,' have been taken from their homes and scourged, mainly, if not entirely, on account of their political opinions; that eight murders have been committed, including that of a State senator, on the same account; that another State senator has been compelled from fear for his life to make his escape to a distant State. I have reason to believe that the governments of the said counties have been mainly, if not entirely in the hands of the men who belong to the Ku-klux Klan, whose members have perpetrated the atrocities referred to; and that these county governments have not merely omitted to ferret out and bring to justice those of this Klan, who have thus violated the law, but that they have actually shielded them from arrest and punishment. The State judicial power in the said counties, though in the hands of energetic, learned and upright men, has not been able to bring criminals to justice; indeed it is my opinion, based on facts that have come to my knowledge, that the life of the judge whose duty it is to ride the circuit to which the said counties belong, has not been safe, on account of the hatred entertained towards him by the Klan referred to, because of his wish and purpose to bring said criminals to justice. For, be it known to your Honor, that there is a wide spread and formidable secret organization in this State, partly political and partly social in its objects; that this organization is known, first, as '*The Constitutional Union Guard*'; secondly, as '*The White Brotherhood*'; thirdly, as '*The Invisible Empire*' — that the members of this organization are united by oaths which ignore or repudiate the ordinary oaths or obligations that rest upon all other citizens to respect the laws and to uphold the government; that these oaths inculcate hatred between the two races that inhabit this State; that the members of this Klan are irreconcilably hostile to the great principles of political and civil equality on which the government of this State has been reconstructed; that these Klans meet in secret, in disguise, with arms, in uniform of a certain kind intended to conceal their persons and their horses, and to terrify those whom they assault, or among whom they move; that they hold their camps in secret places, and decree judgment against their peaceable fellow-citizens, from mere intimidation to scourging, mutilations and murder, and that certain persons of the Klan are deputed to execute these judgments; that when the members of this Klan are arrested for violations of law, it is most difficult to obtain bills of indictment against them, and still more difficult

to convict them ; first, because some of the members, or their sympathizers, are almost always on the grand and petit juries, and secondly, because witnesses who are members or sympathizers unblushingly commit perjury to screen their confederates and associates in crime ; that this Klan thus constituted, and having in view the objects referred to, is very powerful in at least twenty-five counties of the State, and has had absolute control, for the last twelve months, of the counties of Alamance and Caswell.

"Under these circumstances I would have been recreant to duty and faithless to my oath, if I had not exercised the power in the said counties which your honor has been pleased to say I have exercised constitutionally and lawfully; especially as since October, 1868, I have repeatedly, by proclamation and by letters, invoked public opinion to repress these evils, and warn criminals and offenders against the law of the State that must in the end overtake them if under the cloak of the Klan referred to, they should persist in their course. I beg to assure your honor that no one subscribes more thoroughly than I do to the great principles of habeas corpus and trial by jury. Except in extreme cases in which, beyond all question, 'the safety of the State is the supreme law,' these privileges of habeas corpus and trial by jury should be maintained. I have declared that, in my judgment, your Honor and all the other civil and judicial authorities are unable *at this time* to deal with the *insurgents*. The civil and the military are alike constitutional powers; the civil to protect life and property when it can, the military only when the civil has failed. As the chief executive I seek to execute, not to subvert, the judicial power. Your honor has done your duty, and in perfect harmony with you I seek to do mine. It is not I, nor the military power, that has supplanted the civil authority; that has been done by the insurrection in the counties referred to. I do not see how I can restore the civil authority until I 'suppress the insurrection,' which your honor declares I have the power to do; and I do not see how I can surrender the insurgents to the civil authority until that authority is restored. It would be a mockery in me to declare that the civil authority was unable to protect the citizens against the insurgents and then turn the insurgents over to the civil authority. My oath to support the constitution makes it imperative on me to 'suppress the insurrection,' and restore the civil power in the counties referred to, and this I must do. In doing this I renew to your honor expressions of my profound respect for the civil authority, and my earnest wish that this authority may soon be restored to every county and neighborhood in the State. I have the honor to be, with great respect, your obedient servant,

W. W. HOLDEN, Governor."

On July 27th the counsel for the petitioners moved: "1. For an attachment, or rule to show cause, against the governor for not making a sufficient return to the writ of habeas corpus; 2. If that be not proper, then for a like attachment or rule against George W. Kirk; 3. That the

marshal of the Supreme Court be directed to proceed in the execution of the writ directed to him, to bring the body of the prisoner before him." The chief-justice denied all three motions.[54]

The prisoners thereupon applied to Judge Brooks, of the District Court of the United States, who granted the writ. The governor directed Colonel Kirk to refuse to obey the writ, and telegraphed to President Grant stating this, and that it was his purpose to detain the prisoners, unless the army of the United States, under the orders of the President, should act in aid of the process of the Court of the United States. The secretary of war, General Belknap, answered, forwarding an opinion from Attorney-General Ackerman, advising "that the State authorities yield to the United States judiciary." Judge Brooks entered an order discharging the petitioners. Pending the proceedings before the Federal judge and after he had received the letter from the secretary of war, the governor ordered Colonel Kirk to obey the writs of habeas corpus issued by the chief-justice of North Carolina. When the return was filed, the counsel for the petitioners filed a statement in which, "deeming themselves without remedy from the judiciary of the State, and having obtained writs of habeas corpus from Hon. G. W. Brooks, judge of the District Court of the United States for the district of North Carolina, returnable before him at chambers, in Salisbury, this day, as counsel for the said prisoners," they requested leave to withdraw their petitions and abandon further proceedings under the State writs. The chief-justice allowed the prisoners to withdraw their applications. The State attorney-general, anticipating the course that would be taken on the part of the prisoners, had applied for and obtained a bench warrant against them. The chief-justice granted this, and directed that they be held, provided the State was able to prove proper cause against them, expressing the opinion, which was probably correct, that Judge Brooks had no jurisdiction in the matter.[55]

In order to prevent the governor from obtaining funds to prosecute the new civil war, an injunction was granted by the Superior Court of the county of Iredell, at the suit of a tax-payer, forbidding the State treasurer from paying him any sums of money for that purpose, and forbidding the paymaster from spending for that purpose any money which he had received from the treasurer, and was then in his hands. The in-

[54] *Ex parte* Moore, 64 N. C., 802, 815; *Ex parte* Kerr, 64 N.C., 816.

[55] State *v.* Wiley, 56 N. C., 821; State *v.* Turpley, 54 N. C., 826, 829. The opinion in the latter case concluded with a sentence significant of the times: "We think it proper to add that General Hunt, commanding the U. S. troops in this State, was invited by us to take a seat on the bench and heard the whole proceedings."

junctions were served upon the governor, treasurer, and paymaster. In order to circumvent the injunction, the governor removed the paymaster, and appointed in his place his own private secretary, who collected the money from the treasurer and paid the troops.

Governor Holden was impeached by the house of representatives in December, 1870. His trial before the senate took place in 1871.

The articles charged the respondent with misconduct in proclaiming the counties of Alamance and Caswell in insurrection, and with occupying the same by military force. The respondent was acquitted as to these articles, since the vote of guilty lacked two or three votes of the constitutional two-thirds. He was convicted upon the remaining articles, charging him with unlawful arrests in a county which he had not proclaimed to be in insurrection; with unlawful arrests and imprisonments in the proclaimed counties; with refusal to obey the writs of habeas corpus; with unlawful conduct in sending into the proclaimed counties troops, some of whom were brought from another State, and consisted "of the most reckless, desperate rufflans and lawless characters," "under the chief command of a desperado from the State of Tennessee by the name of George W. Kirk"; with unlawful acts committed by Kirk under his authority; with unlawful payments of sums of money for that purpose; and with his acts in circumvention and in violation of the injunction as above described. The sentence imposed was removal from office and disqualification to hold any office of honor, trust or profit under the State.[56]

The trial is interesting from the evidence which it contains concerning the rules and operations of the Ku-klux Klan. The proceedings, over which Chief-Justice Pearson presided were dignified and conducted with apparent impartiality. The only exception in this respect is a cheap and vulgar opinion by one of the senators. The main acts for which Holden was convicted were similar to those of President Lincoln at the opening of the Civil War.

In the same State, on March 27th, 1871, the house of representatives impeached Judge Edmund W. Jones, of the superior court of the second judicial district, for drunkenness in public places. On March 31st, Governor Caldwell informed the house that the respondent had tendered his resignation, but that "this resignation would not be accepted until the articles of impeachment were disposed of." The house

[56] Trial of William W. Holden, Governor of North Carolina, before the Senate of North Carolina, on "Impeachment by the House of Representatives for High Crimes and Misdemeanors." Three volumes, numbered consecutively, aggregate pp. 2564: vol. i, 1–1037; vol. ii. pp. 1039–2269; vol. iii, pp. 2271–2564. Two Appendixes, No. 1, pp. 1–108; No. 2, pp. 1–38.

thereupon resolved that the articles of impeachment be withdrawn, and that the managers so inform the senate and request their return. The senate ordered that the house "may discontinue the further prosecution of the impeachment," and adjourned the court of impeachment without a day.[57]

GEORGIA.

In 1791, Judge Henry Osborne of the Superior Court of Camden County, was impeached by the assembly and convicted by the senate of the State of Georgia upon six articles, which charged the falsification of returns upon an election to Congress in favor of General "Mad Anthony" Wayne, whose competitor, General James Jackson, was seated by the House of Representatives. He was sentenced to removal, disqualification for thirty years, and a fine of six hundred dollars to defray the expenses of the impeachment.[58] Apparently for his sole benefit, the following clause was inserted in the Georgia constitution of 1798: "Convictions on impeachments which have heretofore taken place are hereby released, and persons lying under convictions, restored to citizenship."[59]

In 1825, John Loving, Samuel Jackson, and Fleming F. Adrian, commissioners of fraction sales, were impeached and tried before the Georgia senate. The articles charged: the retention and keeping of moneys collected by them as cash payments for sales of the fractional parts of surveys; the withholding of a large number of grants which had been furnished them by the State so that they might execute complete titles to the purchasers of said fractional surveys; the interlineation and mutilation of a bond executed by a purchaser so as to increase the amount for which he was bound; and, generally that by the proceeding and conduct set forth in the foregoing articles, contrary to the high and important trust confided to them as commissioners aforesaid, and the sacred oath by them respectively taken, they had for the sake of lucre and gain and their own personal aggrandizement, been disgracefully instrumental in establishing a precedent subversive of the good faith which ought to be found in the actings and doings of all persons to whom the great concerns of the State and the interest of the good citizens thereof might thereafter be confided.

John Loving was acquitted, the vote upon several of the articles being

[57] Appleton's Annual Encyclopædia for 1871, p. 561. See also legislative journals.

[58] This case is only reported in the legislative journals. See also Georgia Miscellany, vol. iii, p. 12. For his information concerning it the author is indebted to the courtesy of A. L. Alexander, Esq., of the Savannah bar.

[59] Article IV, Sec. 8.

a majority of less than two-thirds against him. Thereupon at the request of the house of representatives the managers asked leave of the court to enter a nolle prosequi on the articles of impeachment against the other respondents, which was granted.[60]

In the same State, in 1879, Washington L. Goldsmith, the comptroller-general, and John W. Renfroe, the State treasurer, were impeached and tried before the senate. The articles against the comptroller-general charged: the collection of illegal fees as costs upon writs of *fieri facias* issued by him for taxes on wild land; the illegal payment of the proceeds of tax-sales of wild land to various persons without the sanction and warrant of the governor as was required by law; the illegal delegation to the sheriffs of the power and duty to pass upon the evidence of title to unreturned wild land sold by them for taxes when the owners elected to receive the balance of the proceeds of the sale; the failure to pay to the treasurer sums of money received by him for taxes and costs; making erroneous, false and fraudulent returns and reports concerning the money collected by him for taxes on wild lands and insurance taxes; retaining money collected as insurance taxes and fees which belonged to the State; procuring and permitting to be altered and falsified the record in his office of published lists of wild lands unreturned; keeping in his office a clerk who he knew had made a wrongful and fraudulent entry in such book; appropriating moneys belonging to the State to his own use; the offer of a bribe of two hundred and fifty dollars and a suit of clothes to members of a joint committee of the legislature which had been appointed to investigate his office; employing a lobbyist to corrupt them; and finally that he had for the sake of lucre and gain and his own personal aggrandizement, been disgracefully instrumental in establishing a precedent subversive of the good faith which ought to be found in the actings and doings of all persons to whom the great concerns of the State and the good citizens thereof might thereafter be confided.

The respondent answered at length; and included in his answer demurrers to several of the articles as not constituting impeachable offenses. The demurrer to the article which charged that the respondent had made false and fraudulent returns of the moneys belonging to the State in his possession as the proceeds of the collection of taxes on wild

[60] Minutes of the High Court of Impeachment of the State of Georgia, for the trial of John Loving, Samuel Jackson, and Fleming F. Adrian, commissioners of fraction sales, Impeached by the House of Representatives, and charged with certain high crimes and misdemeanors against the State. Milledgeville: printed by Camak & Ragland. 1825. pp. 127.

lands was sustained, apparently on the ground that the respondent had a legal right to the money which he retained and did not report. Such demurrers as were filed to the other articles were overruled, in nearly every case unanimously.

The senate permitted evidence of offenses charged in the articles which were committed during a term of the same office immediately preceding that then held by the respondent. The respondent was convicted of the articles which charged the illegal collection of costs on the issue of writs of *fieri facias;* the illegal collection of insurance taxes and fees; making false reports concerning public money collected by him in which he understated the amount of insurance taxes collected; appropriating to his own use, money collected for insurance taxes and fees as aforesaid; and also on the final article. He was sentenced to removal and perpetual disqualification from office.[61]

The State treasurer, John W. Renfroe, was impeached, tried and acquitted by a minority vote of more than one-third in his favor during the same year.

The articles charged that he had corruptly and illegally received from banks commissions in return for the deposit with them of State funds; that he had made an arrangement with the sureties who signed his official bond that the funds should be deposited in certain banks, who paid a commission for such deposit, which was divided between the treasurer and the sureties; that he had extorted illegal fees from a railroad company for affixing his signature to coupons upon its bonds; that he had corruptly proposed to the president of a bank that he would deposit State funds in such bank in consideration of an appointment to a position in the bank of a person whom he named; and finally that he had for the sake of lucre and gain and his personal aggrandizement, been disgracefully instrumental in establishing a precedent subversive of the good faith which ought to be found in the actings and doings of all persons to whom the great concerns of the State, and of the good people thereof, might thereafter be confided.[62]

FLORIDA.

In Florida, on November 6th, 1868, the house of representatives impeached the governor, Harrison Reed. The foundations of the impeach-

[61] Journal of the Senate of the State of Georgia at the session of the General Assembly, commenced at Atlanta, Ga., Nov. 6, 1878. Atlanta, Ga.: Jas. P. Harrison, State Printer. 1879. Appendix, pp. 683–798.

[62] Journal of the Senate of the State of Georgia, 1878. Atlanta, Ga.: Jas. P. Harrison, State Printer. 1879. Appendix, pp. 799–848.

ment, presented to the house by a senator, who it was claimed was disqualified to hold his seat, were as follows: —

"1. He has been guilty of falsehood, and lying, while transacting business with members of the Legislature and other officers of the State.

"2. I charge him with incompetency, inasmuch as he has filled commissions to officers in blank, and other irresponsible persons have issued them.

"3. He has issued a proclamation declaring many seats of the Legislature vacant, before the members duly elected and returned had resigned or their legal term of service expired.

"4. He has been guilty of embezzlement, having taken from the State Treasury securities and money, and sold such securities, and then failed to return a portion or all of the proceeds of the sale to the Treasury.

"5. He has been guilty of corruption and bribery, having bartered and sold prominent offices in the State to sundry persons for money to him in hand paid, and nominated such persons to the Senate for confirmation."

On the same day a committee presented the impeachment at the bar of the State senate in the presence of eight senators; twenty-four being the entire number of the senate when full, but several elected being disqualified by the acceptance of inconsistent offices, and vacancies existing also through resignations, so that eight was a majority of the number of senators in office. By the State constitution,[63] on the impeachment of the governor, he was suspended from office till the end of the trial. That same evening the lieutenant-governor, William H. Gleason, issued a proclamation stating that he had taken possession of the office of governor. On the following day the assembly adjourned to the first Monday of January, 1869, and as the senate refused to concur in the adjournment, the lieutenant-governor sent in a message as acting governor adjourning both houses to that day. Meanwhile Governor Reed refused to surrender possession of his office, and requested the opinion of the State Supreme Court on the question whether a quorum of the senate had been present when the impeachment was presented, and whether the proceedings had the effect of suspending him from office. The lieutenant-governor wrote the court claiming that it ought not to give a legal opinion upon the questions which were within the exclusive jurisdiction of the senate and assembly. The court held unanimously that no quorum of the senate was present when the impeachment was presented, and that consequently Governor Reed had not been suspended from office.[64] In December, 1868, the Supreme Court upon an

[63] Constitution of 1865, Article III, Sec. 19.

[64] In the Matter of the Executive Communication of the 9th of November, A. D. 1868, 12 Florida, 653.

information in the nature of a *quo warranto* entered judgment removing the lieutenant-governor from office for ineligibility;[65] but he obtained a writ of error and *supersedeas* from the Supreme Court of the United States, which kept him in office a while longer. When the legislature reassembled in January, 1869, the vacancies had been filled by intervening elections, both houses recognized Governor Reed as still in office, and the impeachment was abandoned.[66]

ALABAMA.

In 1876, an information was filed by the State attorney-general in the supreme court of Alabama for the removal of Charles W. Buckley, probate judge of Montgomery County, for corruption and misconduct in office, with specifications of the unlawful purchase of and dealing in county claims, a conspiracy to procure a contract for the support of the poor for his fellow conspirator, who was not the lowest bidder, and the appointment of a guardian *ad litem* with a corrupt understanding and agreement that the guardian should share his fees with the judge. The proceeding was founded upon a constitutional provision which gave the court jurisdiction of such cases "under such regulations as may be prescribed by law,"[67] and a statute which authorized depositions to be put in evidence. The court held that that part of the statute was unconstitutional; that without them there was no law prescribing the mode of trial; and that consequently it had no jurisdiction.[68]

MISSISSIPPI.

In 1808, the legislature of the Mississippi Territory directed the Territorial delegate to impeach in Congress, Peter B. Bruin, the presiding judge of the Territory, for drunkenness on the bench and neglect of duty. The delegate, George Poindexter, after the resolutions were read, obtained the appointment of a committee to investigate the charges, but no report seems to have been made.[69]

[65] The State of Florida in the Relation of the Attorney-General *v.* William H. Gleason, 12 Florida, 190.

[66] Appleton's Annual Encyclopædia for 1868, pp. 273–276.

[67] Alabama Constitution, Art. VII, Sec. 3.

[68] The State *ex rel.* Attorney-General *v.* Buckley, 54 Ala. 599.

[69] American State Papers, vol. xx, pp. 921, 922; House Journal, Tenth Cong., First Sess., pp. 561, 562, 589, 608. In 1833, the House Committee on the Judiciary reported their opinion that a territorial judge was not an officer of the United States and so could not be impeached (House Reports, 22d Congress, 2d Sess., No. 88). In 1839, Felix Grundy, the Attorney-General, gave a similar opinion (Ex. Doc., 25th Cong., 3d Sess., vol. iv, No. 154). For these references the

In 1876, Adelbert Ames, governor of Mississippi, was impeached and tried before the State senate. The articles charged a failure and refusal to comply with the request of the county treasurer to suspend a sheriff and tax collector who had failed and refused to make monthly reports and payments of the taxes collected; the appointment of justices of the peace and constables for partisan purposes; the approval of an official bond filed by the State treasurer, which was defective in form and signed by insufficient sureties; permitting the State treasurer to remain in office and in possession of the treasury after the State attorney-general had notified the governor that the bond was insufficient; instigating and directing a forcible removal of a sheriff by soldiers of the United States; defrauding the State of $33,750 by granting contracts to personal and partisan favorites for convict labor without any fair and open competition or public bidding, and at less than other persons would have paid for the same; conspiring to slander and libel a citizen of the State in order to prevent his appointment to the office of district attorney of the United States; permitting, conniving at and assisting in an exchange of offices between a chancellor and a district attorney; neglecting and refusing to nominate chancellors to the senate while in session, and appointing them in vacation, with thirteen specifications of such offenses; endeavoring to persuade the chief-justice to interfere with, direct and control the judicial action of the latter's son, who was then a chancellor in a certain cause; when he failed in this, arbitrarily and corruptly removing the said chancellor, and failing to report to the senate at its next succeeding session his appointment, in the recess, which consequently lapsed; unlawfully removing three other chancellors; appointing to the office of chancellor in six specified cases men who were notoriously incompetent, immoral and dishonest, of whom one had been publicly charged with forgery, and two others, one a physician, had never practiced law and had been admitted to the bar only a few days prior to their appointment, with the understanding that they should receive their appointment upon admission; inciting a riot and conflict of arms between the whites and blacks in a certain county, by calling out a company of black militia in the charge of dangerous, turbulent and obnoxious officers, causing them to march and parade with the purpose of thus provoking bloodshed; making intemperate and inflammatory speeches with a design to bring out an armed conflict between the white and colored citizens of the State, in which he said amongst other things: "I and other white men have faced the bullets to free the

author is indebted to the courtesy of Melville E. Ingalls, Jr., Esq., of the New York bar, who has made an exhaustive study of the subject of American Impeachments.

colored people, and now if they are not willing to fight to maintain that freedom, they are unworthy of it." "What if it does cost blood; the blood of the martyr is the seed of the church." "That very likely fifteen or twenty negroes may be killed, but that it would result to the benefit of the Republican party"; making an intemperate and inflammatory speech and giving unlawful advice to a person claiming the office of sheriff, thus causing riot, bloodshed and death, through the attempt of the claimant to take possession of his office by force of arms; in consideration of the payment of three thousand dollars to a third person, granting a pardon to a person imprisoned after conviction of the crime of rape upon a child; and grossly, willfully and wickedly abusing and perverting the power and discretion of pardoning criminals by granting a pardon in the last named case, upon a petition signed by a few of the respondent's personal friends, who did not pretend to any personal knowledge of the facts and were residents of a distant part of the State, which petition stated only one substantial reason for the pardon, a statement known by the respondent to be false.

A few weeks after the articles of impeachment were adopted, a member of the house presented a letter from the governor stating that on account of his embarrassment by the election of a hostile legislature, he desired to resign his office, but that he could not and would not retire from the position while the proceedings of impeachment were pending against him. Thereupon the house adopted a resolution with a preamble referring to this letter and a direction that the managers be directed to dismiss the articles of impeachment. The articles were accordingly dismissed with the consent of the senate.[70]

In the same year, the lieutenant-governor, Alexander K. Davis, was impeached, and notwithstanding his attempted resignation, was convicted and sentenced to removal from office and perpetual disqualification by a vote of thirty-two to four upon articles charging the sale of a pardon to a convicted murderer while the governor was absent from the State.[71]

In the same year, Thomas W. Cardozo, superintendent of education, was impeached on articles which charged embezzlement of the State funds, and useless purchase of excessive supplies for the schools, receipt of bribes, making false returns and knowingly paying fraudulent warrants. Pending the proceedings he resigned, whereupon the assembly abandoned the impeachment and the senate sitting as a court adjourned without a day.[72]

[70] The testimony in the Impeachment of Adelbert Ames, as Governor of Mississippi. Index to Articles of Impeachment, p. 317; Alphabetical Index to Witnesses, p. 230. Jackson, Miss: Power & Barksdale, State Printers, 1877, pp. 323. See also Senate Journal by same publisher, pp. 62.

[71] Senate Journal of Trial, pp. 133.

[72] Senate Journal of the Trial, pp.

TENNESSEE.

Thomas N. Frazier, judge of the criminal court of Davidson County, was impeached before and convicted by the senate of the State of Tennessee in 1867. The proceedings grew out of the ratification of the Fourteenth Amendment to the Constitution of the United States by the legislature of that State. An attempt was made in 1866 to block the ratification by preventing a quorum of the house of representatives. The State constitution provided that "Two-thirds of each House shall constitute a quorum to do business, but a smaller number may attend from day to day and may be authorized by law to compel the attendance of absent members." Another clause provided that "each House may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds, expel a member, but not a second time for the same offence, and shall have all other powers necessary for a branch of the legislature of a free State." No act had been passed expressly authorizing a smaller number of representatives than a quorum to compel the attendance of absent members. The rules of the former house of representatives gave such authority. The members of the new house who assembled, although less than two-thirds, ordered the arrest by its sergeant-at-arms of two of the absent members, who were brought in by him and held there in custody. On the day after they were brought there, Judge Frazier issued a writ of habeas corpus commanding the sergeant-at-arms to bring one of these members before him for examination as to the reason of their imprisonment. The house of representatives thereupon resolved that they denied the jurisdiction of the criminal court in the premises, and its authority to interfere with the discipline and regulations of the house, and directed the sergeant-at-arms to continue under arrest all members retained by him under the resolution until otherwise ordered by the house. The sergeant-at-arms obeyed the resolution and filed it as his return. The judge refused to accept the return, issued an attachment against the sergeant-at-arms, had him brought into court by the sheriff of the county, punished him by a fine of ten dollars for contempt of court, and ordered the sheriff to release the members from the custody of the house, which he did. For this Judge Frazier was impeached. The trial is interesting to students of the history of the Reconstruction. The facts were undisputed, and the only questions were whether a less number than a quorum of those elected to the house

59. The volume which contains the journals of the three trials may be found in the Astor Library.

of representatives had authority to compel the attendance of absent members when no statute upon the subject had previously been passed, and also whether the judge's intent was criminal. He was convicted by a vote of 14 to 4, and sentenced to a removal from office and disqualification from holding any office thereafter in the State of Tennessee.[73]

ARKANSAS.

In 1871, Powell Clayton, governor of the State of Arkansas, was impeached by the State house of representatives. A short time previously he had been elected senator of the United States. The articles charged that he had conspired with the members of the State supreme court to maliciously and unlawfully deprive the lieutenant-governor, James M. Johnson, of his office to which he had been duly elected and for which he had duly qualified; that he had unlawfully removed a county and probate judge who had beeen duly and constitutionally elected; that he had directed, encouraged and aided in frauds in the election of a senator and three representatives to the general assembly of the State; that he had accepted pecuniary considerations for issuing bonds or obligations of the State, to and in favor of the Memphis and Little Rock Railroad Company and the Little Rock and Fort Smith Railroad Company, in utter violation of law and disregard of his official duty; that he had issued bonds or obligations of the State, to the Mississippi, Ouachita, and Red River Railroad Company when that company was notoriously not entitled to the same under the laws; and that he had been guilty of other misconduct and malfeasance in office, and high crimes and misdemeanors.

At the same time a resolution was passed that the respondent be suspended from exercising the functions of governor, and the members of the house of representatives proceeded by force to lock him into the executive chamber or nail the door in order that he might not escape and act. The governor notified the assembly on the following day that he had been unofficially informed that the articles had been approved and a resolution of suspension passed; but that he had been advised by counsel that the constitution did not confer the power of suspension from office on the assembly. The next day a resolution

[73] Proceedings of the High Court of Impeachment in the Case of People of the State of Tennessee v. Thomas N. Frazier, Judge, etc. Begun and held at Nashville, Tennessee, Monday, May 11th, 1867. Nashville: S. C. Mercer, Printer to the State, 1867. pp. 124. Form of Subpœna and Summons with Report of House Committee, pp. 8. Appendix: containing the Evidence and Argument of Counsel in the case of The People of Tennessee v. Frazier, Judge, &c., Impeached. pp. 207.

was passed impeaching John McClure, the chief-justice of the State, which charged: that he had engaged in a conspiracy with the governor and others, to unlawfully and maliciously deprive Lieutenant-Governor James M. Johnson of his office to which he had been duly elected and to which he had duly qualified; that he had bargained for pay and bribes to influence his actions and decisions as a justice of said court, at divers times and on various occasions, all contrary to law and the constitution of the State of Arkansas; that he had, as chief-justice of the supreme court, without authority and in violation of law and the Constitution of the State of Arkansas, issued a writ of mandamus upon Lieutenant-Governor James M. Johnson, "now acting governor of the State of Arkansas," by reason of the impeachment of Governor Powell Clayton by the house of representatives, and said Clayton suffering under said disabilities, and pretending to restrain the said lieutenant-governor from performing the functions of said office, thus presenting a remarkable and unwarrantable case of one co-ordinate department of government attempting to restrain another by a writ of mandamus; all with the unlawful and corrupt design to retard the operation of the State government, and in contempt of the house. As soon as a quorum of the senate was present, articles of impeachment against the governor and chief-justice were presented. Other State officers were impeached about the same time, amongst them a county clerk and a district attorney. The senate thereupon adopted rules for the court of impeachment, to expedite the proceedings, which forbade managers from arguing any preliminary or interlocutory question or motion during the trial for more than ten minutes, unless the senate should otherwise direct, and by which more than two of the managers were prohibited from making a final argument on the merits. and the final argument of each was limited to thirty minutes, unless the senate should extend the time. Thereupon the committee of managers reported to the house that in their opinion no fair and impartial trial of the impeachment of Governor Clayton could be had before the senate under those rules, and that any trial under them would be a farce. They also stated that they were willing to again appear at the bar of the senate and announce the impeachment of the governor upon the following conditions: That they should be assured that any articles of impeachment preferred by the committee against the said governor will not be considered invalid, set at naught, or dismissed by the senate. because notice was or has not been given to them within the time required by law. That the senate would give the committee at least twenty days in which to prefer particular articles of impeachment against the governor and at least thirty days from the second announcement or notice of the impeachment in which to produce the evidence to

sustain the same, and also all continuances necessary to obtain important testimony which they had failed to obtain after the use of reasonable diligence; and that the senate repeal the rules adopted for impeachment trials and grant to them an unlimited right of argument and debate of all questions and issues of law, fact and evidence arising in the progress of the trial. The report was accepted, the committee discharged, and the speaker authorized to appoint another board of managers, which was done. It was then resolved that all cases, reports and questions arising in any way upon cases of impeachment be postponed for several days, except questions arising out of the impeachment of the governor and chief-justice. The new committee then reported that they had been unable to find sufficient evidence or information that would warrant them in attempting to prepare particular articles of impeachment against the governor, and requested that they be discharged. It was accordingly resolved by the house "That further proceedings in the impeachment of Powell Clayton be dispensed with, and that the action of this house heretofore taken, be set aside and cancelled; that the senate be informed of the action of this house in the premises, by the clerk of the house, and that the committee as the board of managers be discharged." On the same day Governor Clayton sent the senate a message declining to accept the position of United States senator.

The committee of managers appointed to appear and prosecute the articles of impeachment against Chief-Justice McClure, reported that they were of the opinion that "all those specifications and charges against the Honorable John McClure, which are alleged against him while he was associate justice of the Supreme Court of the State of Arkansas, cannot be properly and legally considered against him as chief-justice of the supreme court of the State of Arkansas." They presented a single article of impeachment. This charged that on February 16th, 1871, at the City of Little Rock, in the state of Arkansas, "unmindful of the high duties of his office, of his oath of office, that the requirements of the constitution should be honestly, faithfully and impartially adjudicated, did unlawfully and in violation of the laws and constitution of the state of Arkansas," issue a fiat in the nature of a temporary restraining order, in writing, directed to the clerk of the supreme court of the State of Arkansas, directing and ordering the clerk to issue forthwith an order, directed as the law directs, commanding and restraining James M. Johnson and his confederates from attempting to usurp or exercise the functions of governor of the State of Arkansas, or in any manner to interfere with the exercise of the functions thereof by Powell Clayton. That thereupon the clerk issued his order accordingly, which order was duly served on the lieutenant-governor, James M. Johnson;

the chief-justice well knowing that Johnson was lieutenant-governor, and "which order was unlawfully issued, with intent then and there, in violation of the laws and constituion of the State of Arkansas, the said John McClure, chief-justice of the State of Arkansas, to interfere with the exercise of the rights, franchises and functions of the executive department, and to hinder the said James M. Johnson, being then and there lieutenant-governor of the State of Arkansas, and being then and there in due execution and discharge of the duties of said office, whereby said John McClure, chief-justice of the State of Arkansas, did then and there commit and was guilty of a high misdemeanor in office."

The report was adopted and the article presented at the bar of the senate. A compromise was arranged, under which Johnson resigned and was appointed secretary of state. Governor Clayton was then re-elected to the Senate of the United States, and accepted the office.

A special chief-justice was appointed by the governor to preside on the trial of Chief-Justice McClure. The respondent filed a demurrer to the articles, upon the ground that, although he was charged with unlawfully issuing an order, it was not alleged that he did it with a corrupt motive, or with an intent to interrupt the course of law and justice. The demurrer was unanimously sustained. In the same year, impeachments were voted, but not pressed, against several judges of inferior courts, prosecuting attorneys, and county clerks.[74]

LOUISIANA.

In 1844, Benjamin Elliott, judge of the city court of the city of Lafayette, was impeached and tried before the Louisiana senate. The articles charged that he had failed to properly keep the records of the naturalization of aliens in his court, and that he had permitted the issue by his clerk of seventeen hundred and forty-eight false certificates of naturalization. Judah P. Benjamin was one of the managers, and Pierre Soule one of the counsel for the respondent. Judge Elliott was convicted and sentenced to removal from office.[75]

[74] Arkansas House Journal for 1871; Arkansas Senate Journal for 1871; Trial of John McClure, Chief-Justice of Arkansas, Little Rock, Arkansas: Price & McClure, State Printers, 1871. The Brooks-Baxter War. A History of the Reconstruction Period in Arkansas, by John M. Harrell. The Almighty Dollar. 1893; Slawson Printing Co., St. Louis.

[75] Official Report of the High Court of Impeachment of the State of Louisiana, on the Trial of Benjamin C. Elliott, Judge of the City Court of the City of Lafayette; Begun and holden at the City of New Orleans, the 23d of March, 1844. (Published by Authority.) New Orleans: Printed at the office of the Morning Herald, 34 St. Charles Street, 1844; pp. 40.

In 1870, George M. Wickliffe, auditor of the public accounts, was impeached and tried before the senate of the same State. The articles charged a default upon an application for a mandamus to compel the issue of warrants by him to which he and the State had a legal defense; the unlawful issue of warrants on the State treasury, — in one case for his own use, in another, in consideration of a bribe; — extorting the payment of large sums of money for auditing accounts for printing, and for cutting up warrants into smaller warrants, which were more easily negotiable; failing to make a report required by the constitution; issuing a new warrant in place of one which had been issued when the State was under the control of the Confederate government; employing more clerks than the law allowed; and keeping his office in such a state of confusion that it was impossible for him to report to the governor or the general assembly the condition of the State finances, or for the committee of the general assembly to ascertain the State's financial condition in any reasonable time, thereby proving himself to be incompetent to perform the duties and functions of his high office.

The respondent answered, denying or justifying all the matters charged. He set up as a defense to several of the articles that he had been indicted, tried, and acquitted of the matters therein charged by a court and jury. After the evidence was concluded and a judgment was pronounced, the counsel for the respondent presented his resignation from his office. Chief-Justice Ludeling, at the request of a senator, stated his opinion that the resignation did not deprive the court of jurisdiction. A vote was taken on but one article, which charged: That the respondent had issued a warrant on the State comptroller for $1980, and induced the payee to indorse and negotiate it for his own benefit, although he knew that it was unauthorized and issued in payment of an illegal claim. He was unanimously convicted, and sentenced to removal from office and disqualification from holding any office in the State.[76]

In 1872, Governor Henry C. Warmoth was impeached and tried before the State senate. The articles charged: the forcible expulsion from office of the secretary of state and the issue of a commission to another in his place; the unlawful appointment after the adjournment of the senate of a tax-collector whose nomination the senate had rejected; the issue of commissions to the offices of attorney-general, judge, sheriff and other offices to candidates who had not been elected; connivance in the forcible ejection of a judge from his office in order to obtain possession of the court and use the same in a scheme to remove and set aside

[76] Official Journal of the Proceedings of the Senate of the State of Louisiana, at the session begun and held in New Orleans, Jan. 3, 1870. By authority. New Orleans: A. L. Lee, State Printer, 1870; pp. 192.

the board authorized to count and return the votes; the offer of a bribe of $50,000 to the Lieutenant Governor, P. B. S. Pinchback, at two o'clock in the morning, if the latter would on that day organize the State senate in Warmoth's interest, break down the opposition to the Fusion party in the legislature, and place himself under the respondent's direction and control; the inducement and procurement of the supervisors of registration by the promise of patronage, threats of dismissal from office and bribery, to refuse and fail to register a large number of legal voters, and to make a false return of the votes cast at a presidential election; the offer of an office as a bribe for similar misconduct at a State election; the issue after his impeachment and suspension from office of two proclamations which refused to recognize the legislature which impeached him and recognized another body as the lawful legislature. The respondent appeared by counsel and filed exceptions disputing the legality of the court and the lower house on the ground that they were not lawful bodies. The court rejected these and refused to permit them to be filed. Before any further proceedings the senate requested the advice of the chief-justice whether the trial could proceed after the respondent's term of office had expired. Chief-Justice Ludeling delivered an opinion that it could not, saying: "I question the policy of kicking a dead lion." The senate adopted this opinion and adjourned.[77]

TEXAS.

In Texas, 1874, charges against James R. Burnett, a judge of the thirtieth judicial district, were presented to the legislature, with an application for his removal. The charges were: An illegal arrest on a charge of murder, after the grand jury had failed to find an indictment; false representation to the governor that the civil authorities were unable to execute the laws in a certain county, which caused a proclamation of martial law, arrest, fine and imprisonment in the execution of the same, and increased taxation; refusal to enjoin the military authorities from taking forcible possession of corn without compensation; attempting to assassinate, and procuring to be assassinated, one of the counsel in a case that was tried before him, by an assault on the part of the judge, who was then protected by an armed body of State police, while the attorney was alone and unarmed; maliciously and through revenge causing the arrest of many citizens while martial law prevailed; con-

[77] Proceedings of the Senate sitting as a Court of Impeachment in the case of the State of Louisiana *v.* Henry C. Warmoth. By Authority. New Orleans: Printed at the office of the Republican, 94 Camp Street, 1873; pp. 14. See *supra*, § 38.

gratulating, upon his acquittal, one of the persons whom he had arrested for murder as above charged, and to whom he had refused bail, and an accompanying apology for such refusal, upon the plea that he was compelled so to act, — meaning thereby that he would have lost his office had he granted bail.

Testimony was taken before a committee of the legislature in support of and against the petition.[78]

OHIO.

In 1806, Calvin Pease, president judge of the third circuit of Ohio, held that so much of the State law of February 12th, 1805, as attempted to give to justices of the peace jurisdiction of claims for more than twenty dollars, and to prevent plaintiffs in other courts from recovering costs when they recovered judgment for more than twenty and less than fifty dollars, was repugnant to both the State and Federal Constitutions, and consequently void. This, which was the first decision in that State which held an act of the legislature unconstitutional, was followed by the president judge of the third circuit, George Tod, and Judge Huntington also of the supreme court; but it created great public excitement, and led to the separate impeachment of Judges Pease and Tod at the session of the legislature in 1808. Judge Huntington had in the meantime been elected governor; and for that reason the charge against him was abandoned. The articles against Judge Pease charged: "*First*, That on appeal from the judgment of a justice of the peace, for a sum exceeding twenty dollars, he had, as president judge of the third circuit, reversed that judgment, on the ground that the justice had no constitutional jurisdiction of the case. *Second*, That in an action for a sum between twenty and fifty dollars, commenced by original writ from the court of common pleas, he had allowed the plaintiff his costs of suit, upon recovering judgment, contrary to the twenty-ninth section of the Justices' Act, and the fifth section of the act organizing the judicial courts. *Third*, That, sitting as president judge of the third circuit, he had decided, on various occasions, that the court had full power to set aside, suspend, and declare null and void, the fifth section of the act defining the duties of justices of the peace."

The respondent's answer admitted that in his judicial capacity he had decided that the fifth section of the act was unconstitutional and void, asserted his right to make the decision, and insisted that it was his duty

[78] The State of Texas against Hon. James R. Burnett, judge thirtieth judicial district. Evidence taken before the Joint Committee of the Fourteenth Legislature, appointed to investigate charges preferred by an Address for removal from Office. Austin: J. D. Elliott, State Printer, 1874.

to determine cases brought before him according to the convictions of his judgment, "and vindicated the purity of his motives and uprightness of his official conduct." After a trial of several days, on February 6th, 1809, Judge Pease was acquitted, through the lack of a two-thirds vote against him. The vote on the first charge was unanimous for acquittal; on the second, fifteen for conviction against nine for acquittal. The third charge was decided, by a vote of sixteen to eight, to be insufficient to sustain an impeachment.

At the same session, Judge Tod was previously tried and acquitted upon similar articles. At the following session, the legislature, by a majority of less than two-thirds, adopted the "sweeping resolution" which declared to be vacant all judicial offices that had been filled by appointment before the adoption of the constitutional provision giving to the legislature the right to elect judges. Although many declared this resolution to be a violation of the State constitution, those judges against whom it was directed submitted. Judge Pease promptly resigned, and Judge Tod made no objection to the appointment of his successor. Six years later, both of them were restored to the bench.[79]

In 1811, Judge John Thompson was impeached, and in 1812, tried and acquitted by the senate of the same State.

Since the proceedings are only reported in the legislative journals, which are rare, the articles are inserted here at length: —

"Articles exhibited by the house of representatives of the state of Ohio, in the name of themselves and of all the people of the state of Ohio, against John Thompson, president of the court of Common Pleas, for the second circuit, in maintenance and support of their impeachment against him for high crimes and misdemeanors.

"*Article I.* That the said John Thompson, unmindful of the solemn duties of his office, and contrary to the sacred obligation by which he stood bound to discharge them faithfully and impartially, agreeably to law and without respect to persons: the said John Thompson, on the trial of Jonas Graham, charged with larceny, before the court of Common Pleas, holden in the county of Clermont, in the circuit aforesaid, at the town of Williamsburg, in the month of September, in the year of our Lord one thousand, eight hundred and eleven, whereat the said John Thompson, president, did, in his judicial capacity, arbitrarily, illegally and injuriously, and in a manner highly oppressive, confine and restrict the attornies engaged in the defence of the said Graham to two in number, in their address to the jury, in defence of their client; and did also observe, that the attornies engaged in the case should not occupy more than ten minutes, each, in their argu-

[79] Sketch of Hon. Calvin Pease, Western Law Monthly, vol. ii, p. 1. Sketch of Hon. David Tod, by same author, ibid., p. 113.

ments to the jury on the trial aforesaid; and when one of the defendant's counsel stated to the court, in respectful terms, that he thought it impossible to elucidate the law and evidence arising on the case aforesaid in so short a time as ten minutes, he, the said John Thompson, imperiously and peremptorily declared from the bench, that if the attornies engaged in the cause aforesaid were not satisfied with ten minutes each, they should have but five; and to five minutes, each, the attornies aforesaid, in their address to the jury aforesaid, by the order of the said John Thompson, were arbitrarily and illegally restricted and confined; and the said John Thompson, in a manner highly arbitrary, oppressive and unjust, at the term of the court of common pleas aforesaid, and on the trial of Samuel Howell, charged with usurpation of office (when one of the attornies of said court was called by the counsel for said Howell to give testimony in behalf of his client), declared from the bench, while in the discharge of his official duties, that the gentlemen of the bar might take notice, that no attorney should thereafter be admitted to give testimony in that court, and the attorney aforesaid, who was called as a witness, though not engaged in the cause, was not sworn.

"*Article II.* And the said John Thompson, prompted by a similar spirit of persecution and injustice, at a court holden in the town of Williamsburg, in and for the county aforesaid, in the month of December, instant, did, while in the discharge of his official duties, conduct himself in a manner highly arbitrary, illegal, oppressive and unjust. 1st. In ordering the constables who kept the doors of the bar, to knock down certain by-standers with their staves, without assigning any reason therefor. 2nd. In refusing to sign a bill of exceptions when legally tendered on the trial of Samuel Elliot, and in erasing with his pen part of the bill aforesaid, and writing another with his own hand, containing facts not excepted to, though naming the same parties and cause, and signed the same as the true bill of exceptions. 3rd. In declaring on the trial of Benjamin Snider, who was charged with an assault and battery, as the opinion of the court that the attorney for the said Snider had no right to argue the question of fact to the jury, without the permission of the court, and when the opinion of the associate judges was individually called for on the question of right aforesaid, and they decided the attorney had the right to argue facts to the jury, John Thompson imperiously and impatiently told the attorney to go on. 4th. In coercing a jury which had been a long time out, and which came into court and asked again to examine the witness, but was prevented by John Thompson, who told them the cause was too trifling to take up the time of the court, and ordered the jury immediately to withdraw. 5th. In ordering and compelling a jury to be sworn on the trial of James Lewis, charged with robbery, although the jury all declared in their places, before they were sworn, that they had made up an opinion on the case, and the jury found the defendant guilty without leaving the box.

"*Article III.* That instigated by a spirit of wantonness, injustice and

intemperance, entirely incompatible with his duties as a judge, and totally unworthy the high station he fills, he, the said John Thompson, at a court of common pleas holden at Chillicothe, in the county of Ross, in the circuit aforesaid, on the second Monday of October, in the year of our Lord, one thousand, eight hundred and eleven, while in the discharge of his official duties, did declare that the people were their own worst enemies, and that they were cursed brutes — worse than brutes.

"*Article IV.* That at a court of common pleas holden in and for the county of Highland, at the town of Hillsborough, in the month of November last, the said John Thompson, not regarding his official duties, illegally and unjustly refused to sign a bill of exceptions to testimony offered on the trial of the commissioners of the county aforesaid, who were charged with improper conduct in the discharge of their duties as commissioners. And secondly, for refusing to let an appeal, legally taken by James D. Scott, from the judgment of a justice of the peace, be entered on the docket of said court.

"*Article V.* That the said John Thompson, disregarding the duties and dignity of his official character, did, at Gallipolis, in the county of Gallia, during the term of the court of common pleas holden therein for the county aforesaid, in the month of September, one thousand eight hundred and ten, return into court two recognizances of special bail, purporting to be taken and acknowledged before him as president of the second circuit, in both of which recognizances Calvin Shepherd and Luther Shepherd were named as special bail for a certain William Bridger, which recognizances of special bail were not on the day on which recognizances were dated, or at any other time before or after, acknowledged by the said Luther Shepherd and Calvin Shepherd before the said John Thompson, or any other person.

"*Article VI.* That the said John Thompson, disregarding the important privilege of trial by jury, and disregarding his judicial character, did, at a court of common pleas holden at Gallipolis, for the county of Gallia, in the month of September, one thousand eight hundred and eleven, on the trial between Edward W. Tupper, and Joseph and Thomas Vail, arbitrarily, unjustly and illegally, confine the attornies employed to twenty or twenty-five minutes in their arguments to the jury; and when one of the attornies had spoken that length of time to the jury, Judge Thompson ordered him to sit down, and assigned as a reason for such order, that the court were convinced that the jury would not do justice to the cause.

"*Article VII.* That at a court of common pleas held at Gallipolis, in the county of Gallia, in the month of September, one thousand eight hundred and eleven, the said John Thompson, not regarding his official duties, did illegally and unjustly order the prosecuting attorney not to suffer any person to give testimony to the grand jury, until he knew what that testimony was, that it might be laid before the court before it went to the grand jury. And at the same term in the county and place aforesaid, he the said John Thompson did, illegally and arbitrarily, send a message to the foreman of

the grand jury the day before, and send it to him for the purpose of preventing him, the said John Thompson, from being indicted for having returned into court a recognizance of special bail which never had been acknowledged before him, or any other person, by the persons named as bail in the recognizance aforesaid.

"*Article VIII.* That the said John Thompson, influenced by a spirit of wantonness and aversion to the American government and the good people of these United States, did, at a court of common pleas, holden at Circleville, in the county of Pickaway, in the month of November, one thousand eight hundred and eleven, while delivering a charge to the grand jury, illegally and derogatory to his character as a judge, with the intention to prejudice the minds of the people against their government, declare from the bench, that the American government was the most corrupt and perfidious government in the world; that the people of the government aforesaid were their own worst enemies — that they were devils, perfect devils in men's clothing.

"And the house of representatives, by protestation, saving to themselves the liberty of exhibiting, at any time hereafter, any further articles or other accusation or impeachment against him, the said John Thompson, and also of replying to the answers he shall make to the said articles, or any of them, and of offering proof to all and every of the aforesaid articles, impeachment or accusation which shall be exhibited by them, as the case may require — do demand that the said John Thompson may be put to answer the aforesaid crimes and misdemeanors, and that such proceedings, examinations, trials and judgments may be thereon had and given, as are agreeable to law and justice." [80]

In 1814, James Ferguson, a justice of the peace, was impeached, tried and acquitted before the senate of the same State. The articles charged the unlawful discharge of two persons arrested under a warrant for assault, and refusal in the same case to permit the complainant upon whom the assault had been committed to testify on the part of the State; causing the illegal and unjust rendition of a judgment against the complainant for costs and the collection of the same through a constable; refusing to furnish the complainant with a copy or transcript from his docket, although the legal fee was tendered him; and the use of indecorous, insulting and angry language on the same occasion, when he ordered the complainant out of his office and followed him into the yard, threatening to kick him as long as he could find him if he did not immediately depart.[81]

[80] Copied from House Journal of Ohio, for the Session of 1811 and 1812, at the N. Y. State Library.

[81] Journal of the Senate of the State of Ohio, being the Twelfth General Assembly, begun and held in the town of Chillicothe, in the county of Ross, on Monday, the sixth day of

ILLINOIS.

In 1833, Theophilus W. Smith, a justice of the supreme court, was impeached and tried before the senate of the State of Illinois. The articles charged: his permitting his son, then a minor, to bargain off the office of clerk of the circuit court of Madison county and to hire and employ another to do and perform the duties thereof at twenty-five dollars a month, reserving the fees and emoluments of the said office to himself, which contract the respondent ratified and confirmed, reserving the fees and emoluments of the office less the twenty-five dollars per month to himself with the intention of reserving a future appointment to the office for his son; appointments to the office of clerk of the circuit court within his circuit without requiring bonds as the law directed, with the corrupt intention of rendering said office subject to his will; bringing a suit in which he was interested in a court in which he presided, and causing the defendants therein to be held to bail in an excessive sum; suspending an attorney from practice because he had instructed his client to consent to any change of venue which would remove the cause to any court where the respondent did not preside; committing a quaker to jail and certifying that he was incompetent to serve as a juror by reason of a want of soundness of mind, because he presented himself to the court with his hat on; and rendering an opinion involving the rights of a county with the intent to prejudice it on an agreed case made up between the sheriff and county treasurer, although he well knew that the rights of the county might be, and they in fact were, afterwards submitted to his decision, which was then made in accordance with the preceding opinion.

The respondent was acquitted on all the charges, the senate being nearly equally divided.[82]

MICHIGAN.

In 1872, Charles A. Edmonds, commissioner of the State land-office was impeached and tried before the senate of Michigan. The articles charged him with corruptly withholding land from sale for the benefit of certain land-dealers in return for money paid to himself and deputies and clerks; with engaging in the purchase of State lands, sold in his office; with deciding that certain lands which were in the possession of actual settlers who had failed to file proofs of their settlement and occu-

December, 1813, and in the twelfth year of the said State. Published by authority. Chillicothe: Printed by James Barnes, 1813.

[82] Appendix to Illinois Senate Journal for 1832. Vandalia: Printed by Greiner & Sherman, 1833. pp. 91.

pancy in his office were subject to sale, and with furnishing secret information concerning such lands to land-dealers, in whose profits he shared; with engaging in the sale of swamp-land scrip; with appointing and keeping in his office as clerks men of dissolute habits and character, unworthy of their position, and allowing them to purchase and to be interested in the purchase of land in his office, and to corruptly sell to land-dealers valuable information therein contained; with keeping for his own use, the purchase money from State lands and depositing in the State treasury swamp-land scrip in place thereof; with depositing in a post-office of the United States, in the State of Indiana, an obscene newspaper entitled "Every Saturday Night," in violation of the statutes of the United States regulating matter transmitted through the mails; with publishing and circulating the same newspaper in the State of Michigan; with disgracing his office by drunkenness during his official term at the City of Lansing; and with committing adultery at the city of Lansing, during his official term, he then being a married man. The respondent was acquitted on all these charges, in most instances by a majority or unanimous vote in his favor; and on three articles by a bare majority which was less than two-thirds against him. He was ably defended by John B. Shipman, whose arguments contained the most learned disquisition on the law of impeachment that the writer has ever seen.[88]

WISCONSIN.

In 1853, Levi Hubbell, judge of the second judicial circuit of the State of Wisconsin, was impeached and tried before the State senate. The articles charged: that he consulted with one of the counsel in a case pending before him during the trial, and afterwards while he was holding his decision under advisement, and that at the same time he borrowed from the same counsel two hundred dollars, making no agreement for the repayment thereof, which the counsel charged to his client's account; that within two days thereafter he decided in favor of the client of the lawyer from whom he had borrowed the money, and that the so-called loan was treated as a gift until after threats of prosecution by impeachment for receiving the same as a bribe, when he gave a due-bill for the sum of money which was never collected. That he presided and adjudicated as judge in causes in which he was pecuniarily interested; with specifications of his purchase of a judgment, and his subsequent hearing

[88] Trial of Charles A. Edmonds, Commissioner of the Land Office of the State of Michigan, before the Senate of said State, on an impeachment prepared by the House of Representatives against him, for Corrupt Conduct in Office, Crimes and Misdemeanors. By Authority. Lansing: W. S. George & Co., State Printers and Binders, 1872. Vols. I and II. pp. 1891.

and denying a motion to dissolve an injunction granted upon a creditor's bill brought to collect the same in the name of a third party who held the judgment for his use; of his rendering judgment in a suit to collect a promissory note held for his use and benefit by another, and of his subsequent confirmation of a sale of real estate under said judgment, which had been sold to his brother for his use and benefit. That he had willfully, arbitrarily, partially and illegally sentenced persons convicted of crime to punishment different from the punishment prescribed by law: with specifications of the sentence of a man convicted of an assault with intent to kill to a fine of two hundred dollars and costs, and to the sentence of a man convicted of grand larceny to a fine of five dollars and costs. That he had presided and adjudicated in causes, in the subject whereof he had been retained and counselled with as attorney, solicitor and counsellor by the parties to such causes, and had acted as attorney, solicitor and counsellor in such causes; with specifications. That he had taken and used moneys paid into his court in the progress of the suits therein, to the manifest scandal and danger of the administration of justice; with specifications of his taking from the sheriff and clerk money collected in civil and criminal proceedings, and keeping and using the same for a considerable period of time. That he had improperly and collusively given judicial advice and made judicial promises to suitors and persons likely to become suitors in the courts of the State on the subject-matter of their suits; with three specifications, the last of which charged that he gave the advice concerning a divorce suit which was afterwards brought before him, and after granting a decree for divorce, solicited a present from the plaintiff. That in the exercise of his judicial functions he had conducted himself with undue and unjust partiality and favor to particular suitors in his court; with specifications of his refusal to hold a special term for the purpose of confirming a sale, because a party interested was his opponent, and afterwards holding the same for the benefit of another party who was his friend. That contrary to public decency he had a private and indecent interview with the wife of a party against whom an indictment was pending in his court, wherein she solicited him on behalf of her husband in the matter of said indictment, and that he afterwards brought about an acquittal of her husband. That against public decency he had a private and indecent interview with a woman who was living apart from her husband, when he advised her in relation to a divorce; afterwards permitted the husband, who also desired a divorce from his wife, to exhibit affidavits to him in support of such an application, advised the latter that the papers did not establish grounds for a divorce, and that he could obtain his end by permitting his wife to obtain it, to which the husband assented; and

afterwards knowing of this collusion, made a decree granting the divorce against the husband in the wife's favor. That he made an order staying an execution on a judgment until the further order of the court, because it was inconvenient and difficult for the defendant to pay it. That he partially and unfairly attempted to prevent the counsel for the plaintiff, in an action tried before him, from adhering to an admission of fact made by such counsel, and from making the same. That he insisted upon hearing a certain cause in chancery at a special term held by him for that purpose, and arbitrarily and partially refused the counsel for the defendant adequate time for the argument of said cause. That he had private and indecent interviews with women for the purpose of obtaining divorces, contrary to public decency and to the manifest scandal and danger to the administration of justice; with four specifications, two of which were set forth in the specifications in the previous charges. That he had arbitrarily and oppressively exercised the functions of his judicial office to the danger of suitors and the administration of justice; with specifications of ordering a new trial without sufficient cause and without argument; of refusing counsel adequate time for argument; of staying an execution without sufficient cause; of quashing an indictment without proper cause, after having previously refused to quash the same; and of forcing a motion to a hearing without reasonable cause. That he had contrary to his duty and obligation allowed himself to be improperly counselled on the subject of suits and proceedings instituted or about to be instituted in his courts by suitors and their friends and agents to the manifest scandal and danger to the administration of justice, with twenty-one specifications; and that he had contrary to his duty and obligation as such judge informed and advised upon the subject-matter of suits instituted or about to be instituted in the circuit and supreme courts of this State, suitors, their friends and agents, to the manifest scandal and danger to the administration of justice.

Judge Hubbell was acquitted by a majority vote in his favor on all of the articles. In some cases the vote was unanimous.[84]

MINNESOTA.

In 1873, the Minnesota house of representatives impeached William Seeger, the State treasurer. The charges were his concealment of the delinquency of his predecessor in office, and his loaning the State funds

[84] Trial of Impeachment of Levi Hubbell, Judge of the Second Judicial Circuit, by the Senate of the State of Wisconsin, June, 1853. Reported by T. C. Leland. Beriah Brown, Publisher, Madison: Argus & Democrat Steam Press, 1853. p. 820.

to private individuals, some of them his bondsmen, a practice which was stigmatized as hazardous to the safety of the public moneys, although not forbidden by any statute. After the articles were presented to the senate, Seeger sent to the governor his resignation in a letter stating: that "he believed himself already acquitted in the minds of all fairly disposed men"; but that the principal reason for his resignation was the information he had recently received, that his counsel fees and other expenses, if he defended the impeachment, would amount to five or six thousand dollars, which would reduce his family to penury. The governor accepted the resignation, but the senate voted — twenty-six yeas to ten nays — "that this court will receive no evidence concerning the resignation of William Seeger. Seeger's counsel then filed a plea of guilty to each of the articles "in the manner and form as in said charges and specifications alleged," which concluded with a statement that "the same were done without any corrupt or willful intent." The senate thereupon by a vote of more than two-thirds found the respondent guilty and sentenced him to removal from office.[85]

In 1878, Sherman Page, Judge of the Tenth Judicial District, was impeached and tried before the senate of the same State. The articles charged him with maliciously adjourning for four years the trial of an indictment for a libel against him, pending the adjournments, holding the accused under heavy bail, the excuse for the postponement being, that he did not care to try the case himself, and neglecting to procure the attendance of any other judge of the district court to hold the term at which the case could be tried; with appearing before the board of county commissioners, and in an angry and threatening manner asserted that it would be illegal for them to pay the bill of a deputy sheriff for subpœnaing certain witnesses, thus inducing the board to disallow the bill, and afterwards on an appeal from the judgment of a justice's court in favor of the deputy sheriff against the said board for the amount of the bill, falsely and erroneously deciding that the issue of the subpœnas was unauthorized by law, and that an order had previously been made, directing that none of the costs or fees for issuing or serving the subpœnas should be paid by the county, although the contrary was the fact; with refusing at the conclusion of a term to make an order fixing the number of deputies which were necessary for the sheriff to have for attendance upon such term, although he had previously recognized and acquiesced in the attendance of a deputy; with publicly insulting in open court the special deputy when he applied

[85] Appleton's Annual Encyclopædia for 1873, pp. 508, 509.

for the order, and with thus preventing the payment of the deputy; with peremptorily and threateningly commanding a deputy sheriff, in the presence of the grand jury and a number of other persons in attendance upon a term of court, to pay over to the clerk of the court the sum which he had retained for his fees, without giving him a hearing, and thus compelling him to pay over such fees, at the same time reprimanding the deputy and accusing him of having retained illegal fees, and threatening that he would seriously punish him if he took any illegal fees again; "with needlessly, maliciously and unlawfully, and with intent thereby to foment disturbance among the inhabitants" of a certain county, and in particular among those of a certain village in said county, and with a further intent to insult and humiliate the sheriff, writing and causing to be delivered to the sheriff two orders, one directing him to "disperse any noisy, tumultuous or riotous assemblage of persons numbering thirty or more, or a less number, if any of them are armed, found anywhere within the limits of your county," also a letter reprimanding him for not having acted sooner in the matter; with maliciously attempting to persuade a grand jury to indict a county treasurer who had committed no crime, and when he failed in that purpose, directing the county attorney to prefer a charge against the county treasurer, arresting him upon such charges, compelling him to give bail, to appear at the next term of court; and "during the proceedings the said Page, as such judge, maliciously and without provocation spoke to and treated the county treasurer in a very insulting and unbecoming manner, and in particular accused the said county treasurer of having in other places and upon other occasions talked of himself, the said Page, in a derogatory way;" with reprimanding the grand jury for failing to bring in an indictment against the said county treasurer; with unlawfully issuing a warrant to arrest a party for contempt of court on account of publicly attacking him; with requiring the attendance during the contempt proceedings, of a number of persons to testify as to matters wholly irrelevant to said charges for the purpose of ascertaining what persons other than the accused had written and published attacks upon the judge, and with asking and compelling the answer of a number of irrelevant questions designed for this purpose; and with habitually demeaning himself towards the officers of his court and towards the other officers of the said county of Mower in a malicious, arbitrary and oppressive manner, and habitually using the powers vested in him as such judge, to annoy and oppress all other persons who had chanced to incur the displeasure of him, the said Page.

The respondent was acquitted by a majority vote in his favor on all

the charges but three, and as to those three charges, which related to the proceedings against the county treasurer and the contempt proceedings, by a majority of less than two-thirds against him.[86]

In 1881 E. St. Julien Cox, judge of the ninth judicial district of Minnesota, was impeached, tried, and convicted before the senate for drunkenness in the discharge of his official duties.[87]

NEBRASKA.

In 1871, the first governor of the State of Nebraska, David Butler, was impeached and tried before the State senate. The articles charged him with improperly appropriating to his own use the sum of $16,881.26 which he had collected in the name of the State from the United States; with attempts to obtain bribes; with the receipt of bribes for his official action as official member of certain State boards and in the exercise of his executive powers; with falsely appropriating to his own use the sum of one thousand dollars for which a warrant had been issued to pay the fees due an attorney for the State; with unlawfully and corruptly entering into a contract with an insolvent for the completion of the State lunatic asylum, and with willfully and recklessly assenting and becoming a party to a contract for the erection of the State university and agricultural college, at prices greatly in excess of the sums appropriated for the said buildings; with a false communication to the house of representatives concerning the investment of the money collected from the United States which he was charged with having appropriated to his own use; with unlawfully and willfully advising and consenting to the loaning of the State funds and causing the same to be loaned, improvidently and willfully, without good authority of the law and regard to the public interests, upon totally insufficient and inadequate security, and without the concurrent action thereon by the treasurer and auditor of the State, as was required by law; with appropriating to his own use the sum of $648.43 a balance in the hands of the treasurer of the board of immigration, which was the property of the State; with unlawfully executing and causing to be delivered to the Sioux City and Pacific Railroad Company a patent or patents for lands

[86] Twentieth Session, 1878. Journal of the Senate of Minnesota, sitting as a High Court of Impeachment for the Trial of Hon. Sherman Page, Judge of Tenth Judicial District, Vol. i. Printed by Authority. Ramaley and Cunningham, Saint Paul. 3 volumes. Vol. i, pp. 784; vol. ii, pp. 549; vol. iii, pp. 389.

[87] Journal of the Senate of Minnesota, sitting as a High Court of Impeachment for the Trial of Hon. E. St. Julien Cox, Judge of the Ninth Judicial District. Printed by Authority. St. Paul Printing House, O. G. Miller, 36 E. 3d St. 1882. 3 volumes. pp. 1006.

of the State; and with selling certain State lands and appropriating to his own use part of the purchase money. Governor Butler was acquitted by either a majority vote of not guilty or a vote of less than two-thirds of guilty as to all the articles except the first, which charged him with appropriating to his own use $16,881.26 which had been collected for the state of Nebraska from the United States. As to that his defense was an attempt to prove that the money had been paid into the State treasury and afterwards loaned to him upon bonds and mortgages on his own property. The testimony shows a remarkable method of keeping the public funds. The State treasurer was a member of a banking firm and at first kept the treasury in an old-fashioned fire-proof safe, but afterwards, in pursuance of an act of the legislature, bought a Herring burglar-proof safe at a cost of one thousand dollars. In that he kept both the private funds of his firm and the public funds. The public funds were supposed to be kept in separate envelopes; but a large part of them were mingled with the private funds of the firm and credited upon its books to the fictitious name of John Rix. The official books of the treasury showed no trace of the money which the governor had collected from the United States. The governor claimed, however, that it had been duly paid to the treasurer, credited to the name of John Rix, and subsequently loaned to him. This defense was overruled by the senate, which by a majority of more than two-thirds found him guilty under the first article of impeachment. The sentence was removal from office. Members of both the political parties voted for conviction.[88]

In the same year that Governor Butler was impeached, the Nebraska house of representatives voted to impeach John Gillespie, State auditor of Nebraska. The articles charged him with delivering warrants against the State funds without having first received the legal vouchers therefor, and in cases in which the State was not indebted, giving as a specification the payment to Governor Butler of the State warrants for the fees of an attorney which was the subject of one of the articles of Butler's impeachment; with unlawfully, corruptly, and in violation of a section of the State constitution, agreeing and consenting to the payment of extra compensation to a contractor for the erection of the State lunatic asylum above the amount stipulated to be paid for the building; with disregarding and setting at naught a law which required him to direct prosecutions, in the name of the State, for all possible delinquencies in

[88] Impeachment Trial of David Butler, Governor of Nebraska, at Lincoln, March, May and June, 1871. Messrs. Bell, Hall & Brown, Official Reporters, Omaha. Tribune Steam Book and Job Printing House: 1871. pp. 133. Closing Arguments, pp. 88. Trial Proceedings, pp. 65. Senate Proceedings, pp. 28. See also Nebraska House Journal for 1871-1872, pp. 828.

relation to the assessment, collection and payment of the revenue, and against all persons who might by any means become possessed of any public moneys or property due or belonging to the State, and fail to pay over or deliver the same, and also to give information in writing to either house of the legislature in regard to any duty of his office, giving as a specification the failure to collect the sum of $16,881.21, which was collected and retained by Governor Butler, as charged in the latter's impeachment; with unlawfully ordering and approving of certain loans of the school-money at less interest than might have been collected for the use of the same; with opening one of the sealed bids for the public printing, and disclosing to another bidder the estimates of the same, so as to enable him to so alter his bid as to secure the contract; with being influenced by pecuniary motives to agree in his official capacity to an unsuitable location for the State lunatic asylum; and with making a false entry in his accounts, stating the receipt of $1082.10, and the payment thereof upon a warrant for trees for the capitol grounds, when in fact no such money was received or paid, but the trees were furnished for the individual benefit of the respondent, Governor Butler and another officer, so as to make up the deficiency in the proceeds of the sale of certain public lands.

This impeachment was never tried, but in the following year, 1872, was withdrawn by the succeeding house of representatives.[89]

In 1893, the legislature of Nebraska presented to the supreme court articles against William Leese, who had been formerly attorney-general. They were dismissed upon the ground that no impeachment could be sustained against a man who was not in office.[90] In the same year, the legislature presented articles against George Hastings, attorney-general, John C. Allen, secretary of state, and Augustine R. Humphrey, commissioner of public lands and buildings. They charged misconduct by the respondents when acting as a board of public lands and buildings by the waste and misappropriation to their own use of public funds and negligence in the payment of fraudulent claims for supplies, chiefly in connection with the construction of a cell-house in a penitentiary and the supervision of the maintenance of an insane asylum. It appeared that they had by the advice of the attorney-general used five hundred dollars of an appropriation for the construction of a cell-house in payment of their own expenses upon a junketing trip to visit prisons in other States, and two hundred dollars to pay the expenses of the warden and chaplain of the prison as delegates to the National Prison Congress at

[89] House Journal of the General Assembly of the State of Nebraska, for 1871–1872. pp. 828.

[90] State of Nebraska *v.* William Leese, Ex-Attorney-General, 37 Neb., 92.

Philadelphia. A majority, two of the court, acquitted all the respondents for lack of proof of a criminal intent. The chief-justice dissented in a strong opinion.[91]

KANSAS.

A painful exposure of the corruption which existed during the civil war was made on the trial of the governor, secretary of state, and auditor of the State of Kansas before the senate on their impeachment by the house of representatives in 1862. The first legislature of the State authorized the issue of bonds to the amount of $150,000 to defray the current expenses. These officers were authorized to negotiate for their sale. The only probable customer at that time, the summer of 1861, was the government of the United States, who were authorized to invest certain sums of money held by it in trust for Indians under different treaties "in safe and profitable stocks." The Kansas secretary of state and auditor employed Robert Stevens, a leading Kansas politician, to negotiate the sale of these bonds. His employment was advised by senator Pomeroy of Kansas, because of his business relations with Caleb B. Smith, secretary of the interior of the United States.[92]

The accused secretary of state testified: "I had no definite information, but owing to the character of those assisting Mr. Stevens, I thought his expenses must be heavy indeed. Any gentleman who will go to Washington on similar business will be satisfied of that fact."[93]

Stevens first attempted to sell the bonds to the United States through the secretary of the interior, but failed. He then employed to assist him in the negotiation, R. G. Corwin of Dayton, Ohio, who was connected by marriage with the secretary of the interior. Corwin was then engaged as a claim-agent in Washington before the War and Interior Departments.[94] Corwin succeeded in arranging that the bonds should be bought, provided the entire Kansas delegation at Washington advised the purchase in writing.[95] All of the delegation with one exception were persuaded to recommend the purchase. Senator Lane refused to sign, saying that he expected to be a candidate for a re-election to the Senate before the State legislature; that he had a majority of one in the State senate, and he feared lest, if Stevens had the money, the latter

[91] State of Nebraska *v.* George H. Hastings, Attorney-General, John C. Allen, Secretary of State, and Augustine L. Humphrey, Commissioner of Public Lands and Buildings, 37 Neb., 96.

[92] Proceedings in cases of the Impeachment of Charles Robinson, Governor; John W. Robinson, Secretary of State; George S. Hillyer, Auditor of State of Kansas. Lawrence: Kansas State Journal Steam Press, 1862. pp. 484.

[93] Ibid., p. 386.

[94] Ibid., pp. 256, 258, 262.

[95] Ibid., pp. 154, 167.

would buy up enough votes to defeat him and elect himself.[96] One thousand dollars were paid to Lane's private secretary to procure the senator's signature to a letter recommending the purchase, which signature was subsequently procured through the private secretary, by a misrepresentation as to the character of the letter signed.[97] Bonds to the amount of $56,000 were sold to the United States accordingly at eighty-five per centum on their amount. The State only received sixty per cent. The remainder was retained by Stevens. With whom he divided did not appear. At the same time certain State bonds held by the auditor and secretary of state were sold to the government of the United States in the same lot, at the same price, and seventy cents on the dollar was paid to their owners for the same.

John W. Robinson, state secretary of state, and George S. Hillyer, state auditor, were convicted on the article of impeachment charging these facts, and sentenced to a removal from office, but not to disqualification.[98] The governor, Charles Robinson, was acquitted upon the ground that there was no evidence of his complicity in the act.[99]

Other articles of impeachment were presented against the same three officers, charging other offenses connected with the sale of the same bonds, and in the case of the secretary of state, charging him with authorizing a public advertisement in a pretended county newspaper which was not in fact published in such county, in countersigning certain bonds, and in authorizing the withdrawal of a bid for public printing after its acceptance. They were acquitted on all of these.

After the conviction of the secretary of state, it was charged that one of the senators had endeavored to obtain a bribe of three thousand dollars in return for his vote for an acquittal. An investigation was ordered. The editor of the Topeka "Tribune" testified that on the day before the final vote he was approached by a member of the senate who told that there were seventeen senators ready to vote to impeach John W. Robinson; that if the speaker voted in favor of the acquittal, other senators would go with him; and that if he was paid $5,000 in cash, he would vote "not guilty." The witness had in his pocket about $4,500 in scrip and offered the senator $2,000. Subsequently, the witness talked to one of the respondent's attorneys, saying: "I had offered so much money on my own responsibility, and that afterwards I would expect to have the money returned, if none was handed to me before." On the day when the vote took place, between the morning and afternoon sessions, he again met the senator and told him that he might draw on him for $3,000 if he wished for his vote, but the senator replied: "It is too

[96] Ibid., pp. 145, 160.
[97] Ibid., pp. 146, 147, 154.
[98] Ibid., pp. 348, 349, 392, 396.
[99] Ibid., pp. 392, 425.

late." The senator had also told him that he could get an office under the general government worth $2,000, in case he voted for the conviction of John W. Robinson, which would be obtained through Senator Lane. The witness refused to state the name of the senator with whom he had the conversation. Each of the senators who was present testified that he had no such conversation. Thereupon it was voted, "that it was the opinion of the senate that the charges against the members of this body of corruption are untrue, and that no further action be taken in the premises." The witness was then discharged, without any attempt to compel him to disclose the senator's name.[100]

In 1891, Theodosius Botkin, judge of the thirty-second judicial district, was impeached by the house of representatives and tried before the senate of Kansas. The articles charged him with habitual and repeated drunkenness both on and off the bench; with the illegal purchase of intoxicating liquors and frequenting "drug-stores" where he knew that liquor was sold in violation of the law; with blasphemy in a so-called "drug store"; with unlawful imprisonment in a proceeding to punish as a contempt the circulation of a petition for his impeachment which made similar charges to those contained in the other articles; with issuing "a fictitious or fraudulent warrant of arrest," without any sworn complaint such as the law required; with ordering a court stenographer to erase from his notes an exception taken on a trial; and with being party to a corrupt conspiracy for the robbery of a city treasury, wherein, without any statutory authority, he appointed "a receiver of the city treasury, which contained less than $7,759\frac{88}{100}$," recommended the city council to employ a certain attorney to represent them in the litigation, at midnight signed an order directing the payment by the receiver of $4,000 to the attorney, which the council had voted an hour before to pay him for his services, exhausted the balance left in the treasury by other illegal warrants which he approved, and then discharged the receivership. The trial is interesting from the picture it gives of the State of civilization in Kansas and the condition of drug-stores in a prohibition State. Demurrers were sustained to the articles which charged drunkenness when not engaged in his official duties, the illegal purchase of intoxicating liquor, and the frequenting of places where he knew that liquor was illegally sold.[101] The acts charged were substantially proved, leaving the intent of the accused the sole question in issue, except as regards the drunkenness and blasphemy, concerning which the evidence was conflicting. The main point on which the counsel for the respondent relied, which was reiterated

[100] Ibid., pp. 354–376.

[101] *Supra*, § 93.

throughout the examination of witnesses and the arguments, was that Botkin was a Republican, as were also a majority of the senate, and that the impeachment was voted by the members of the Farmers' Alliance in the lower house. The attorney to whom the judge gave the four thousand dollars from the city treasury was not only a witness but the leading counsel for the respondent, and the coarseness of his cross-examinations and speeches throughout the case, which were unchecked by the senate, illustrate the character of the court. The respondent was acquitted by a majority, and in some cases by a unanimous vote of "not guilty" on the articles charging drunkenness and blasphemy. On the other articles the votes stood eighteen to sixteen and eighteen to seventeen against him; and as two-thirds failed to vote for conviction he was finally acquitted.[102]

IOWA.

In 1886, John L. Brown, auditor of the State of Iowa was impeached, tried and acquitted by the State senate. The articles charged a failure to keep proper accounts and to make reports of the fees collected by him from insurance companies, banks and others; inducement by a bribe of one hundred dollars to omit to direct the attorney-general to institute proceedings for the appointment of a receiver of an insolvent bank; certifying that that bank was solvent; drawing and collecting and issuing warrants on the treasurer without vouchers; refusing to obey an order by the governor suspending him from office; continuing to exercise the functions of his office after such suspension; refusing to allow the governor to inspect his books; allowing to act as his deputy a man whose appointment the governor had refused to approve; paying such deputy a salary and money beyond his salary by warrants on the State treasury; and compelling the payment to himself and his deputy of illegal fees by banks and insurance companies which were subject to his suspension.[103]

MISSOURI.

In Missouri there have been three impeachments. In 1826, Richard S. Thomas, a circuit judge, was impeached, convicted and removed.

[102] Daily Journal of the Senate Trial of Theodosius Botkin, Judge of the 32d Judicial District, before the Senate of the State of Kansas, on Impeachment by the House of Representatives, for Misdemeanors in Office. April, 1891. Published by order of the Senate. Topeka, Kansas, Publishing House; Clifford C. Bowker, State Printer, 1891. Volumes i and ii. pp. 1426.

[103] Journal of the Senate of Iowa, sitting as a Court of Impeachment for the Trial of John L. Brown, Auditor of State. Des Moines: Iowa Printing Company, 1886. pp. 2610.

He had refused to recognize the rightful clerk of his court under the pretense that the adoption of certain amendments to the State constitution had vacated the office; had put his own son in the place of the clerk; had refused to hold court until the clerk had surrendered the papers to his son; and had thus forced him to resign. This conduct was the subject of two articles of the impeachment. The third article charged him with becoming security on an appeal by his son to his own court from the judgment of a justice of the peace; ordering of his own motion a change of venue of the appeal without the request or consent of either party; and when the court to which the venue had been changed sent it back for want of jurisdiction, adjourning the trial from term to term of his own motion without the consent of the party who had recovered judgment against his son below. The fourth article charged, that, while a warrant was out on a charge of murder, he agreed with the counsel for the accused that the latter, if he surrendered, should be admitted to bail, and that no testimony should be taken against him; and that he fulfilled this promise and discharged the accused on bail after his surrender, declaring that it was not his business to procure the attendance of witnesses, although he well knew that several witnesses acquainted with the facts lived within a short distance, and that their attendance could be procured within a short time. Judge Thomas was convicted on all these articles.[104]

In 1859, the State house of representatives, by a vote of seventy-nine to thirty-four, impeached Albert Jackson, a circuit judge. The main articles of impeachment charged that he was guilty of insulting, oppressive and tyrannical conduct towards parties and counsel; had imposed illegal imprisonment; had refused the writ of habeas corpus; had advised parties and counsel out of court in regard to cases which afterwards came before him — in one case advising a young attorney to procure a retainer upon a contingent fee to defend a case on a point which he suggested and afterwards sustained; that he had refused to give fair bills of exceptions; that he had improperly interfered with a grand jury to prevent his own indictment for gaming; and that he had been guilty of gross partiality on several trials both criminal and civil, in one of which the defendant was convicted of murder, where he had also refused a fair bill of exceptions. One of the managers was James Proctor Knott who afterwards gained celebrity by his speech in Congress on Duluth. His speeches on this trial, although florid, are forcible, logical and well

[104] The writer has been able to find no report of this trial. The articles may be found in the argument of Manager Charles H. Hardin, in Jackson's Impeachment Trial. Public Printer, Jefferson City; pp. 336-337.

worth reading. The judge defended himself in person. His answer is a model of technical pleading. It even contained this traverse: "Said Jackson does not know that the experience of ages has demonstrated that the writ of *habeas corpus* is one of the chief bulwarks of the liberty of the people; joins issue and takes the negative of that proposition." The principal facts alleged in the articles were proved by uncontradicted evidence, leaving the intention of the accused the main matter in doubt. His evidence consisted mostly of laymen on his circuit who had not thought his judicial manners oppressive, contumelious and insulting. His defense was able, but his language throughout the trial showed that his temper unfitted him for a judicial position. A majority, but less than two-thirds, all of whom apparently were Democrats, voted for his conviction on the principal articles. The minority was almost, if not quite entirely, composed of the members of the political party in opposition, to which he apparently belonged; and they attempted to prevent the publication by the State of the proceedings.[105]

In 1872, Philander Lucas, judge of the fifth judicial circuit in Missouri, was impeached and tried before the State senate. The articles charged that he had certified to bills of costs in blank against a county in his circuit, allowing the clerk to fill them in; that he had certified to fraudulent charges in other bills of costs; had with a reckless disregard of the public interests and for the purpose of assisting a friend, dismissed at the defendant's costs a prosecution for selling liquor without a license; and had connived at and permitted a practice by the circuit attorney of multiplying indictments against insolvents who were unable to pay the costs, and in permitting and ordering attachments against witnesses whom he knew to be present, for the purpose of multiplying the attorney's fees. The respondent answered and defended. The articles were withdrawn at the conclusion of the evidence offered in their support.[106]

CALIFORNIA.

In 1851, Stephen J. Field, afterwards a Justice of the Supreme Court of the United States, and other members of the bar, presented to the

[105] Official Report of the Trial of the Hon. Albert Jackson, Judge of the Fifteenth Judicial Circuit, before the Senate, composing the High Court of Impeachment of the State of Missouri. Reported by Thomas J. Henderson. Jefferson City: W. G. Cheeney, Public Printer, 1859; pp. 480.

[106] Official Report of the Trial of Philander Lucas, Judge of the Fifth Judicial Circuit, before the Missouri State Senate, sitting as a High Court of Impeachment, June, 1872. Jefferson City: Regan & Edwards, Public Printers, 1872; pp. 323.

California assembly charges against William R. Turner, judge of the eighth judicial district of that State. The charges arose out of the commitment of Mr. Field for contempt of court to an imprisonment of forty-eight hours accompanied by a fine of five hundred dollars, his disbarment for protesting and taking legal proceedings to set aside this proceeding; and the similar treatment of two other members of the bar who assisted him in the matter. Mr. Field was released by habeas corpus immediately after his arrest, but Judge Turner had him arrested again, threatened with commitment the judge who granted the writ, and after the attorneys had been restored to the bar by a mandamus from a higher court, attempted to again disbar them. The matter was compromised by the passage of a law redividing the State into judicial districts and assigning Judge Turner to another part of the State. He subsequently resigned to avoid an impeachment for habitual drunkenness and other charges.[107] His experience in this matter undoubtedly aided in impressing on the mind of the sufferer from judicial tyranny the public importance of the protection of the rights of the bar which he afterwards established by his own decisions on the bench.[108]

In the same State, in 1857, Henry Bates, the State treasurer, was impeached. The articles charged: a conspiracy with another to defraud the State, by which in violation of the statutes he deposited part of the State funds with private bankers, who allowed his confederate the use of the money, and he loaned another part directly to his confederate, who failed to repay the same to the State; the loss of other funds of the State through negligence without an allegation of a corrupt intent; the purchase by himself and others with his connivance of State scrip and

[107] Proceedings of the Assembly of the State of California. Second Session, 1851, on the petition of citizens of Yuba and Nevada Counties for the Impeachment of Wm. R. Turner, Judge of the Eighth Judicial District of California. Jos. L. Pearson, Printer, 1878.

Statement of the Controversy between Judge William R. Turner, of the Eighth Judicial District of California, and members of the Maryville Bar, and their Reply to his violent Attacks upon them. Second edition, with an appendix.

Documents in relation to charges preferred by Stephen J. Field and others, before the House of Assembly of the State of California, against Wm. R. Turner, District Judge of the Eighth Judicial District of California. California, 1851. "Truth is omnipotent, and public justice certain." Henry Clay. San Francisco: Whitton, Towne & Co., printers, Excelsior Steam Presses, No. 151 Clay Street, three doors below Montgomery. 1856.

People *v.* Turner, 1 Cal., 143; s. c., 1 Cal., 152; *Ex parte* Field, 1 Cal., 187; People *v.* Turner, 1 Cal., 188; People *v.* Turner, 1 Cal., 90.

[108] See *Ex parte* Garland, 4 Wallace, 333; *Ex parte* Bradley, 7 Wallace, 364; Bradley *v.* Fisher, 13 Wallace, 335; *Ex parte* Robinson, 19 Wallace, 506.

warrants with the coin of the State; the substitution of controller's warrants for coin paid him by county treasurers; connivance at similar substitutions by another officer; borrowing money on the credit of the State to conceal the deficiency in the treasury; and a failure to redeem State bonds as required by law. The respondent pleaded to the jurisdiction in an answer; which alleged that his resignation had been accepted by the governor, and that he was no longer in office when the articles were adopted by the assembly, and also that two indictments had been found against him by a grand jury on the charges alleged in the articles. The managers filed a replication, which alleged that the respondent was treasurer of the State at the time of his impeachment, and that if he had been indicted as alleged, the indictments were found after the articles had been presented. To this, Bates filed a plea which claimed that the allegations in his answer which were not denied by the replication were sufficient to show that the court had no jurisdiction and prayed judgment accordingly. The senate overruled the objections to the jurisdiction and ordered a further answer, which the respondent refused to make. He was thereupon convicted by default by a vote of thirty-two to one; and was sentenced to perpetual disqualification from office in a judgment which recited the fact that he had resigned after his impeachment.[109]

In 1862, James H. Hardy, judge of the sixteenth judicial district, was impeached before and convicted by the senate of the State of California. The articles charged him with a number of corrupt decisions for the benefit of his friends, no charge of bribery being made. The principal ones were alleged to have been made for the purpose of delaying litigation, and thus enabling the defendants to compromise. He was also charged with having advised counsel outside of court as to the course which they should take, and the decisions which he expected to make; thus in one case misleading a counsel so far as to prevent him from filing an argument against a motion for a new trial which the judge said privately to him would be denied, but afterwards granted. The most serious charge was his action when presiding over the trial of David S. Terry, a former chief-justice of the State, for the murder of senator David C. Broderick in a duel. In that case, through the collusion of the district-attorney, a jury was impanelled between nine and ten o'clock in the morning, at which hour the witnesses for the State had been subpœnaed to appear. The witnesses were in a sail-boat and

[109] California Senate Journal, 8th Sess., 1857, pp. 297-303, 407-410, 424, 425, 457, 463. The account of this case is taken from the notes of Melville E. Ingalls, Jr., Esq., of the New York bar, who courteously loaned them to the author.

were detained by a fog, as was generally known at the place of trial. The case was submitted to the jury in the absence of the witnesses for the State, and a verdict of not guilty allowed before ten o'clock that morning. The witnesses arrived one or two hours afterwards. One of the jurymen had previously sat on another jury on the trial of George Pen Johnston for killing Senator Ferguson in a duel, and had openly declared upon the streets that he would never convict a man for killing another in a duel, provided the duel was a fair one. Another juryman, as was well known to the county officers, was under indictment for a murder of which he was subsequently convicted. The articles also charged frequent drunkenness upon the bench; and willful neglect to perform the duties of his office with reasonable diligence. The fifteenth article charged a number of instances of seditious and treasonable language used off the bench, in most cases in public bar-rooms.

It appeared upon the trial that Judge Hardy had previously been tried for murder but acquitted. An attempt was made by one witness for the respondent to kill a witness for the State during the trial. One witness appeared in court with a loaded pistol and a dirk-knife, which latter weapon he was asked but refused to exhibit. The evidence was conflicting as to all of the charges except those relating to the trial of Terry, and the seditious language. One of the witnesses for the State testified as regards the charge of drunkenness that he had frequently seen the judge intoxicated, but not in court, nor during the terms of his courts. Most of the delays charged against him were alleged to have been caused by his desire to keep on good terms with both sides until after election. The respondent was acquitted on all the articles except those charging treasonable language. He had in his favor a large majority and in some cases a unanimity upon all the others except those relating to the trial of Judge Terry, and on that charge he was acquitted; the vote standing eighteen for him and eighteen against him. He was convicted by a two-thirds vote of twenty-four to twelve on the fifteenth article of impeachment, which charged him with profane language out of court, and the expression of sympathy with secession, Jefferson Davis and the Confederacy. The sentence was simply removal from office. A proposition to limit the punishment to suspension for six months was voted down.[110]

[110] Official Report of the Proceedings, Testimony and Arguments, in the Trial of James H. Hardy, District Judge of the Sixteenth Judicial District, before the Senate of the State of California, sitting as a High Court of Impeachment. Sumner & Cutter Official Reporters. Sacramento: Benj. P. Anthony, State Printer, 1862. pp. 712.