COMMENTARIES

ON

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By JAMES KENT.

Vol. I.

TWELFTH EDITION.

EDITED BY

O. W. HOLMES, Jr.

FOURTEENTH EDITION.

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TO

WILLIAM JOHNSON, Esq.

DEAR SIR,

IN compiling these volumes, (originally intended, and now published for the benefit of American students,) I have frequently been led to revisit the same ground, and to follow out the same paths, over which I have so often passed with you as a companion to cheer and delight me.

You have reported every opinion which I gave in term time, and thought worth reporting, during the five-and-twenty years that I was a Judge at Law and in Equity, with the exception of the short interval occupied by Mr. Caines's Reports. During that long period, I had the happiness to maintain a free, cordial, and instructive intercourse with you; and I feel unwilling now to close my labors as an author, and withdraw myself finally from the public eye, without leaving some memorial of my grateful sense of the value of your friendship, and my reverence for your character.

In inscribing this work to you, I beg leave, sir, at the same time, to add my ardent wishes for your future welfare, and assure you of my constant esteem and regard.

JAMES KENT.

PREFACE TO FOURTEENTH EDITION.

THE masterpiece of Chancellor Kent has now become so interwoven with judicial decisions that these commentaries upon our frame of government and system of laws will doubtless continue to rank as the first of American legal classics so long as the present order shall prevail. It is worthy of note that, in the preparation of this edition, notwithstanding the rapid development and extension of doctrine in our growing country, the statements of this jurist, though long since made, have rarely been found criticised or curtailed in final decisions. The thorough and lucid annotation of Judge Holmes in the twelfth edition, which placed the work fully in harmony with the later researches and the current of more recent decision, has in all respects been preserved and retained, as first published, in this edition. The notes of Mr. Barnes in the thirteenth edition, which though not so elaborate, added much of value, are now chiefly enclosed in brackets and followed by the letter B. In this form, when directly relating to matters discussed in the notes of Judge Holmes, they are added thereto; in other cases they have in the main been added, with the same designation, to the older notes. Certain of Mr. Barnes's notes, based upon decisions which have been overruled or more carefully considered in recent cases before courts of the highest authority, are now omitted or briefly incorporated in the new notes, in order

to save space and to prevent the repetition of the same discussion, with different results, in more than one place.

The aim of the present editor has been to present fully the growth of doctrine in recent years upon all the topics discussed in this work; to supply new illustrations of the principles derived from the very latest decisions; to define the extension or limits of these principles resulting from such decisions, and especially to fortify the work in parts not recently much developed, especially in those relating to the Law of Nations, equity, judgments, taxation, master and servant, aliens, the domestic relations, patents, copyrights, and trade-marks. An examination of the new notes, which are in double columns at the foot of the pages, and are indicated by the last letters of the alphabet, will best enable an intelligent profession to determine the value of this new material, in which nearly nine thousand cases have been added to the twenty-four thousand cases cited in the last edition, not including the frequent citation of other authorities than the reports and the not infrequent further use made of decisions already cited in that edition.

BOSTON, MASS., *Aug.* 1, 1896.

PREFACE TO THE TWELFTH EDITION.

I HAVE devoted more than three years to the attempt to bring this work down through the quarter of a century which has elapsed since the author's death. While it has been in progress I have tried to keep the various subjects before my mind, so far as to see the bearing upon them of any new decision in this country or in England. Almost all my more important notes have been partially or wholly rewritten — many of them more than once — in the light of cases which have appeared since their first preparation; and every case cited has been carefully examined in the original report. In order to avoid encumbering the text with frequent interruptions and an unmanageable body of notes, the additions to each of the author's subdivisions have generally been compressed into one subordinate essay. Great care has been taken to insert nothing which does not contribute to the main current of the discussion, to condense as far as possible what has been inserted, and to make each of the more important notes a whole in itself when that could be done without repetition. The contents of the notes are indicated by italicized headings. The notes which have been added to former editions since the author's death have not been retained, with the exception of one by Mr. Justice Kent, the Chancellor's son, and several by the last and very able editor, Judge Comstock. These are enclosed in brackets, and marked with the initials of the authors. The large store of materials which has been collected since the sixth edition has not been neglected, however, and has often furnished valuable cases not to be found elsewhere.

The great weight attaching to any opinion of Chancellor Kent has been deemed a sufficient reason for not attempting any alteration in his text or notes. To insure accuracy, this edition has been printed from the eleventh, and then read with the sixth, which contained the author's last corrections. The original text

has been scrupulously restored, except that whenever a difference between the proofs and the sixth edition has occurred in a citation, it has been corrected in the proper abbreviated form. In this way a large proportion of the author's citations has been verified; and it is believed that the present revision, together with the care which former editors have bestowed, has insured their accuracy.

In order to make the author's arrangement clear, the principal headings into which he divides each chapter are distinguished by full-faced type; the subordinate heads are printed in italics; and when, as happens in a few chapters, these are again subdivided, the heads of the last subdivisions are also printed in italics, but enclosed in brackets.

The star paging, which is that of the second edition, and by which the book ought always to be cited, is put at the top of the page. It has been thought advisable to present the cases cited in the four volumes in one table, for the same reason that one index is better than four.

I wish to express my gratitude to my friend, JAMES B. THAYER, Esq., upon whom has rested the whole responsibility for my work to the owners of the copyright. He has read all that I have written, and has given it the great benefit of his scholarly and intelligent criticism. I have further to acknowledge the valuable aid which my friends, HENRY PARKMAN and JOSEPH B. WARNER, have given me by selecting from the cases cited in the eleventh edition most of those which have been added in brackets [ ] to the author's notes in the fourth volume. Mr. PARKMAN has also made, under my supervision, such additions as were necessary to the index.

O. W. HOLMES, JR.

OCTOBER 3, 1873.

PREFACE

TO THE FIRST VOLUME OF THE FIRST EDITION.

HAVING retired from public office in the summer of 1823, I had the honor to receive the appointment of Professor of Law in Columbia College. The trustees of that institution have repeatedly given me the most liberal and encouraging proofs of their respect and confidence, and of which I shall ever retain a grateful recollection. A similar appointment was received from them in the year 1793; and this renewed mark of their approbation determined me to employ the entire leisure, in which I found myself, in further endeavors to discharge the debt which, according to Lord Bacon, every man owes to his profession. I was strongly induced to accept the trust, from want of occupation; being apprehensive that the sudden cessation of my habitual employment,[1] and the contrast between the discussions of the forum and the solitude of retirement might be unpropitious to my health and spirits, and cast a premature shade over the happiness of declining years.

The following Lectures are the fruit of the acceptance of that trust; and, in the performance of my collegiate duty, I had the satisfaction to meet a collection of interesting young gentlemen, of fine talents and pure character, who placed themselves under my instruction, and in whose future welfare a deep interest is felt.

[1] I was appointed Recorder of New York in March, 1797, and from that time until August, 1823, I was constantly employed in judicial duties.

Having been encouraged to suppose that the publication of the Lectures might render them more extensively useful, I have been induced to submit the present volume to the notice of students, and of the junior members of the profession, for whose use they were originally compiled. Another volume is wanting, to embrace all the material parts of the Lectures which have been composed. It will treat, at large, and in an elementary manner, of the law of property, and of personal rights and commercial contracts; and will be prepared for the press in the course of the ensuing year, unless, in the mean time, there should be reason to apprehend that another volume would be trespassing too far upon the patience and indulgence of the public.

New York, November 23, 1826.

PREFACE

TO THE SECOND VOLUME.

When the first volume of these Commentaries was published, it was hoped and expected that a second would be sufficient to include the remainder of the Lectures which had been delivered in Columbia College. But, in revising them for the press, some parts required to be suppressed, others to be considerably enlarged, and the arrangement of the whole to be altered and improved. A third volume has accordingly become requisite,[1] to embrace that remaining portion of the work which treats of commercial law, and of the doctrines of real estates, and the incorporeal rights and privileges incident to them.

It is probable that, in some instances, I may have been led into more detail than may be thought consistent with the plan of the publication. My apology is to be found in the difficulty of being really useful on some branches of the law, without going far into practical illustrations, and stating, as far as I was able, with precision and accuracy, the established distinctions. Such a detail, however, has been, and will hereafter be, avoided as much as possible; for the knowledge that is intended to be communicated in these volumes is believed to be, in most cases, of general application, and is of that elementary kind, which is not only essential to every person who pursues the science of the law as a practical profession, but is deemed

[1] This appeared in 1828, and a fourth volume was required, and appeared in 1830.

useful and ornamental to gentlemen in every pursuit, and especially to those who are to assume places of public trust, and to take a share in the business and in the councils of our country.

NEW YORK, November 17, 1827.

NOTE BY THE AUTHOR.—When the *N. Y. Revised Statutes* are cited in this work, the first edition, of 1829, is generally referred to; and if the last edition, of 1846, be referred to, it is cited as *New York Revised Statutes, 3d edition*; and if the citation of the *3d edition* be by the page, the reference is to the new paging at the top of each leaf. Whenever I have had occasion to refer, in this new edition of the Commentaries, to any of the New York statutes, I have always cited from the 3d edition; but, in other respects, the reference to the 1st edition of the New York Revised Statutes remains undisturbed; and I have not thought it worth the trouble of altering that reference, inasmuch as the paging to the first edition of the statutes is preserved in the margin to the 3d edition.

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COMMENTARIES

ON

AMERICAN LAW.

PART I.

OF THE LAW OF NATIONS.

LECTURE I.

OF THE FOUNDATION AND HISTORY OF THE LAW OF NATIONS.

When the United States ceased to be a part of the British empire, and assumed the character of an independent nation, they became subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe, as their public law. During the war of the American revolution, Congress claimed cognizance of all matters arising upon the law of nations, and they professed obedience to that law, "according to the general usages of Europe." (*a*) By this law we are to understand that code of public instruction which defines the rights and prescribes the duties of nations, in their intercourse with each other.[1] The faithful observance of this law is essential to national

(*a*) Ordinance of the 4th December, 1781, relative to maritime captures. Journals of Congress, vii. 185. The English judges have frequently declared that the law of nations was part of the common law of England. Triquet *v.* Bath, 3 Burr. 1478; Heathfield *v.* Chilton, 4 ib. 2015; and it is well settled that the common law of England, so far as it may be consistent with the constitutions of this country, and remains unaltered by statute, is an essential part of American jurisprudence. *Vide infra*, 342, 472, 473.

[1] For other definitions, see Wheat. pt. 1, c. 1, Dana's note, 9; Aust. Jur. lect. 6, 3d ed. 231.

International Law is p. the better title. Wheat. Dana's ac ; Woolsey, Introd. § 9; Abdy's Kent, 4, Twiss, Law of Nat. pt. 1, § 85; cf. Aust. Jur. lect. 5, 3d ed. 177; *post*, 51, n. (*b*). The *jus gentium* of the Roman lawyers is now understood to have meant something very different from the modern international law. It was "a collection of rules and principles, determined by observation to be common to the institutions which prevailed among the various Italian tribes." "The *jus naturale*, or Law of Nature, is simply the *jus gentium*, . . . seen in the light of a peculiar theory. . . . The confusion between Jus Gentium, or law common to all nations, and *international law* is entirely modern." Maine, Anc. Law, c. 3, Am. ed. pp. 48, 50. See Aust. Jur. lect. 31; Gaii. Inst. 1, § 1.

character, and to the happiness of mankind. According to the observation of Montesquieu, (*b*) it is founded on the principle

that different nations ought to do each other as much good * 2 in peace, and as * little harm in war, as possible, without injury to their true interests. But as the precepts of this code are not defined in every case with perfect precision, and as nations have no common civil tribunal to resort to for the interpretation and execution of this law, it is often very difficult to ascertain, to the satisfaction of the parties concerned, its precise injunctions and extent; and a still greater difficulty is the want of adequate pacific means to secure obedience to its dictates.

There has been a difference of opinion among writers, concerning the foundation of the law of nations. It has been considered by some as a mere system of positive institutions, founded upon consent and usage; while others have insisted that it was essentially the same as the law of nature, applied to the conduct of nations, in the character of moral persons, susceptible of obligations and laws. We are not to adopt either of these theories as exclusively true. The most useful and practical part of the law of nations is, no doubt, instituted or positive law, founded on usage, consent, and agreement. But it would be improper to separate this law entirely from natural jurisprudence, and not to consider it as deriving much of its force and dignity from the same principles of right reason, the same views of the nature and constitution of man, and the same sanction of Divine revela-

(*b*) L'Esprit des Loix, b. 1, c. 3.

These chapters of Austin and Maine show the derivation of the theory in question from doctrines of the Stoic philosophy, which were held by many of the Roman jurists. See also Heinecc. Elem. Juris. Civ. sec. ord. Pand. 1. 1. § 12. The origin of the modern law of nations is well explained in Mr. Maine's fourth chapter. [See Hall, Int. Law, Appen. I.]

Austin was further of the opinion, which he sustained by arguments of great force, that international law, so called, is not properly law at all, but a branch of morality, as it does not consist of commands propounded by a political superior to a political inferior and enforced by penalties to be incurred in case of disobedience. Aust. Jur. lect. 5 and 6, *supra*; 6 Am. Law Rev. 340. But other writers have thought this too narrow a view. Manning's Law of N. 4; Twiss, Law of N. pt. 1, §§ 96, 97; 5 Am. Law Rev. 4, 5; 6 Am. Law Rev. 723; 1 Law Mag. & Rev. N. S. 189; April, 1872. Of course, when the principles of international law are adopted by statute or judicial decision, they become part of the municipal law of that jurisdiction, and are binding as such. The question is, whether the sovereign power can properly be said to be subject to law.

tion, as those from which the science of morality is deduced. There is a natural and a positive law of nations. By the former, every state, in its relations with other states, is bound to conduct itself with justice, good faith, and benevolence; and this application of the law of nature has been called by Vattel the necessary law of nations, because nations are bound by the law of nature to observe it; and it is termed by others the internal law of nations, because it is obligatory upon them in point of conscience. (*c*)

We ought not, therefore, to separate the science of public law from that of ethics, nor encourage the dangerous * suggestion that governments are not so strictly bound * 3 by th obligations of truth, justice, and humanity, in relation to other powers, as they are in the management of their own local concerns. States, or bodies politic, are to be considered as moral persons, having a public will, capable and free to do right and wrong, inasmuch as they are collections of individuals, each of whom carries with him into the service of the community the same binding law of morality and religion which ought to control his conduct in private life. (*a*) The law of nations is a complex system, composed of various ingredients. It consists of general principles of right and justice, equally suitable to the government of individuals in a state of natural equality, and to the relations and conduct of nations; of a collection of usages, customs, and opinions, the growth of civilization and commerce; and of a code of conventional or positive law. (*b*)

(*c*) Vattel, Prelim. sec. 7. Omni autem in re consensio omnium gentium lex naturæ putanda est. — Cic. Tusc. Disp. 1, 13. Heineccius, in his Elementa Juris Naturæ et Gentium, b. 1, c. 1 and 3 (and which is very excellent as to the first branch of the subject), and all the other great masters of ethical and national jurisprudence, place the foundation of the law of nature in the will of God, discoverable by right reason, and aided by Divine revelation; and its principles, when applicable, apply with equal obligation to individuals and to nations. A recent French writer (M. Victor Foucher) divides the law of nations into two branches. (1.) *Public* international law, which regulates the political relation of nation to nation; and (2.) *private* international law, which, though based upon the first, regulates the reciprocal and personal relations of the inhabitants of different states.

(*a*) Dr. Francis Lieber, in his Manual of Political Ethics, 2 vols., Boston, 1838, has shown with great force, and by the most striking and apposite illustrations, the original connection between right and morality, and the reason and necessity of the application of the principles of ethics to the science of politics and the administration of government. The work is excellent in its doctrines, and it is enriched with various and profound erudition.

(*b*) 2 Mason, 448, Story J.

In the absence of these latter regulations, the intercourse and conduct of nations are to be governed by principles fairly to be deduced from the rights and duties of nations, and the nature of moral obligation; and we have the authority of the lawyers of antiquity, and of some of the first masters in the modern school of public law, for placing the moral obligation of nations and of individuals on similar grounds, and for considering individual and national morality as parts of one and the same science. (*c*)

The law of nations, so far as it is founded on the principles of natural law, is equally binding in every age, and upon all mankind. But the Christian nations of Europe, and their descendants on this side of the Atlantic, by the vast superiority of their attainments in arts, and science, and commerce, as well as in policy and government, and, above all, by the brighter light, the more certain truths, and the more definite sanction which Christianity has communicated to the ethical jurisprudence of

the ancients, have established a law of nations peculiar to
*4 themselves. They *form together a community of nations
united by religion, manners, morals, humanity, and science, and united also by the mutual advantages of commercial intercourse, by the habit of forming alliances and treaties with each other, of interchanging ambassadors, and of studying and recognizing the same writers and systems of public law. (*a*)

After devoting the present lecture to a cursory view of the

(*c*) A writer in the Edinburgh Review for April, 1843, considers the elements of which the law of nations is composed, as consisting, (1) of *international morality*, being the rules commanded by the Deity, and which may be called the divine or natural law of nations; (2) of *international law*, being rules of conduct sanctioned by the public opinion and usages of civilized nations, and which may be called the human, the actual, the received, or the positive law of nations. The one treats thelaws of nations as a science, and the other as a system of positive rules.

(*a*) The law of nature, by the obligations of which individuals and states are bound, is identical with the will of God, and that will is ascertained, says Mr. Manning, either by consulting Divine revelation, where that is declaratory, or by the application of human reason, where revelation is silent. Christianity, in the words of Butler, "is an authoritative publication of natural religion," and it is from the sanction which revelation gives to natural law that we must expect the gradual increase of the respect paid to justice between nations. Christianity reveals to us a general system of morality, but the application to the details of practice is left to be discovered by human reason. See Commentaries on the Law of Nations, by Wm. Oke Manning, Esq., London, 1839, b. 2, c. 1. This work is the first English treatise which I have seen, containing a regular and didactic discussion of the science, and is a work of great excellence; and I beg leave to recommend it strongly to the attention of the American student.

history of the law of nations, I shall enter upon the examination of the European and American code of international law, and endeavor to collect, with accuracy, its leading principles, and to discuss its practical details.

The law of nations, as understood by the European world, and by us, is the offspring of modern times. The most refined states among the ancients seem to have had no conception of the moral obligations of justice and humanity between nations, and there was no such thing in existence as the science of international law. They regarded strangers and enemies as nearly synonymous, and considered foreign persons and property as lawful prize. Their laws of war and peace were barbarous and deplorable. So little were mankind accustomed to regard the rights of persons or property, or to perceive the value and beauty of public order, that in the most enlightened ages of the Grecian republics piracy was regarded as an honorable employment. There were powerful Grecian states that avowed the practice of piracy; and the fleets of Athens, the best disciplined and most respectable naval force in all antiquity, were exceedingly addicted to piratical excursions. It was the received opinion that Greeks, even as between their own cities and states, were bound to no duties, nor by any moral law, without compact; and that prisoners taken in war had no rights, and might lawfully be put to death, or sold into perpetual slavery, with their wives and children. (*b*)

*There were, however, many feeble efforts, and some successful examples, to be met with in Grecian history, in favor of national justice. The object of the Amphictyonic council was to institute a law of nations among the Greeks, and settle contests between Grecian states by a pacific adjustment.[1] It was also a law of nations among them, and one which was very religiously observed, to allow to the vanquished the privilege of *5

(*b*) Thucydides, b. 1, sec. 5; Mitford's History of Greece, 8vo edit. ii. 352, — vi. 107, 135, *et passim*. Isocrates, Orat. Panathe., Opera, edit. Wolfius, 635. Barbari natura essent hostes. Ward's Inquiry into the History of the Law of Nations, i. 177–183; Goguet's Origine des Loix, &c., pt. 2, b. 5; Grotius, b. 3, c. 7; Justin's Hist. 1, 43, c. 3; Latrocinium maris gloriosum habebatur. Potter's Antiquities of Greece, b. 3, c. 10 and 12, b. 4, c. 21.

[1] It was a religious rather than a political assembly. The text is said to be inaccurate in Abdy's edition. See also Fustel de Coulanges, La Cité Antique, 250, n. 2.

burying their own dead, and to grant the requisite truce for that purpose. Some of these states had public ministers resident at the courts of others, (*a*) and there were some distinguished instances of great humanity shown to prisoners of war. During a cessation of arms in the course of the Peloponnesian war, Athens and Sparta agreed to an exchange or mutual surrender of prisoners. (*b*) The sound judgment and profound reflections of Aristotle naturally raised his sense of right above the atrocious maxims and practices of his age, and he perceived the injustice of that doctrine of Grecian policy, that, by the laws of war, the vanquished became the absolute property of the victor. "Wise men," he observed, "entertained different opinions upon that subject. Some considered superiority as a proof of virtue, because it is its natural effect, and they asserted it to be just that the victors should be masters of the vanquished; whilst others denied the force of the argument, and maintained that nothing could be truly just which was inconsistent with humanity." (*c*) He then proceeded to weaken by argument the false foundations on which the law of slavery, by means of capture in war, was established; and though he does not write on the subject very distinctly or forcibly, it seems to be quite apparent that his convictions were against the law.

The Romans exhibited much stronger proofs than the Greeks of the influence of regular law, and there was a marked
* 6 difference between those nations in their intercourse * with foreign powers. It was a principle of the Roman government, that none but a sworn soldier could lawfully fight the enemy; and in many instances the Romans showed that they excelled the Greeks, by the observance of better principles in their relations with other nations. The institution of a college of heralds or priests, charged with the fecial law relating to declarations of war and treaties of peace, was evidence of a people considerably advanced in the cultivation of the law of nations as a science; (*a*)[1] and yet with what little attention *they* were

(*a*) Mitford's History, v. 378, 379. (*b*) Thucyd. 1, 5, c. 18.
(*c*) Gillies' Aristotle's Politics, ii. 35, 36.
(*a*) Livy, b. 1, c. 32; ib. b. 9, c. 5; ib. 36, c. 3; Cicero de Off. 1, 11. The *colle-*

[1] Mr. Abdy, in his edition of this volume, thinks that the function of the *feciales* was only ministerial, and consisted in seeing that the proper forms were observed in declaring war. p. 17.

accustomed to listen to the voice of justice and humanity, appears but too plainly in their haughty triumphs, their cunning interpretation of treaties, their continual violation of justice, their cruel rules of war, and the whole series of their wonderful successes, in the steady progress of the conquest of the world. The perusal of Livy's magnificent history of the rise and progress of the Roman power excites our constant admiration of the vigor, the skill, the valor, and the fortitude of the Roman people; yet, notwithstanding the splendor of the story, and the attractive simplicity of the writer, no reader of taste and principle can well avoid feeling a thorough detestation of the fierce spirit of conquest which it displays, and of the barbarous international law and customs of the ancients.

A purer system of public morals was cultivated, and insensibly gained ground, in the Roman state. The cruelties of Marius in the Jugurthan war, when he put part of the inhabitants of a Numidian town to the sword, and sold the rest for slaves, were declared by Sallust (*b*) to be a proceeding *contra jus belli.* At the zenith of the Roman power, the enlarged and philosophical mind of Cicero was struck with extreme disgust, at the excesses in which his countrymen indulged their military spirit. He justly discerned that mankind were not intended, by the law and constitution of their nature, as rational and social beings, to live in eternal enmity with each other; and he recommends, in one of the most beautiful and perfect ethical codes to be met with
* among the remains of the ancients, the virtues of humanity, * 7
liberality, and justice towards other people, as being founded in the universal law of nature. Their ancestors, he observed, applied the term "enemy" to that man whom they regarded merely as a foreigner; but to deny to strangers the use and protection of the city, would be inhuman. To overturn justice by plundering others, tended to destroy civil society, as well as violate the law of nature, and the institutions of heaven; and by some of the most happy illustrations and pathetic examples, Cicero vindicated the truth, and inculcated the value of the precept, that nothing was truly useful which was not honest. (*a*) In the lat-

gium fetialium was instituted, according to legendary story, as early as the reign of Numa Pompilius, and the efficacy of that institution on the rights of war is declared by Cicero, — belli æquitas sanctissime fetiali populi Romani jure prescripta est.

(*b*) Sal. Jug. c. 91.

(*a*) Off. b. 1, sec. 12; b. 3, sec. 5, 6, 7, 11; De Legibus, b. 1.

ter ages of the Roman Empire, when their municipal law became highly cultivated, and adorned by philosophy and science, the law of nations was recognized as part of the natural reason of mankind.[1] Quod vero naturalis ratio inter omnes homines constituit, id apud omnes [gentes][2] peræque custoditur, vocaturque jus gentium, quasi quo jure omnes gentes utuntur. (*b*) The Roman law was destined to obtain the honorable distinction of becoming a national guide to future ages, and to be appealed to by modern tribunals and writers, in cases in which usage and positive law are silent, as one authoritative evidence of the decisions of the law of nations.

It must be admitted, however, that the sages from whose works the Pandects were compiled speak very indistinctly and imperfectly on the subject of national law. They must be read with much discrimination, as Grotius observed, (*c*) for they often call *that* the law of nations which prevailed, and perhaps by casual consent, among some nations only; and many things which belonged to the law of nations they treated indiscriminately with matters of mere municipal law. The Roman jurisprudence, in its most cultivated state, was a very imperfect
* 8 transcript of the precepts of natural * justice on the subject of national duty. It retained strong traces of ancient rudeness, from the want of the Christian system of morals, and the civilizing restraints of commerce. We find the barbarous doctrine still asserted, that prisoners of war became slaves *jure gentium*, (*a*) and even in respect to foreign nations with whom the Romans were at peace, but had no particular alliance, it is laid down in the digests, that whoever passed from one country to the other became immediately a slave. Nam si cum gente aliqua neque amicitiam, neque hospitium, neque fœdus amicitiæ causa factum habemus: hi hostes quidem non sunt: quod autem ex nostro ad eos pervenit, illorum fit: et liber homo noster ab eis captus, servus fit et eorum. Idemque est, si ab illis ad nos aliquid perveniat.(*b*) It is impossible to conceive of a rule of national law more directly calculated to destroy all commercial intercourse, and to maintain eternal enmity between nations.

(*b*) Dig. 1. 1. 9 ; Inst. 1. 2. 1. (*c*) Proleg. sec. 53.
(*a*) Inst. 1. 3. 4 ; Dig. lib. 1, tit. 5, § 5, and lib. 49, tit. 15, c. 12, § 1.
(*b*) Dig. 49. 15. 5. 2.

[1] *Ante*, 1, n. 1. [2] *Populos* in the original passage, Gaii Inst. 1. 1.

The irruption of the northern tribes of Scythia and Germany overturned all that was gained by the Roman law, annihilated every restraint, and all sense of obligation; and civil society relapsed into the violence and confusion of the barbarous ages. Mankind seemed to be doomed to live once more in constant distrust or hostility, and to regard a stranger and an enemy as almost the same. Piracy, rapine, and ferocious warfare deformed the annals of Europe. The manners of nations were barbarous, and their maxims of war cruel. Slavery was considered as a lawful consequence of captivity. Mr. Barrington (*c*) has, indeed, cited the laws of the Visigoths, Saxons, Sicilians, and Bavarians, as restraining, by the severest penalties, the plunder of shipwrecked goods and the abuse of shipwrecked seamen, and as extending the rights of hospitality to strangers.
But notwithstanding * a few efforts of this kind to intro- * 9
duce order and justice, and though municipal law had undergone great improvement, the law of nations remained in a rude and uncultivated state, down to the period of the 16th century. In many instances, shipwrecked strangers were made prisoners, and sold as slaves, without exciting any complaint, or offending any public sense of justice. Numerous cases occurred of acts of the greatest perfidy and cruelty towards strangers and enemies. Prisoners were put to death for their gallantry and brave defence in war. There was no reliance upon the word and honor of men in power. Reprisals and private war were in constant activity. Instances were frequent of the violation of embassies, of the murder of hostages, the imprisonment of guests, and the killing of heralds. The victor in war had his option in dealing with his prisoners, either to put them to death, or reduce them to slavery, or exact an exorbitant ransom for their deliverance. So late as the time of Cardinal Richelieu, it was held to be the right of all nations to arrest strangers who came into the country without a safe-conduct. (*a*)

The Emperor Charlemagne made distinguished efforts to improve the condition of Europe by the introduction of order and the propagation of Christianity; and we have cheering examples, during the darkness of the middle ages, of some recognition of

(*c*) Observations on the Statutes, chiefly the more ancient, 22.
(*a*) Ward's History of the Law of Nations, c. 7, 8, 9.

public law by means of alliances, and the submission of disputes to the arbitrament of a neutral power. Mr. Ward enumerates five institutions, existing about the period of the 11th century, which made a deep impression upon Europe, and contributed, in a very essential degree, to improve the law of nations. (*b*) These institutions were the feudal system, the concurrence of Europe in one form of religious worship and government,

* 10 the * establishment of chivalry, the negotiations and treaties forming the conventional law of Europe, and the settlement of a scale of political rank and precedency.

Of all these causes of reformation, the most weight is to be attributed to the intimate alliance of the great powers as one Christian community. The influence of Christianity was very efficient towards the introduction of a better and more enlightened sense of right and justice among the governments of Europe. It taught the duty of benevolence to strangers, of humanity to the vanquished, of the obligation of good faith, and of the sin of murder, revenge, and rapacity. The history of Europe, during the early periods of modern history, abounds with interesting and strong cases, to show the authority of the church over turbulent princes and fierce warriors, and the effect of that authority in meliorating manners, checking violence, and introducing a system of morals, which inculcated peace, moderation, and justice. The church had its councils or convocations of the clergy, which formed the nations professing Christianity into a connection resembling a federal alliance, and those councils sometimes settled the titles and claims of princes, and regulated the temporal affairs of the Christian powers. The confederacy of the Christian nations was bound together by a sense of common duty and interest in respect to the rest of mankind. It became a general principle of belief and action, that it was not only a right, but a duty, to reduce to obedience, for the sake of conversion, every people who professed a religious faith different from their own. To make war upon infidels was, for many ages, a conspicuous part of European public law; but this gross perversion of the doctrines and spirit of Christianity had at least one propitious effect upon the Christian powers, inasmuch as it led to the cultivation of peace and union between them, and to a more free and civilized intercourse. The notion that it was

(*b*) Ward's History of the Law of Nations, i., 322–328.

lawful to invade and subdue Mahometan and Pagan countries continued very long to sway the minds of men; and it was not till after the age of Grotius and Bacon that *this error *11 was entirely eradicated. Lord Coke (*a*) held that an alliance for mutual defence was unlawful between Christians and Turks; and Grotius was very cautious as to the admission of the lawfulness of alliances with infidels, and he had no doubt that all Christian nations were bound to assist one another against the attacks of infidels. (*b*) Even Lord Bacon (*c*) thought it a matter of so much doubt as to propound it seriously as a question, whether a war with infidels was not first in order of dignity, and to be preferred to all other just temporal quarrels; and whether a war with infidels might not be undertaken merely for the propagation of the Christian faith, without other cause of hostility.

The influence of chivalry was beneficial upon the laws of war.[1] It introduced declarations of war by heralds; and to attack an enemy by surprise was deemed cowardly and dishonorable. It dictated humane treatment to the vanquished, courtesy to enemies, and the virtues of fidelity, honor, and magnanimity in every species of warfare.

The introduction and study of the civil law must also have contributed largely to more correct and liberal views of the rights and duties of nations. It was impossible that such a

(*a*) 4 Inst. 155.

(*b*) Grotius, b. 2, c. 15, sec. 11, 12. The university of Salamanca, as early as 1550, decided in favor of Las Casas upon the thesis maintained by Sepulveda, and refuted by Las Casas, that it was a right and duty to make war upon Pagans and Heretics, in order to propagate the true faith. But the minds of men in Catholic countries remained long unsettled on this point, and the doctrines of Sepulveda are said to have been sanctioned within the period of the last fifty years, by the Royal Academy of History at Madrid. (Dict. Hist. art. Sepulveda. Verplanck's Discourse before the New York Historical Society, 1818.) Even as late as 1718, the Emperor Charles VI. commissioned two ships of war to cruise "through any seas, far and wide, to follow and pursue any such as are the enemies of our august house, *but chiefly the enemies of the Christian name.*" The commission was dated at Vienna, July 16, 1718. But afterwards the commission was restricted by an additional instruction, dated at Brussels, 28th September, 1718, to war "against the Spaniards, but not against any other power, *though even enemies to the Christian name.*" See the commission at large in Callender's Voyages, iii. 447, 450.

(*c*) Bacon's Works, iii. 472, 492.

[1] Maine, Anc. Law, c. 4, explains the influence of feudalism on international law. [See also Amos, Lect. on Int. Law, p. 21.]

refined and wise system of municipal and ethical jurisprudence as the Roman law could have been taught in universities and schools, and illustrated by a succession of eminent civilians, who were worthy of being associated with the Roman sages, without at the same time producing a great effect upon the public mind. This grand monument of the embodied wisdom of the ancients, when once known and examined, must have reflected a broad stream of light upon the feudal institutions and the public councils of the European nations. We accordingly find that the rules of the civil law were applied to the government of national
* 12 rights, and they have * contributed very materially to the erection of the modern international law of Europe. From the 13th to the 16th century all controversies between nations were adjudged by the rules of the civil law.

Treaties, conventions, and commercial associations had a still more direct and visible influence in the formation of the great modern code of public law. They gave a new character to the law of nations, and rendered it more and more of a positive or instituted code. Commercial ordinances and conventions contributed greatly to improve and refine public law and the intercourse of nations, by protecting the persons and property of merchants in cases of shipwreck, and against piracy, and against seizure and arrest upon the breaking out of war. Auxiliary treaties were tolerated, by which one nation was allowed to be an enemy to a certain extent only. Thus, if in time of peace a defensive treaty had been made between one of the parties to a subsequent war and a third power, by which a certain number of troops were to be furnished in case of war, a compliance with this engagement implicated the auxiliary as a party to the war, *only so far* as her contingent was concerned. The nations of Europe had advanced to this extent in diplomatic science as early as the beginning of the 13th century, and such a refinement was totally unknown to the ancients. (*a*) Treaties of subsidy showed also the progress of the law of nations. The troops of one nation, to a definite extent, could be hired for the

(*a*) Under Henry III., in 1240, the Flemings obtained leave to carry on their trade as usual, when England and France were at war, so long as they took no other part in the war than what their earl, under his feudal relation to the crown of France, was called upon by reason of his homage to perform. Southey's Early Naval History of England, i. 180.

service of one of the belligerents, without affording ground for hostility with the community which supplied the specific aid. The rights of commerce began to be regarded as under the protection of the law of nations, and Queen Elizabeth complained of the Spaniards, that they had prohibited commerce in the Indian seas, contrary to that law.

The efforts that were made, upon the revival of commerce, to suppress piracy and protect shipwrecked property show a returning sense of the value and of the obligations of national justice. The case of shipwrecks may be cited, and dwelt upon for a moment, as a particular and strong instance *of *13 the feeble beginnings, the slow and interrupted progress, and final and triumphant success of the principles of public right. Valin (*a*) imputes the barbarous custom of plundering shipwrecked property, not merely to the ordinary cupidity for gain, but to a more particular and peculiar cause. The earliest navigators were almost all pirates, and the inhabitants of the coasts were constantly armed against their depredations, and whenever they had the misfortune to be shipwrecked, they were pursued with a vindictive spirit, and deemed just objects of punishment. The practice of plundering shipwrecks has been traced to the Rhodians, and from them it passed to the Romans; and the efforts to restrain it were very feeble and gradual, and mixed with much positive injustice. The goods cast ashore first belonged to the fortunate occupant, and then they were considered as belonging to the state. This change from private to public appropriation of the property rendered a returning sense of right and duty more natural and easy. The Emperors Hadrian and Antoninus had the honor of having first renounced the claim to shipwrecked property in favor of the rightful owner. (*b*) But the inhuman customs on this subject were too deeply rooted to be eradicated by the wisdom and vigilance of the Roman lawgivers. The laws in favor of the unfortunate were disregarded by succeeding emperors, and when the empire itself was overturned by the northern barbarians, the laws of humanity were swept away in the tempest; and the continual depredations of the Saxons and Normans induced the inhabitants of the western coasts of Europe to treat all navigators, who were thrown by the

(*a*) Com. sur Ord. ii. 579–587.

(*b*) Vinnius in Inst. lib. 2, tit. 1, art. 47, note 5; Valin, *ubi supra*.

perils of the sea upon their shores, as pirates, and to punish them as such, without inquiry or discrimination.

The Emperor Andronicus Comnenus, who reigned at Constantinople in 1183, made great efforts to repress this inhuman
* 14 practice. His edict was worthy of the highest * praise, but it ceased to be put in execution after his death. Pillage had become an inveterate moral pestilence. It required something more effectual than papal bulls and the excommunication of the church to stop the evil. The revival of commerce, and with it a sense of the value of order, commercial ordinances, particular conventions and treaties between sovereigns, contributed gradually to suppress this criminal practice, by rendering the regulations on that subject a branch of the public law of nations. Valin says, it was reserved for the ordinances of Louis XIV. to put the finishing stroke to this species of piracy, by declaring that shipwrecked persons and property were placed under the special protection and safeguard of the crown; and the punishment of death, without hope of pardon, was pronounced against the guilty. (*a*) [1]

The progress of moderation and humanity in the treatment of prisoners is to be imputed to the influence of Christianity, and of conventional law, establishing a general exchange of prisoners, rank for rank, and giving protection to cartel ships for that purpose. It is a practice of no very ancient introduction among the states of Europe, and it was not of very familiar use in the age of Grotius, and it succeeded the elder practice of ransom. From the

(*a*) The sense of justice, in respect to shipwrecks and piracy, has made its way into the kingdom of Siam, in Eastern India; and by a treaty with the United States, in April, 1836, persons and property in American vessels, suffering shipwreck in the Siamese dominions, or taken by pirates and brought therein, are to be carefully protected, preserved, and restored. By the treaty of commerce and navigation between the United States and Hanover, May 20, 1840, art. 8, assistance is to be given to the shipwrecked and stranded vessels, and no more than the ordinary salvage or duties, on unlading the cargo for repairs in such cases, shall be demanded. The treaty likewise specially declares, "that the ancient and barbarous right to wrecks of the sea shall be entirely abolished, with respect to the property of the subjects or citizens of the contracting parties." Such a stipulation between two civilized and Christian nations, near the middle of the 19th century, sounds oddly, and might as well have been spared.

[1] See Lawrence's Wheaton, App. 2; Treaties of the United States with Borneo, 10 U. S. St. at L. 909, art. 8; with Lew-Chew, ib. 1101; and with Japan, 11 id. 597, art. 8.

extracts which Dr. Robinson (*b*) gives from Bellus, who was a judge or assessor in the armies of Charles V. and Philip II., he concludes that no practice so general, and so favorable to the conduct of prisoners, as a public exchange in time of war, was known in the 16th century. (*c*) The private interest of the captor in his prisoner, and his right to claim ransom money, continued through that period; and the practice of ransom, founded on the right of property claimed by the captor, succeeded to the Greek and Roman practice of killing prisoners, or selling them as slaves.

The custom of admitting resident ministers at each sovereign's court was another important improvement in the security and facility of national intercourse; (*d*) and this led * to *15 the settlement of a great question, which was very frequently discussed in the 15th and 16th centuries, concerning the inviolability of ambassadors. It became at last a definitive principle of public law, that ambassadors were exempted from all local jurisdiction, civil and criminal; though Lord Coke considered the law in his day to be, that if an ambassador committed any crime which was not merely *malum prohibitum*, he lost his privilege and dignity as an ambassador, and might be punished as any other private alien, and that he was even bound to answer civilly for his contracts that were good, *jure gentium*. (*a*)[1]

Thus stood the law of nations at the age of Grotius. It had

(*b*) 3 Rob. Adm., Appendix A.

(*c*) When Sir Richard Hawkins, in his armed ship Dainty, was captured in the South Sea, after a desperate engagement, in 1594, the Spanish commander, Don Beltran, an officer of great gallantry, courtesy, and humanity, claimed, nevertheless, a property in his prisoner, and the right to a ransom. Callender's Voyages, ii. 126, 134. The custom of enslaving prisoners of war was continued in Europe down to the 13th century, and was then extinguished, though asserted even by Grotius, De Jure Belli, lib. 3, c. 7, to be conformable to the law of nations. It was discontinued under the influence of Christianity, though the right to the ransom of prisoners as the subjects of property was continued to a much later period.

(*d*) Ferdinand the Catholic is said to have introduced the practice of resident ministers. Prescott's Hist. of Ferdinand and Isabella, i. 352. The right of sending public ministers to the confederate states, and to foreign states, is preserved to all the princes and states composing the present Germanic Confederation (1844), and so it is in that of the Swiss Cantons; but the privilege is wisely taken away from the several states by the Constitution of the United States of America.

(*a*) 4 Inst. 153.

[1] Magdalena Steam Nav. Co. *v.* Martin, 2 El. & El. 94; Taylor *v.* Best, 14 C. B. 487.

been rescued, to a very considerable extent, from the cruel usages and practices of the barbarians. It had been restored to some degree of science and civility by the influence of Christianity, the study of the Roman law, and the spirit of commerce. It had grown in value and efficacy, from the intimate connection and constant intercourse of the modern nations of Europe, who were derived from a common origin, and were governed by similar institutions, manners, laws, and religion. But it was still in a state of extreme disorder, and its principles were little known, and less observed. It consisted of a series of undigested precedents, without order or authority. Grotius has, therefore, been justly considered as the father of the law of nations. He arose like a splendid luminary, dispelling darkness and confusion, and imparting light and security to the intercourse of nations. It is said by Barbeyrac, (*b*) that Lord Bacon's works first suggested to Grotius the idea of reducing the law of nations to the certainty and precision of a regular science. Grotius has himself fully explained the reasons which led him to undertake his necessary, and most useful and immortal work. (*c*) He found the sentiment

universally prevalent, not only among the vulgar, but
* 16 among men of reputed wisdom and learning, that war * was

a stranger to all justice, and that no commonwealth could be governed without injustice. The saying of Euphemus in Thucydides, he perceived to be in almost every one's mouth, that nothing which was useful was unjust. Many persons, who were friends to justice in private life, made no account of it in a whole nation, and did not consider it as applicable to rulers. He perceived a horrible licentiousness and cruelty in war, throughout the Christian world, of which barbarians might be ashamed. When men took up arms, there was no longer any reverence for law, either human or divine; and it seemed as if some malignant fury was sent forth into the world, with a general license for the commission of all manner of wickedness and crime. (*a*)

The object of Grotius was to correct these false theories and pernicious maxims, by showing a community of sentiment among the wise and learned of all nations and ages, in favor of the natural law of morality. He likewise undertook to show that justice was of perpetual obligation, and essential to the well-being

(*b*) Puff. sec. 29. (*c*) Proleg. De Jur. Bel.

(*a*) Proleg. sec. 3 and 28.

of every society, and that the great commonwealth of nations stood in need of law, and the observance of faith, and the practice of justice. His object was, to digest in one systematic code the principles of public right, and to supply authorities for almost every case in the conduct of nations; and he had the honor of reducing the law of nations to a system, and of producing a work which has been resorted to as the standard of authority in every succeeding age. The more it is studied, the more will our admiration be excited at the consummate execution of the plan, and the genius and erudition of the author. There was no system of the kind extant that had been produced by the ancient philosophers of Greece, or by the primitive Christians. The work of Aristotle on the rights of war, and the writings of the Romans on their fecial law, had not survived the wreck of ancient literature; and the essays of some learned

moderns on public law were* most imperfect, and exceed- *17
ingly defective in illustrations from history, and in omitting to place their decisions upon the true foundations of equity and justice. (*a*) Grotius, therefore, went purposely into the details of history and the usages of nations, and he resorted to the works of philosophers, historians, orators, poets, civilians, and divines for the materials out of which the science of public morality should be formed; proceeding on the principle, that when many men, at different times and places, unanimously affirmed the same thing for truth, it ought to be ascribed to some universal cause. (*b*) His unsparing citation of authorities, in support of what the present age may consider very plain and undisputed truths, has been censured by many persons as detracting from the value of the work. On the other hand, the support that he gave to those truths, by the concurrent testimony of all nations and ages, has been justly supposed to contribute to that reverence for the principles of international justice which has since distinguished the European nations.

Among the disciples of Grotius, Puffendorf has always held the first rank. His work went more at large into the principles of natural law, and combined the science of ethics with what may be more strictly called the law of nations. It is copious in

(*a*) Proleg. of Grot. sec. 36, 37, 38.

(*b*) Omni autem in re consensio omnium gentium lex natura putanda est. Cic. Tusc. Disp. lib. 1, c. 13.

detail, but of very little practical value in teaching us what the law of nations is at this day. It is rather a treatise on moral philosophy than on international law; and the same thing may be said of the works of Wolfius, Burlamaqui, and Rutherforth. The summary of the law of nations, by Professor Martens, is a treatise of greater practical utility, but it is only a very partial view of the system, being confined to the customary and conventional law of the modern nations of Europe. (*c*) Bynkershoek's treatise on the laws of war has been received as of great authority on that particular branch of the science of the law of *18 nations, and the subject is by him ably and copiously * discussed. The work is replete with practical illustration, though too exclusive in its references to the ordinances of his own country to render his authority very unquestionable. The most popular and the most elegant writer on the law of nations is Vattel, whose method has been greatly admired. He professed to have followed the voluminous work of Wolff on the Law of Nature and Nations, and to be enlightened and guided by his learning, with much improvement upon the doctrine and arrangement of his great master. He has been cited, for the last half-century, more freely than any one of the public jurists; but he is very deficient in philosophical precision. His topics are loosely and often tediously and diffusively discussed, and he is not sufficiently supported by the authority of precedents, which constitute the foundation of the positive law of nations. There is no work which combines, in just proportions and with entire satisfaction, an accurate and comprehensive view of the necessary and of the instituted law of nations, and in which principles are sufficiently supported by argument, authority, and example. (*y*) Since the age of Grotius, the code of war has been

(*c*) Wheaton, in his History of the Law of Nations, edit. N. Y. 1845, says that the treatise of Martens, of which a third edition in French appeared in 1821, Précis du Droit des Gens Modernes de l'Europe fondé sur les Traités et l'Usage, has become a justly esteemed manual of the science.

(*y*) [The most considerable additions to the literature of international law since 1873 are the work of Hall, already cited, the discussions of various questions of international law found in the Revue de Droit International, and the reports of the meetings of the Institut de Droit International, which are given in the Revue de Droit International. While it cannot be said that the modifications and ameliorations of international law advocated in these writings have become a part of the law, yet there can be no doubt that such writings and discussions will prove a considerable influence

vastly enlarged and improved, and its rights better defined, and its severities greatly mitigated. The rights of maritime capture, the principles of the law of prize, and the duties and privileges of neutrals, have grown into very important titles in the system of national law. We now appeal to more accurate, more authentic, more precise, and more commanding evidence of the rules of public law, by a reference to the decisions of those tribunals to whom, in every country, the administration of that branch of jurisprudence is specially intrusted. We likewise appeal to the official documents and ordinances of particular states, which have professed to reduce into a systematic code, for the direction of their own tribunals, and for the information of foreign powers, the law of nations on those points which relate particularly to the rights of commerce and the duties of neutrality. (*x*) But in the absence of higher and more authoritative sanctions, the ordinances of foreign states, the opinions of eminent statesmen, and the writings of distinguished jurists are regarded as of great consideration on questions not settled by conventional law. In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their *maxims; and no civilized nation that does not *19 arrogantly set all ordinary law and justice at defiance will venture to disregard the uniform sense of the established writers on international law. England and the United States have been equally disposed to acknowledge the authority of the works of jurists writing professedly on public law and the binding force of the general usage and practice of nations, and the still greater respect due to judicial decisions recognizing and enforcing the law of nations.[1] In all our foreign negotiations and domestic discussions of questions of national law we have paid the most implicit respect to the practice of Europe and the opinions of her most distinguished civilians. In England, the report made in 1753, to the king, in answer to the Prussian memorial, is very satisfactory evidence of the obedience shown to the great stand-

in shaping the development of the law, when circumstances arise which force nations to a consideration and determination of the points involved. — B.]

[1] Wheaton, Dana's note 11.

(*x*) In ascertaining facts within the judicial notice of the courts, the judges may properly inquire of the Department of State, when they relate to international affairs. Jones *v.* United States, 137 U. S. 202.

ing authorities on the law of nations, to which I have alluded. And in a case which came before Lord Mansfield, in 1764, in the K. B., (*a*) he referred to a decision of Lord Talbot, who had declared that the law of nations was to be collected from the practice of different nations and the authority of writers; and who had argued from such authorities as Grotius, Barbeyrac, Bynkershoek, Wicquefort, &c., in a case where British authority was silent. The most celebrated collections and codes of maritime law, such as the *Consolato del Mare*, the laws of Oleron, the laws of the Hanseatic league, and, above all, the marine ordinances of Louis XIV., are alsc referred to as containing the most authentic evidence of the immemorial and customary law of Europe. (*y*)

(*a*) Triquet *v.* Bath, 3 Burr, 1478.

(*y*) Amos, in his Lectures on International Law, gives the following as the sources of international law: I. Eminent writers. II. Ancient laws. III. Treaties. IV. Diplomatic documents. V. Decisions of tribunals.

In Reg. *v.* Keyn, 2 Ex. D. 63, Brett, J. A. said (p. 132): "In my opinion, the long list of great authorities to which I have referred and the constant practice of the English International Court, nay, I think, of all English Courts, show that it is considered that all countries have recognized that the consent of them all, as sovereigns, may and should be inferred in favor of a reasonable proposition from a common consent to it of all, or of such a considerable number as to amount substantially to all, recognized writers on international law, although there be no other evidence of their sovereign assent." Lord Coleridge (p. 154) said: "Treaties and acts of state are but evidence of the agreement of nations, and do not in this country at least *per se* bind the tribunals. Neither, certainly, does a consensus of jurists; but it is evidence of the agreement of nations on international points; and on such points, when they arise, the English Courts give effect, as part of the English law, to such agreement. Regarding jurists, then, in the light of witnesses, it is their competency rather than their ability which most concerns us." And Cockburn, C. J. (p. 202) said: "Writers on international law, however valuable their labors may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding, the law must have received the assent of the nations who are to be bound by it. This assent may be express, as by treaty or the acknowledged concurrence of governments, or may be implied from established usage, — an instance of which is to be found in the fact that merchant vessels on the high seas are held to be subject only to the law of the nation under whose flag they sail, while in the ports of a foreign state they are subject to the local law as well as to that of their own country. In the absence of proof of assent, as derived from one or other of these sources, no unanimity on the part of theoretical writers would warrant the judicial application of the law on the sole authority of their views or statements. Nor, in my opinion, would the clearest proof of unanimous assent on the part of other nations be sufficient to authorize the tribunals of this country to apply, without an Act of Parliament, what would practically amount to a new law.

The dignity and importance of this branch of jurisprudence cannot fail to recommend it to the deep attention of the student; and a thorough knowledge of its principles is necessary to law-

In so doing we should be unjustifiably usurping the province of the legislature."

In the arguments before the Behring Sea Tribunal of Arbitration, at Paris, in 1893, Hon. James C. Carter, as counsel, derived International Law mainly from the "Law of Nature," while Sir Charles Russell defined it as follows: "International Law, properly so called, is only so much of the principles of morality and justice as the nations have agreed shall be part of those rules of conduct which shall govern their relations one to another;" and elsewhere said that it "has long passed the stage at which an appeal to any vague, general principles can afford any safe, certain resting-place, or guide at all. It is now, and it has long been, a body of derivative principles and concrete rules, formed by the action and reaction upon each other of custom, moral feeling, and convenience."

Mr. Justice Harlan as one of the arbitrators of this tribunal said (Opinions of Mr. Justice Harlan, p. 133): — "The counsel for the United States contended, in argument, that in determining what rights are recognized by the law of nations, the Tribunal is not to ignore, but must give effect to, those principles of right reason, justice, humanity, and morality which have their foundation in the law of nature as applied to the institution of property. This view was earnestly combated by the counsel of Great Britain, and it was, in effect, said that the teachings and precepts of the law of nature were of no importance in the present inquiry; that the rights of these two nations could not be made to depend, in any degree, upon abstract principles founded only on reason, justice, humanity, or morality, but must be determined upon grounds of positive law, resting in the affirmative assent of the nations, independently of ethical considerations arising out of distinctions which the conscience of the world makes between what is morally right and what is morally wrong, or between what is supported by sound reason and justice and what is not so supported.

"Of course, if there be any settled, recognized rules of the law of nations governing the particular question under consideration, they must control our decision whatever may be our view of their justice. The two nations interested are bound by such rules, and the Tribunal may not disregard them, or refuse to give effect to them. But if the precise case before it is not covered by some positive rule, decision or precedent, founded on the conventions or established usages of the civilized nations of the earth, and expressly set forth in the writings of public jurists, we are not, for that reason, to hold that it is not provided for by the law of nations. As a court sitting under municipal authority would be bound, in the absence of precedent, to give judgment according to the principles of right derived from the whole body of the law to which it may properly refer, so this Tribunal, constituted for the determination of questions depending upon the law of nations, may, and if it fulfils the objects for which it was constituted, must, look into the recognized sources of that law and seek in the domain of general jurisprudence for the rule of decision in the case before it. One of the recognized sources of the law of nations are the principles of natural reason and justice applicable to the relations and intercourse of independent political societies. Those principles may be said to have their origin in the Law of Nature, or in what is sometimes called the Natural Law of Equity, because approved by the moral sense of

yers and statesmen, and highly ornamental to every scholar who wishes to be adorned with the accomplishments of various learning. Many questions arise in the course of commercial

mankind. No earthly tribunal, administering justice between individuals, or between nations, if unfettered by statute, or by binding precedent, may rightfully disregard the rules of reason, morality, humanity, and justice derived from that law. Those rules are not the less binding because not formulated in some book, ordinance, or treaty. Certainly, this Tribunal of Arbitration must regard the rules of international morality and justice, applicable to the subject, and fairly to be deduced from the rights and duties of States and from the nature of moral obligations, as an integral part of the law of nations by which the matters submitted to it are to be determined. The institution of property is ordained by society for its improvement and preservation. And there are certain rules, arising out of the very necessities of that institution, which are common to the jurisprudence of all civilized nations. While these rules may be more frequently found recognized in municipal law, they are so grounded in the well being of man, and so thoroughly supported by right reason, and natural justice, as to have become universally recognized, and, therefore, must be regarded as part of the common law of civilized countries. Nations, no more than individuals, may disregard those rules, for upon their observance depends the existence of organized society and the security of government among civilized peoples." As to the Behring Sea arbitration, see 21 Journal du Droit Int. 36; 25 Revue de Droit Int. 417; 26 id. 386; *infra*, p. 30, n. (*x*).

Other writers speak as follows: "The point of view of international law presents law without any sanction whatever. The parties are all sovereign. There is no superior, and, therefore, no positive law is possible. The appeal in all controversy must be to generally recognized principles of justice and equity. . . . Where there are no treaty rights and no precedents, disputes between nations are often arbitrated by appeal to the principles of national equity." Prof. J. G. Hibben in International Journal of Ethics for Jan. 1894, p. 156, quoted in part in 49 Alb. L. J. 13. "International Law was not declared by a legislature, and it still suffers from want of a regular legislature to improve and to develop it. It is still developed by the antiquated method of writer commenting on writer, no security being nowadays taken for the competence or authority of the writer except vague opinion. . . . International Law suffers also from the absence of any method of authoritatively declaring its tenor on some of its branches, and above all from the absence of any method of enforcing its rules short of war or fear of war." Maine's Int. Law, 52. "We find that the sources of International Law are several and distinct. One writer deduces it from the will of God, a second from the Roman Law, a third from the Canon Law, a fourth from the Law of Nature, a fifth from a supposed commonwealth or society of nations existing as moral beings, a sixth from principles of utility, a seventh from treaties and practices, and others from an amalgamation of some or all of these particular sources." Griffith on Int. Law, p. 25.

The necessity of a codification of the rules of International Law, and of an International Court of Justice, is generally recognized. See 21 Revue de Droit International, 521; 25 id. 321, 521, 569; 26 id. 349, 511; 30 L. J. 226; 24 Am. L. Rev. 114. Upon international arbitration, see 24 Am. L. Rev. 897; 8 Harvard L. Rev. 107. Upon the early history of International Law, see 26 Revue de Droit Int. 254, 461.

transactions which require for *their solution an accurate *20 acquaintance with the conventional law of Europe and the general doctrines of the prize tribunals. Though we may remain in peace, there is always war raging in some part of the globe, and we have at the present moment (*a*) neutral rights to exact, and neutral duties to perform, in the course of our Mediterranean trade, and in the trade to the Brazils, and along the shores of the Pacific. A comprehensive and scientific knowledge of international law is highly necessary, not only to lawyers practising in our commercial ports, but to every gentleman who is animated by liberal views and a generous ambition to assume stations of high public trust. It would be exceedingly to the discredit of any person who should be called to take a share in the councils of the nation, if he should be found deficient in the great leading principles of this law; and I think I cannot be mistaken in considering the elementary learning of the law of nations, as not only an essential part of the education of an American lawyer, but as proper to be academically taught. My object, therefore, in some succeeding lectures will be to discuss all the leading points arising upon the rights and duties of nations in the several relations of peace, of war, and of neutrality.

(*a*) November, 1824.

* LECTURE II.

OF THE RIGHTS AND DUTIES OF NATIONS IN A STATE OF PEACE.

A VIEW of the rights and duties of nations in peace will lead us to examine the grounds of national independence, the extent of territorial jurisdiction, the rights of embassy and of commercial intercourse.

1. Right of Interference with other States. — Nations are equal in respect to each other, and entitled to claim equal consideration for their rights, whatever may be their relative dimensions or strength, or however greatly they may differ in government, religion, or manners. This perfect equality, and entire independence of all distinct states, is a fundamental principle of public law. It is a necessary consequence of this equality that each nation has a right to govern itself as it may think proper, and no one nation is entitled to dictate a form of government or religion, or a course of internal policy, to another. No state is entitled to take cognizance or notice of the domestic administration of another state, or of what passes within it as between the government and its own subjects. (*a*) The Spaniards, as

(*a*) Grotius, de Jure Belli et Pacis, b. 1, c. 3, sec. 8; Vattel, Droit des Gens, b. 2, c. 4, sec. 54; Rutherforth's Inst. b. 2, c. 9. The principle of non-interference with the internal policy and government of other states was emphatically declared by England and France in the autumn of 1830, and new strength and solidity were thereby given to national freedom and independence. But the right of intervention exists when impending danger requires it, as when it is necessary to prevent aggression by preventing the dangerous accumulation of the means of attack. An interference to preserve the balance of power among neighboring nations is another case of the utmost moment and difficulty, and requires the most grave and comprehensive consideration. Such intervention has, within the last two centuries, been very frequent, and led to extensive and destructive wars. But it was necessary and just in some of the instances, and pre-eminently so with England in 1803, and with Austria in 1813, under the dangerous preponderance and inveterate aggressions of France. "No governments," said General Washington (Sparks's Writings of Washington, xi. 382), "ought to interfere with the internal concerns of another,

Vattel observes, violated all rules of right, when they set up a tribunal of their own to judge the Inca of Peru according to their laws. If he had broken the law of nations * in respect *22 to them, they would have had a right to punish him; but when they undertook to judge of the merits of his own interior administration, and to try and punish him for acts committed in the course of it, they were guilty of the grossest injustice. No nation had a contention within itself, but the ancient Romans, with their usual insolence, immediately interfered, and with profound duplicity pretended to take part with the oppressed for the sake of justice, though in reality for the purpose of dominion. It was by a violation of the right of national independence that they artfully dissolved the Achæan league, and decreed that each member of the confederacy should be governed by its own laws, independent of the general authority. (*a*) But so surprisingly loose and inaccurate were the theories of the ancients on the subject of national independence, that the Greeks seem never to have questioned the right of one state to interfere in the internal concerns of another. (*b*) We have several instances within time of memory, of unwarrantable and flagrant violations of the independence of nations. The interference of Russia, Prussia, and Austria in the internal government of Poland, and first dismembering it of large portions of its territory, and then finally overturning its constitution, and destroying its existence as an independent power, was an aggravated abuse of national right. There were several cases which preceded or which arose during the violence of the French Revolution which were unjustifiable invasions of the rights of independent nations to prescribe their own forms of government, and to deal in their discretion with their own domestic concerns. Among other instances, we may refer to the invasion of Holland by the Prussian arms in 1787, and of France by the Prussian arms in 1792, and of wars fomented or declared against all monarchical forms of government by the French rulers during *the early and *23

except for the security of what is due to themselves." War may be engaged in behalf of our neighbors, if it be very certain that we must suffer by their ruin. Tua res agitur, paries quum proximus ardet. Heinecc. Elem. Jur. Nat. et Gent. b. 2, c. 9, sec. 107.

(*a*) Livy, b. 33, c. 30; Florus, b. 2, c. 7; Montesq. Consid. sur les Causes de la Grand. des Rom. c. 6.

(*b*) Mitford's Hist. of Greece, v. 127.

more intemperate stages of their revolution. We may cite also the invasion of Naples by Austria in 1821, and the invasion of Spain by France in 1823, under the pretext of putting down a dangerous spirit of internal revolution and reform, as instances of the same violation of the absolute equality and independence of nations.(a)[1] (x)

(a) The British government declined being a party to the promulgated doctrines and proceedings of the congress of the great powers of continental Europe at Troppau and Laybach in 1821, and at Verona in 1822, and which gave sanction to the invasion of Naples and Spain. It was not supposed by Great Britain that there existed in either of those instances a case of such direct and imminent danger to the safety of other states, as to warrant, upon principles of international law, a forcible interference. The allied sovereigns who assembled at Laybach and Verona do not appear to have differed essentially with Great Britain as to the general principles which ought to regulate the interference of other states in the internal affairs of Naples and Spain, but they differed in the application of those principles to the cases before them. They justified their interference on the ground that it was "necessary for protecting Italy from a general insurrection, and the neighboring states from the most imminent dangers;" "that there existed a vast conspiracy against all established power, and against all those rights consecrated by that social order under which Europe had enjoyed so many centuries of glory and happiness." "That, in respecting the rights and independence of all legitimate power, they regarded as disavowed by the principles which constitute the public right of Europe, all pretended reform operated by revolt and open hostility." Their object was to

[1] The origin of the doctrine of equality will be found clearly explained in Maine, Anc. Law, c. 4. For a historical sketch brought down to the present time, see Abdy's Kent, c. 2, pp. 46-88; Wheat pt. 2, c. 1, Lawrence's note 53, and addenda, p. 996; Wheat. Dana's note 41.

(x) Treaties of Protection are treaties in the nature of Unequal Alliance, from which they are principally distinguished by the keeping of a garrison within the Protected State. Swiss' Rights of Nations in Time of Peace (2d ed.), § 247. Thus the seven islands which form the Ionian group, being constituted a sort of commonwealth by the Treaty of Vienna in 1815, were consigned to the protectorate of Great Britain, which had the right of maintaining garrisons in them, and which so held them until 1862, when they were delivered over to the kingdom of Greece. See The Ionian Ships, Spinks' Prize Cases, 193; 1 Phillimore's Int. Law, 101; 50 Albany L. J. 345; 25 Revue de Droit Int. 230, 466; 26 id. 631; 27 id. 49, 355; 21 Journal du Droit Int. 754.

When a protectorate is established by one nation over another, the essential rights of sovereignty, if retained, must be retained *de facto* as well as *de jure;* otherwise it will be regarded as a mere dependence of the governing Power. See 1 Halleck's Int. Law (Baker's 3d ed.), 69. As to the Protectorate over the Mosquito Territory, see Cobbett's Int. Law Cases (2d ed.), 353. As to the French Protectorate over Madagascar, see 10 Law Quarterly Rev. 264; 29 Am. L. Rev. 546. As to the Hawaian islands, see 18 Law Mag. and Rev. (4th Series), 148; 19 id. 172, 313. As to intervention, see 20 id. 239; 26 Revue de Droit Int. 415.

Every nation has an undoubted right to provide for its own safety, and to take due precaution against distant as well as impending danger. The right of self-preservation is paramount to all other considerations. (*b*) A rational fear of an imminent danger is said to be a justifiable cause of war. Posse vicinum impediri, ne in suo solo, sine alia causa suaque evidenti utilitate, munimentum nobis propinquum extruat, aut aliud quid faciat, unde justa formido periculi oriatur. (*c*) The danger must be great, distinct, and imminent, and not rest on vague and uncertain suspicion. The British government officially declared to the allied powers in 1821, (*d*) that no government was more prepared than their own "to uphold the right of any state or states to interfere, where their own security or essential interests were seriously endangered by the internal transactions of another state; that the assumption of the right was only to be justified by the strongest necessity, and to be limited and regulated thereby; that it could not receive a general and indiscriminate application to all revolutionary movements, without reference to their immediate bearing upon some particular state or states;

protect the peace of Europe "against those disastrous attempts which would spread the horror of universal anarchy over the civilized world;" "against a fanaticism for innovation, which would soon have rendered the existence of any public order whatever problematical." "That they were far from wishing to prolong this interference beyond the limits of strict necessity, and would ever prescribe to themselves the preservation of the independence and of the rights of each state." Circular Despatch and Declaration of the Sovereigns of Austria, Russia, and Prussia, Laybach, May, 1821; Annual Register for 1821, p. 599. The quadruple alliance in 1834, between France, Spain, Great Britain, and Portugal, was made for the purpose of putting an end to a war in regard to the succession to the crown of Portugal, waged between the Emperor Don Pedro, contending for the rights of the Queen of Portugal, Donna Maria II., and the Infante Dom Miguel, who had usurped the throne, and also for the purpose of expelling from the Peninsula the Infante Don Carlos, who disputed with Queen Isabella II. the succession to the crown of Spain, and is another instance of interference with the internal concerns of nations. The object of the interference and quadruple alliance was effected by the expulsion of the two Infantes. So far, the armed interference in this case went on the momentous questions of dynasty and succession, and on the pretence of putting an end to a destructive and interminable civil war.

(*b*) Vattel, b. 2, c. 4, sec. 49, 50; Kluber, Droit des Gens, c. 1, p. 75; Grotius, b. 2, c. 1.

(*c*) Huber de Jure Civitatis, lib. 3, c. 7, sec. 4.

(*d*) Lord Castlereagh's Circular Despatch of January 19, 1821, and of May, 1823. Annual Register, lxv. Public Documents. See also Mr. Secretary Canning's Communications in January and March, 1823. Annual Register, lxvi. Public Documents.

that its exercise was an exception to general principles of the greatest value and importance, and as one that only properly grows out of the circumstances of the special case, — and exceptions of this description could never, without the utmost danger, be so far reduced to rule as to be incorporated into the ordinary diplomacy of states, or into the institutes of the law of
* 24 nations." * The limitation to the right of interference with the internal concerns of other states was defined in this instance with uncommon precision; and no form of civil government which a nation may think proper to prescribe for itself can be admitted to create a case of necessity justifying an interference by force; for a nation under any form of civil policy which it may choose to adopt is competent to preserve its faith, and to maintain the relations of peace and amity with other powers.

It is sometimes a very grave question when and how far one nation has a right to assist the subjects of another, who have revolted, and implored that assistance. It is said (*a*) that assistance may be afforded, consistently with the law of nations, in extreme cases, as when rulers have violated the principles of the social compact, and given just cause to their subjects to consider themselves discharged from their allegiance. Vattel mentions the case of the Prince of Orange as a justifiable interference, because the tyranny of James II. had compelled the English nation to rise in their defence, and call for his assistance. The right of interposition must depend upon the special circumstances of the case. It is not susceptible of precise limitations, and is extremely delicate in the application. It must be submitted to the guidance of eminent discretion, and controlled by the principles of justice and sound policy. It would clearly be a violation

(*a*) Vattel, b. 2, c. 4, sec. 56; Rutherforth, b. 2, c. 9. See also Grotius, lib. 2, c. 25, sec. 8; Puff. b. 8, c. 6, sec. 14. The American Secretary of State (Mr. Webster), in his letter to Lord Ashburton, of April 21, 1841, declared, that it was "a manifest and gross impropriety for individuals to engage in the civil conflicts of other states, and thus to be at war, while their government is at peace;" and that "the salutary doctrine of non-intervention by one nation with the affairs of others is liable to be essentially impaired, if, while the government refrains from interference, interference is still allowed to its subjects, individually or in masses;" and that "the United States have been the first among civilized nations to enforce the observance of the just rule of neutrality and peace, by special and adequate legal enactments against allowing individuals to make war on their own authority, or to mingle themselves in the belligerent operations of other nations."

of the law of nations to invite subjects to revolt who were under actual obedience, however just their complaints; or to endeavor to produce discontents, violence, and rebellion in neighboring states, and, under color of a generous assistance, to consummate projects of ambition and dominion. The most unexceptionable precedents are those in which the interference did not take place until the new states had actually been established, and sufficient means and spirit had been displayed to excite a confidence * in their stability. (*a*)[1] The assist- *25 ance that England gave to the United Netherlands when they were struggling against Spain, and the assistance that France

(*a*) The Comm. Pinheiro-Ferreira, in his Cours de Droit Public, ii. 6, 7, very decidedly justifies the recognition, when the revolted people have acquired such stability.

[1] See, as to intervention, the elaborate discussion in Lawrence's Commentaire etc. de H. Wheaton, t. 2, pt. 2, c. 1, III. *et seq.*; [Hall, Int. Law, pt. 2, c. 7;] Halleck, Int. Law, c. 3, § 20; Martens, Nouvelles Causes Célèbres, i. 370 *et seq.* Historicus, in his Letters on International Law, says that it is a question of policy quite outside the law. "Its essence is illegality, and its justification is success." p. 41. [See, however, Hall, Int. Law, *supra.*] See Halleck, Int. Law, c. 4, §§ 4–10.

Recognition of the independence of a revolted state is only lawful when such independence is *de facto* established. Historicus, I. p. 9; *infra*, n. (*e*); [Amos, Lect. on Int. Law, 44, 45.] But the struggle needs not to have been formally abandoned. Wheat. pt. 1, c. 2, Dana's note 16; Halleck, c. 3, §§ 21, 22; Hansard (cited Abdy, 100), clxv. 31; clxxi. 1171; clxxii. 661. The doctrine is incidentally explained in Austin's sixth lecture on jurisprudence, 3d ed. 235 *et seq.* As to recognition of belligerency, Wheat. pt. 1, c. 2, Dana's note 15, and auth. cit.; Hansard (cited Abdy, 106), clxii. 1566.

The principle of the cases at the end of note (*c*), *infra*, is followed in Kenneth *v.* Chambers, 14 How. 38; Jones *v.* Garcia del Rio, Turn. & Russ. 297.

[Hall, Int. Law, 28, says, that recognition of belligerency should be granted only when it is necessary as a matter of self-protection to the granting state.

The concession of belligerent rights by the United States to the Confederate States did not give them the status of an independent nation, (*x*) and did not give them — the rebellion having proved unsuccessful — the right to confiscate debts due to loyal citizens of the United States. Williams *v.* Bruffy, 96 U. S. 176. See generally, as to the relations between the United States and the states in rebellion, Ford *v.* Surget, 97 U. S. 594; Coleman *v.* Tennessee, ib. 509. — B.]

(*x*) In the language of Mr. Justice Matthews in Poindexter *v.* Greenhow, 114 U. S. 270, 290, the civil war of 1861 "was not a war between the States, nor a war of the United States against States, but a war of the United States against unlawful and usurping governments, representing not the States, but a rebellion against the United States." See Johnson *v.* Atlantic, &c., Co., 156 U. S. 618.

gave to this country during the war of our Revolution, were justifiable acts, founded in wisdom and policy. And equally justifiable was the interference of the European powers of France, Great Britain, and Russia, in favor of the Greeks, against the Ottoman Porte, by the treaty for the pacification of Greece, concluded by those three Christian powers in 1827, and by means of which a ferocious and destructive war was terminated by the independence of the Greek state as a new kingdom, and a recognition of that independence by the Ottoman Porte, in 1832. So, also, there was a successful interference, in 1840, of four of the great European powers, Austria, Great Britain, Prussia, and Russia, in the civil war between the Ottoman Porte and Mehemet Ali, the Pacha of Egypt. These, as well as other acts and pacifications, have effectually placed Turkey within the pale of the public law of Europe. And, lastly, there was a memorable interference of the five great European powers in the Belgic revolution of 1830, which ended in the separation of Belgium from Holland, and the establishment of the former as an independent state. The several cases have given recent and practical illustration of the principle of international law, in its application to the preservation of the public peace and security of nations, against internal as well as external violence and oppression. It has been well observed (*b*) that non-interference is the general rule, and cases of justifiable interference form exceptions limited by the necessity of the case. It was stated, on the part of the British ministry, in Parliament, by Lord Palmerston, in 1847, as a rule laid down by writers on the law of nations, that when civil war is regularly established in a country, and when the nation is divided into conflicting armies and opposing camps, the two parties in such war may be dealt with by other powers as if they were separate communities, and that such other powers may take part with one side or the other, according to their sympathies and interests, just as they might in a war between separate and independent nations. Such interference, however justifiable and safe, will be rare, and requires the exercise of eminent discretion. It is not to be doubted that the government of the United States had a perfect right, in the year 1822, to consider, as it then did, the Spanish Provinces in South America as legitimate powers, which had attained sufficient solidity and strength to be en-

(*b*) Wheaton's Elements, p. 120.

titled to the rights and privileges belonging to independent states. (*c*)

Prior to the recognition of the independence of any of the Spanish colonies in America, and during the existence of the civil war between Spain and her colonies, it was the declared policy of the government of the United States, in recognizing the independence of the Spanish American republics, to remain neutral, and to allow to each of the belligerent parties the same rights of asylum and hospitality, and to consider them, in respect to the neutral relation and duties of the United States, as equally entitled to the sovereign rights of war as against each other. (*d*) This was also the judicial doctrine of the Supreme Court, derived from the policy of the government, and seems to have been regarded as a principle of international law. (*e*)

Nations are at liberty to use their own resources in such manner, and to apply them to such purposes as they may deem best, provided they do not violate the perfect rights of other nations, nor endanger their safety, nor infringe the indispensable duties of humanity. They may contract alliances with particular nations, and grant or withhold particular privileges, in their discre-

(*c*) President's Message to Congress of 8th of March, 1822, and act of Congress of 4th of May, 1822, c. 52.

(*d*) President's Message to Congress in 1822.

(*e*) United States *v.* Palmer, 3 Wheaton, 610, 634; The Santissima Trinidad, 7 Wheaton, 283, 337. See also Walley *v.* Schooner Liberty, 12 Louisiana, 98. "The uniform policy and practice of the United States, as declared by President Jackson, in his Message to Congress of the 21st December, 1836, is to avoid all interference in disputes which merely relate to the internal government of other nations, and eventually to recognize the authority of the prevailing party, without reference to the merits of the original controversy. All questions relative to the government of foreign nations, whether of the old or new world, have been treated by the United States as questions *of fact* only, and they have cautiously abstained from deciding upon them, until the clearest evidence was in their possession to enable them to decide correctly." It was further observed, by the American Secretary of State (Mr. Forsyth), in 1837, in his answer to the Texan Envoy, that in determining with respect to the independence of other countries, the United States have never taken the *question of right* between the contending parties into consideration. They have deemed it a dictate of duty and policy to decide upon the question as one *of fact* merely. It belongs to the legislative or executive power according to the character of the government) to recognize the independence of a people in revolt from their foreign sovereign; and until such acknowledgment be made, courts of justice are bound to consider the ancient state of things as remaining unaltered. City of Berne *v.* Bank of England, 9 Vesey, 347; The Manilla, 1 Edw. Adm. 1; Yrisarri *v.* Clement, 3 Bing. 432; Thompson *v.* Powles, 2 Sim. 194; Taylor *v.* Barclay, ib. 213; Rose *v.* Himely, 4 Cranch, 241; Hoyt *v.* Gelston, 13 Johns. 139, 141; United States *v.* Palmer, 3 Wheaton, 610.

tion. By positive engagements of this kind, a new class of rights and duties is created, which forms the conventional law of nations, and constitutes the most diffusive, and, generally, the most important, branch of public jurisprudence. And it is well to be understood, at a period when alterations in the constitutions of governments, and revolutions in states, are familiar, that it is a clear position of the law of nations, that treaties are not affected, nor positive obligations of any kind with other powers or with creditors weakened, by any such mutations. A state neither loses any of its rights, nor is discharged from any of its duties, by a change in the form of its civil government. (*x*) The body

(*x*) By right of military occupation, the conqueror may enforce the collection of debts actually due to the displaced government against debtors in the territory either of the conquered or conquering government. But the conqueror cannot so enforce payment in a neutral State. 2 Halleck's Int. Law (Baker's 3d ed.), p. 461; see *infra*, p. 74, note (*x*). If a revolutionary or *de facto* government is overthrown by the previously existing government, the latter is entitled to all public property belonging to the government at the time of the outbreak. United States *v.* McRae, L. R. 8 Eq. 69. But after the recognition of the revolutionary government by a foreign State, the restored government cannot repudiate contracts made by it with a subject of such foreign State, but in litigation thereon merely takes the rights of the recognized government. Republic of Peru *v.* Dreyfus, 38 Ch. D. 348. See Republic of Peru *v.* Peruvian Guano Co., 36 Ch. D. 489; Republic of Chili *v.* London & River Plate Bank, 10 Times L. R. 658. Probably also if there has been no international recognition, property acquired under such contracts cannot be recovered abroad in violation of such contracts. Ibid.; The Beatrice, 36 L. J. Adm. 9. *See infra*, p. 297, notes.

Although the non-political laws of a conquered or ceded country continue in force until changed by the new government, yet the right to alienate the public domain can only be exercised by its authority. More *v.* Steinbach, 127 U. S. 70. A government which exercises political jurisdiction *de facto* over territory which does not rightfully belong to it, cannot make a valid grant thereof as against the government to which it rightfully belongs. Coffee *v.* Groover, 123 U. S. 1. Private titles to land are not affected by conquest or cession of territory. United States *v.* Moreno, 1 Wall. 400. Individual rights acquired by foreigners under a former government are, it seems, to be respected even in case of conquest by another government. 1 Wharton's Digest, 16.

The overthrow of a government by revolution and the dissolution of its army do not affect the question whether an offence is within the jurisdiction of the military tribunals. *In re* Ezeta, 62 Fed. Rep. 972. The occupation of a department of France by German troops after their victory in 1871, did not suspend or affect the civil, criminal or customs laws of France, and gave to Germany only the use and the revenues of the public domain. See Dalloz, 1872, II., 185, and notes, 229.

Questions as to the boundaries of nations as well as what foreign government exists, are political rather than judicial in their nature. Republic of Peru *v.* Dreyfus, 38 Ch. D. 348; *In re* Cooper, 143 U. S. 472. When a nation's citizens take possession

politic is still the same, though it may have a different organ of communication. (*f*) So, if a state should be divided in respect to territory, its rights and obligations are not impaired; and if they have * not been apportioned by special agreement, * 26 those rights are to be enjoyed, and those obligations fulfilled, by all the parts in common. (*a*)

2. Jurisdiction over Adjoining Seas. — The extent of jurisdiction over the adjoining seas is often a question of difficulty and of dubious right. As far as a nation can conveniently occupy, and that occupancy is acquired by prior possession or treaty, the jurisdiction is exclusive. Navigable rivers which flow through a territory and the sea-coast adjoining it, and the navigable waters included in bays and between headlands and arms of the sea, belong to the sovereign of the adjoining territory, as being necessary to the safety of the nation and to the undisturbed use of the neighboring shores. (*b*) (*x*) The open sea is not capable of being

(*f*) Grotius de Jure, lib. 2, c. 9, sec. 8; Puff. Droit de la Nature et des Gens, par Barbeyrac, ii. liv. 8, c. 12, sec. 2, 3; Burlamaqui, Nat. and Pol. Law, ii. pt. 4, c. 9, sec. 16; Rutherforth's Institutes, b. 2, c. 10; Vattel, b. 2, sec. 85; Protocol of the five great powers of Austria, Great Britain, France, Prussia, and Russia, by their plenipotentiaries at London, December, 1830, stated in Wheaton's History of the Law of Nations, New York, 1845, pp. 538–546.

(*a*) Rutherforth, b. 2, c. 10; [Halleck, c. 3, §§ 27, 28.]

(*b*) Grotius, b. 2, c. 2, sec. 12; c. 3, sec. 7; Puff. b. 3, c. 3, sec. 4; b. 4, c. 5, sec. 3 and 8; Vattel, b. 1, c. 22, 23.

of new territory, like a guano island, in its name and by its authority, or with its assent, it may exercise such authority and for such time as it deems best, over such territory. Territorial sovereignty is a political, not a judicial question, and the courts take judicial notice of the extent of territory claimed by their government, as shown by its public acts. Jones *v.* United States, 137 U. S. 202.

When annexation or colonization is effected through commercial companies, as was done by England in India, and as is now being done in Africa, the chartered company is treated by the English courts as the delegate of the British government so far as regards acts of State, but not as to commercial contracts. See 10 Law Quarterly Rev. 263.

(*x*) The question whether arms of the sea are a part of the sea or belong to the nation's territory is not determined by the width of the enclosed waters or by measuring three miles from each enclosing headland to the other, but by their dimensions and configuration in relation to the coast and adjacent territory. Thus the Mediterranean Sea could not properly be treated as a *mare clausum*. So the Gulf of Mexico is a part of the Atlantic Ocean. Baker *v.* Merchants' Mut. Ins. Co., 4 Woods, 255; 16 Fed. Rep. 915; Merchants' Ins. Co. *v.* Allen, 121 U. S. 67. On the other hand, bays having an entrance of ten miles in width, and somewhat greater, have been frequently treated as closed waters. Thus, Bristol Channel,

possessed as private property. The free use of the ocean for navigation and fishing is common to all mankind, and the public jurists generally and explicitly deny that the main ocean can ever be appropriated. The subjects of all nations meet there, in time of peace, on a footing of entire equality and independence. No nation has any right or jurisdiction at sea, except it be over the persons of its own subjects, in its own public and private vessels; and so far territorial jurisdiction may be considered or preserved, for the vessels of a nation are, in many respects, considered as portions of its territory, and persons on board are protected and governed by the law of the country to which the vessel belongs. They may be punished for offences against the municipal laws of the state, committed on board of its public and private vessels at sea, and on board of its public vessels in foreign ports.(*c*) This jurisdiction is confined to the ship; and no one ship has a right to prohibit the approach of another at sea, or to draw round her a line of territorial jurisdiction, within which no other is at

(*c*) Grotius, b. 2, c. 3, sec. 10 and 13; Rutherforth, b. 2, c. 9; Vattel, b. 1, c. 19, sec. 216; Forbes *v.* Cochrane, 2 Barn. & Cress. 448; Wheaton's Elements of International Law, 3d ed. 157; Edinburgh Review for July, 1841, pp. 294, 295.

where it is more than ten miles wide, is claimed as part of the territory of England and of its county of Glamorgan. Regina *v.* Cunningham, Bell C. C. 86; see 31 & 32 Vict. c. 45; Manning's Law of Nations, 120; 1 Phillimore, Int. Law, § 200; Manchester *v.* Massachusetts, 139 U. S. 240; 152 Mass. 230.

So Chesapeake Bay and Delaware Bay are not high seas. Stetson *v.* United States, 32 Albany L. J. 484; 1 Wharton's Int. Law, § 28; The Grange, 1 A. G. Op. 32. And Narragansett Bay is claimed to be, by usage, within the jurisdiction of the Rhode Island courts. Chase *v.* American Steamboat Co. 9 R. I. 419; 16 Wall. 522.

So of Conception Bay, in Newfoundland, which has been declared British territory by act of Parliament, although it is more than twenty miles wide at its mouth, and nearly fifty miles long. Direct U. S. Cable Co. *v.* Anglo-American Tel. Co., 2 App. Cas. 394. So such bodies of water as the Zuyder Zee and Hudson Bay, being wholly surrounded by the territory of a single nation and approached by narrow entrances, may, it seems, be claimed as subject to the territorial right; while such arms of the sea as the Bay of Fundy and the Bay of Chaleur, having open entrances, remain public, except as to enclosed waters formed within them by the indentations of the coast. See Hall's Int. Law 2d ed., p. 141; 3 Wharton's Int. Law, §§ 28, 304, 305 *a*.

By the Convention of 1818, the United States, making certain exceptions, forever renounced the right of taking, drying, or curing fish "within three marine miles of any of the coasts, bays, creeks, or harbors of His Britannic Majesty's dominions in America." Upon this clause, as considered before the Canadian Fisheries Commission, see their published Proceedings: also 21 Am. L. Rev. 369, 395, 431; 22 Revue de Droit Int. 222.

liberty to intrude. Every vessel, in time of peace, has a right to consult its own safety and convenience, *and to *27 pursue its own course and business, without being disturbed, when it does not violate the rights of others. (*a*) As to narrow seas and waters approaching the land, there have been many and sharp controversies among the European nations concerning the claim for exclusive dominion. The questions arising on this claim are not very clearly defined and settled, and extravagant pretensions are occasionally put forward. The subject abounds in curious and interesting discussions, and, fortunately for the peace of mankind, they are, at the present day, matters rather of speculative curiosity than of use.

Grotius published his Mare Liberum against the Portuguese claim to an exclusive trade to the Indies, through the South Atlantic and Indian Oceans, and he shows that the sea was not capable of private dominion. He vindicates the free navigation of the ocean and the right of commerce between nations, and justly exposes the folly and absurdity of the Portuguese claim. Selden's Mare Clausum was intended to be an answer to the doctrine of Grotius, and he undertook to prove, by the laws, usages, and opinions of all nations, ancient and modern, that the sea was, in point of fact, capable of private dominion; and he poured a flood of learning over the subject. He fell far short of his great rival in the force and beauty of his argument, but he entirely surpassed him in the extent and variety of his citations and researches. Having established the fact that most nations had conceded that the sea was capable of private dominion, he showed, by numerous documents and records, that the English nation had always asserted and enjoyed a supremacy over the surrounding or narrow seas, and that this claim had been recognized by all the neighboring nations. Sir Matthew Hale considered the title of the king to the narrow seas adjoining the coast of England to have been abundantly proved by the treatise of Selden; and Butler speaks of it *as *28 a work of profound erudition. (*a*) Bynkershoek has also written a treatise on the same contested subject, in which he concedes to Selden much of his argument, and admits that the sea was susceptible of dominion, though he denies the title of

(*a*) The Marianna Flora, 11 Wheaton, 38.
(*a*) Harg. Law Tracts, 10; Co. Litt. iii. n. 205.

the English, on the ground of a want of uninterrupted possession. He said there was no instance, at that time, in which the sea was subject to any particular sovereign, where the surrounding territory did not belong to him. (*b*)

The claim of dominion to close or narrow seas is still the theme of discussion and controversy. Puffendorf (*c*) admits that, in a narrow sea, the dominion of it, and the right of fishing therein, may belong to the sovereigns of the adjoining shores. Vattel also (*d*) lays down the position, that the various uses to which the sea contiguous to the coast may be applied render it justly the subject of property. People fish there, and draw from it shells, pearls, amber, &c.; and who can doubt, he observes, but that the pearl fisheries of Bahram and Ceylon may be lawfully enjoyed as property? Chitty, in his work on commercial law, (*e*) has entered into an elaborate vindication of the British title to the four seas surrounding the British Islands, and known by the name of the British Seas, and, consequently, to the exclusive right of fishing and of controlling the navigation of foreigners therein. On the other hand, Sir William Scott, in the case of the *Twee Gebroeders*, (*f*) did not treat the claim of territory to contiguous portions of the sea with much indulgence. He said the general inclination of the law was against it; for in the sea, out of the reach of cannon-shot, universal use was presumed, in like manner as a common use in rivers flowing through conterminous states was presumed; and yet, in both cases,

*29 *there might, by legal possibility, exist a peculiar property, excluding the universal or the common use. The claim of Russia to sovereignty over the Pacific Ocean north of the 51st degree of latitude as a close sea was considered by our government in 1822 to be against the rights of other nations. (*a*) It is difficult to draw any precise or determinate conclusion, amidst the variety of opinions, as to the distance to which a state may lawfully extend its exclusive dominion over the sea adjoining its territories, and beyond those portions of the sea which are embraced by harbors, gulfs, bays, and estuaries, and

(*b*) Dissertatio de Dominio Maris; Bynk. Opera, ii. 124.
(*c*) Droit de la Nat. et des Gens, liv. 4, c. 5, sec. 5–10.
(*d*) B. 1, c. 23. (*e*) Vol. i. 88–102.
(*f*) 3 Rob. Adm. 336.
(*a*) Mr. Adams's Letter to the Russian Minister, March 30, 1822.

over which its jurisdiction unquestionably extends.(*b*) All that can reasonably be asserted is, that the dominion of the sovereign of the shore over the contiguous sea extends as far as is requisite for his safety, and for some lawful end. (*x*) A more extended dominion must rest entirely upon force and maritime supremacy. According to the current of modern authority, the general territorial jurisdiction extends into the sea as far as cannon-shot will reach, and no farther; and this is generally calculated to be a marine league; and the Congress of the United States have recognized this limitation, by authorizing the district courts to take cognizance of all captures made within a marine league of the American shores. (*c*) The executive authority of this country, in 1793, considered the whole of Delaware Bay to be within our territorial jurisdiction; and it rested its claims upon those authorities which admit that gulfs, channels, and arms of the sea belong to the people with whose lands they are encompassed. It was intimated that the law of nations would justify

(*b*) Azuni on the Maritime Law of Europe, vol. i. p. 206.

(*c*) Bynk. Q. Pub. J. c. 8; Vattel, b. 1, c. 23, sec. 289; Act of Congress, June 5, 1794, c. 50; The King *v.* Forty-nine Casks of Brandy, 3 Hagg. Adm. 257. By the convention at London of the 13th July, 1841, between Great Britain, France, Austria, Prussia, and Russia, and the Ottoman Porte, it was declared and agreed to be an established principle of public law, that no ships of war of foreign powers should enter into the Straits of the Dardanelles and of the Bosphorus, thereby placing the territorial jurisdiction of the Sultan over the interior waters of his empire under the protection of the written public law of Europe. Wheaton's History of the Law of Nations, New York, 1845, p. 584.

(*x*) The distance of a marine league is said to have been fixed at a time when no gun could force a ball farther. Hogg *v.* Beerman, 41 Ohio St. 81, 95. See 2 Stephens' History of the Criminal Law, 29 *et scq.*; Walker's Science of Int. Law, 173; Maine's Int. Law, 38. For self-protection in time of war, for the prevention of frauds upon its revenue, etc., a nation may exercise authority beyond this limit. Manchester *v.* Massachusetts, 139 U. S. 240; S. C. *nom.* Commonwealth *v.* Manchester, 152 Mass. 230; The Hungaria, 41 Fed. Rep. 109; 26 Revue de Droit Int. 209. The act of Parliament of 1816 (56 Geo. III. c. 23), § 4, prohibited, under penalty of forfeiture, during Napoleon's detention at St. Helena, domestic and foreign vessels from loitering or hovering within eight leagues of that island, though placing no impediment in the way of vessels pursuing a direct and lawful voyage in such waters.

According to some writers a nation may extend its jurisdiction seaward as the range of its cannon increases. Hall, Int. Law, 127; 1 Fiore, Int. Law, 373; Bluntschli, § 303. It is important that the rule should be certain and the same for all civilized nations though all may not in time of peace be supplied with the newest weapons.

the United States in attaching to their coasts an extent into the sea beyond the reach of cannon-shot. (*d*)

*30 * Considering the great extent of the line of the American coasts, we have a right to claim, for fiscal and defensive regulations, a liberal extension of maritime jurisdiction; and it would not be unreasonable, as I apprehend, to assume, for domestic purposes connected with our safety and welfare, the control of the waters on our coasts, though included within lines stretching from quite distant headlands, as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the capes of the Delaware, and from the south cape of Florida to the Mississippi. (*x*) It is certain that our

(*d*) Opinion of the Attorney-General concerning the seizure of the ship Grange, dated 14th of May, 1793, and the Letter of the Secretary of State to the French Minister, of 15th of May, 1793.

(*x*) As suggested by Captain Mahan in his "Influence of Sea Power upon History" (p. 33), these questions may become of practical importance, especially in the South, should the construction of a Central-American canal convert the Caribbean Sea into a great highway for the commerce of the world. It cannot as yet be said that the United States has an exclusive right in these large, open areas by prescription, the consensus of civilized nations, or by authority. In England, the decision in Regina *v.* Keyn, 2 Ex. D. 63, limits the territory of England and its criminal jurisdiction to low-water mark on the external coast, in the absence of express legislation. See also Harris *v.* The Franconia, 2 C. P. D. 173; Direct U. S. Cable Co. *v.* Anglo-American Tel. Co., 2 App. Cas. 394. In this country, State legislation extending the territorial limits of the State three miles seaward from the shore is valid. Dunham *v.* Lamphere, 3 Gray, 268; Manchester *v.* Massachusetts, 139 U. S. 240; 152 Mass. 230; United States *v.* Smiley, 6 Sawyer, 640; State *v.* Murray, 84 Maine, 135. So under the California Constitution, Art. 21, § 1, and its Political Code, § 33, extending the State line westwards three miles from the shore, a State statute, which makes death by another's wrongful act a cause of action, applies to a cause of action arising on the high seas within such limit from the shore. *In re* Humboldt Lumber Man'rs' Association, 60 Fed. Rep. 428.

The result of the Behring Sea arbitration was that the United States could not protect seals in the ocean beyond three miles from the shore. See Award, Point V.; 37 Cent. L. J. 249; 18 Law Mag. & Rev. (4th Series), 231, 318, 703; 19 id. 21; 6 Jurid. Rev. 21; 27 Chic. L. News, 156; 27 Am. L. Rev. 684; 29 Am. L. Reg. 625. If the United States through the President and Congress see fit to assume jurisdiction and sovereignty over such waters as the Behring Sea beyond the three-mile limit, the courts and the people are bound by such action. United States *v.* The James G. Swan, 50 Fed. Rep. 108. In Reg. *v.* Keyn, 2 Ex. D. 152, Lord Coleridge said: "It is freely admitted to be within the competency of Parliament to extend the realm how far soever it may please." See also United States *v.* Kessler, Baldw. 34. See the articles in 7 Law Mag. & Rev. (4th Series) 353; 8 id. 259; 15 Irish L. T. 626, dis-

government would be disposed to view with some uneasiness and sensibility, in the case of war between other maritime powers, the

cussing the question whether it is competent for French citizens to build a submarine railway to England by purchasing a portion of the foreshore at Dover owned by private individuals, the disability of aliens to hold land in England having been abolished by the Naturalization Act of 1870. The decision in Reg. *v.* Keyn is binding upon all the English courts. Harris *v.* The Franconia, 2 C. P. D. 173. After that decision, The Territorial Waters Jurisdiction Act of 1878 (41 & 42 Vic. c. 73) extended the jurisdiction seaward to one marine league from low-water mark, "for the purpose of any offence declared by this act to be within the jurisdiction of the admiral." This statute has been criticised as contrary to International Law. See *c. g.* Perels' Das internationale öffentliche Seerecht der Gegenwart, § 13.

The government's title to the soil of arms of the sea is often said to be a proprietary right, and not a mere trust for public uses, as in Lord Advocate *v.* Clyde Nav. Trustees, 19 Ct. of Ses. (4th Series), 174.

In this country the States bordering upon the Great Lakes hold the title to the lands under these navigable waters and their inlets in the same manner that the States upon the sea-coast hold title to the soil under tide water by the common law. "That title necessarily carries with it control over the waters above them, whenever the lands are subjected to use. But it is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the State, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. . . . The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which it has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled." Field, J., in Illinois Central R. Co. *v.* Illinois, 146 U. S. 387, 452.

Titles to submerged lands in the Territories, derived from the general government, were settled by the important case of Shively *v.* Bowlby, 152 U. S. 1, deciding that the United States, upon acquiring a Territory, by cession from a State, or by treaty with a foreign country, or by discovery and settlement, take the title and dominion of its tide lands below high-water mark for the benefit of the whole people and in trust for the future State, and, while so holding them, have all the powers both of national and municipal government, and may grant titles thereto for appropriate purposes.

use of the waters of our coasts, far beyond the reach of cannon-shot, as cruising ground for belligerent purposes. In 1793, our government thought they were entitled, in reason, to as broad a margin of protected navigation as any nation whatever, though at that time they did not positively insist beyond the distance of a marine league from the sea-shores; (*a*) and, in 1806, our government thought it would not be unreasonable, considering the extent of the United States, the shoalness of their coast and the natural indication furnished by the well-defined path of the Gulf Stream, to expect an immunity from belligerent warfare, for the space between that limit and the American shore. It ought, at least, to be insisted that the extent of the neutral immunity should correspond with the claims maintained by Great Britain around her own territory, and that no belligerent right should be exercised within "the chambers formed by headlands, or anywhere at sea within the distance of four leagues, or from a
* 31 right line from one headland to another." (*b*) In * the case of the *Little Belt*, which was cruising many miles from the shore between Cape Henry and Cape Hatteras, our government laid stress on the circumstance that she was "hovering on our coasts;" and it was contended on the part of the United States that they had a right to know the national character of armed ships in such a situation, and that it was a right immediately connected with our tranquillity and peace. It was further observed, that all nations exercise the right, and none with more rigor or at a greater distance from the coast than Great Britain, and none on more justifiable ground than the United States. (*a*) There can be but little doubt that, as the United States advance in commerce and naval strength, our government will be disposed more and more to feel and acknowledge the justice and policy of the British claim to supremacy over the narrow seas adjacent to the British isles, because we shall stand in need of similar accommodation and means of security. (*b*)

(*a*) Mr. Jefferson's Letter to M. Genet, November 8, 1793.

(*b*) Mr. Madison's Letter to Messrs. Monroe and Pinckney, dated May 17, 1806.

(*a*) Mr. Monroe's Letter to Mr. Foster, October 11, 1811, and President's Message, November 5, 1811.

(*b*) In placing the commerce and navigation of states, by treaties of commerce, on the basis of equality, it is sometimes deemed advisable to except in express terms the *coasting trade* or *coastwise navigation*, of the respective parties, and to reserve the regulation of that trade to the separate laws of each nation. See the convention of

It was declared in the case of *Le Louis*, (*c*) that maritime states claim, upon a principle just in itself and temperately applied, a right of visitation and inquiry within those parts of the ocean adjoining to their shores. They were to be considered as parts of the territory for various domestic purposes, and the right was admitted by the courtesy of nations. The English hovering laws were founded upon that right. The statute 9 Geo. II. c. 35, prohibited foreign goods to be transshipped within four leagues of the coast without payment of duties; and the act of Congress of March 2, 1799, c. 128, sec. 25, 26, 27, 99, contained the same prohibition; and the exercise of jurisdiction, to that distance, for the safety and protection of the revenue laws, was declared by the Supreme Court, in *Church* v. *Hubbart*, (*d*) to be conformable to the laws and usages of nations.[1]

3. Rights of Commerce.— As the end of the law of nations is the happiness and perfection *of the general society *32

commerce and navigation between the United States and the Peru-Bolivian Confederation, May 28, 1838, and between them and the Kingdom of Greece, August, 1838, and between them and Portugal, April, 1841, and between them and the Republic of Ecuador, June 13, 1839.

(*c*) 2 Dod. Adm. 245.

(*d*) 2 Cranch, 187.

[1] But see Wheat. pt. 2, c. 4, Dana's note 108; Twiss, pt. 1, § 181. [Regina *v.* Keyn, 2 Ex. Div. 63, was an indictment for manslaughter. Defendant was a foreigner, commanding a foreign ship, and while sailing within three miles of the English coast, so negligently and unskilfully sailed his vessel that a collision resulted with an English ship, and by the collision a passenger on board the latter vessel was killed. Defendant was convicted in the Central Criminal Court, and the case came on appeal to the Criminal Court of Appeal, the question being whether the lower court had jurisdiction of the case. It was held by seven judges to six that the court did not have jurisdiction. It was generally admitted that whatever jurisdiction a nation has over the open sea adjacent to its coasts, extends to three miles, or, at most, to the range of cannon-shot from the shore. The majority of the court held, however, that, in the absence of statute, the jurisdiction over these waters was only to the extent necessary for the defence and security of the state, that the ordinary criminal jurisdiction did not extend over them, and hence that the law of the flag was the law to govern the case, and that the country of the flag had jurisdiction. Two judges held that even an act of Parliament could not give such jurisdiction. The minority were of opinion that the sea to the extent of three miles was a part of the territory of England, and subject to her criminal jurisdiction, and that at most the country of the flag had jurisdiction only in case of crimes committed wholly on board the foreign ship. See also Bar, Int. Law, 659, note (EE). The Brigg Ann, 1 Gall. 62; United States *v.* New Bedford Bridge Co., 1 W. & M. 401, 487. — B.]

of mankind, it enjoins upon every nation the punctual observance of benevolence and good-will as well as of justice, towards its neighbors. (*a*) This is equally the policy and the duty of nations. They ought to cultivate a free intercourse for commercial purposes, in order to supply each other's wants and promote each other's prosperity. The variety of climates and productions on the surface of the globe, and the facility of communication, by means of rivers, lakes, and the ocean, invite to a liberal commerce, as agreeable to the law of nature, and extremely conducive to national amity, industry, and happiness. (*b*) The numerous wants of civilized life can only be supplied by mutual exchange between nations of the peculiar productions of each; and who that is familiar with the English classics has not dwelt with delight on the description of the extent and blessings of English commerce, which Addison has given with such graceful simplicity and such enchanting elegance in one of the Spectator's visits to the Royal Exchange? (*c*) But as every nation has the right, and is disposed to exercise it, of judging for itself in respect to the policy and extent of its commercial arrangements, the general freedom of trade, however reasonably and strongly it may be inculcated in the modern school of political economy, is but an imperfect right, and necessarily subject to such regulations and restrictions as each nation may think proper to prescribe for itself. Every state may monopolize as much as it pleases of its own internal and colonial trade, or grant to other nations, with whom it deals, such distinctions and particular privileges as it may deem conducive to its
*33 interests. (*d*) The celebrated English *navigation act of Charles II. contained nothing, said Martens, contrary to the law of nations, notwithstanding it was very embarrassing to other countries. When the United States put an entire stop to their commerce with the world, in December, 1807, by laying a general embargo on their trade, without distinction

(*a*) Vattel's Prelim. sec. 12, 13, b. 2, c. 1, sec. 2, 3.

(*b*) Vattel, b. 2, c. 2, sec. 21.

(*c*) Spectator, i. No. 69.

(*d*) Puff. b. 4, c. 5, sec. 10; Vattel, b. 1, c. 8, sec. 92, 97; Martens, Law of Nations, 146, 148; 1 Chitty on Commercial Law, 76–81; Mr. Canning's Letters to Mr. Gallatin, of September 11 and November 13, 1826; Mr. Gallatin to Mr. Canning, September 22 and December 28, 1826, and Mr. Clay to Mr. Gallatin, November 11, 1826.

as to nation, or limit as to time, no other power complained of it; and the foreign government most affected by it, and against whose interests it was more immediately directed, declared to our government, (*a*) that, as a municipal regulation, foreign states had no concern with it, and that the British government did not conceive that they had the right, or the pretension, to make any complaint of it, and that they had made none.

No nation has a right, in time of peace, to interfere with, or interrupt, any commerce which is lawful by the law of nations, and carried on between other independent powers, or between different members of the same state. The claim of the Portuguese, in the height of their maritime power in India, to exclude all European people from commerce with Asia, was contrary to national law, and a just cause of war. Vattel called it a pretension no less iniquitous than chimerical. (*b*) The attempt of Russia to appropriate to herself an exclusive trade in the North Pacific met with a prompt resistance on the part of this country; and the government of the United States claimed for its citizens the right to carry on trade with the aboriginal natives, on the northwest coast of America, without the territorial jurisdiction of other nations, even in arms and munitions of war. (*c*)

Treaties of commerce, defining and establishing the rights and extent of commercial intercourse, have been found to be of great utility; and they occupy a very important title in the code of national law. They were considered, * even two centu- *34 ries ago, to be so conducive to the public welfare as to overcome the bigotry of the times; and Lord Coke (*a*) admitted them to be one of the four kinds of national compacts that might lawfully be made with infidels. They have multiplied exceedingly within the last century, for it has been found by experience that the general liberty of trade, resting solely on principles of common right, benevolence, and sound policy, was too vague and precarious to be consistent with the safety of the extended intercourse and complicated interests of great commercial states. Every nation may enter into such commercial treaties, and grant

(*a*) Mr. Canning's Letter to Mr. Pinckney, September 23, 1808.

(*b*) B. 2, c. 2, sec. 24.

(*c*) Mr. Adams's Letter to the Russian Minister, March 30, 1822. See also Mr. Forsyth's Letter to the American Minister at St. Petersburgh, November 3, 1837.

(*a*) 4 Inst. 155.

such special privileges, as they think proper; and no nation to whom the like privileges are not conceded has a right to take offence, provided those treaties do not affect their perfect rights. A state may enter into a treaty, by which it grants exclusive privileges to one nation, and deprives itself of the liberty to grant similar privileges to any other. Thus, Portugal, in 1703, by her treaty with England, gave her the monopoly of her wine trade; and the Dutch, formerly, by a treaty with Ceylon, engrossed the cinnamon trade, and, latterly, they have monopolized the trade with Japan. (*b*)[1] These are matters of strict legal right; but it is, nevertheless, in a moral sense, the duty of every nation to deal kindly, liberally, and impartially towards all mankind, and not to bind itself by treaty with one nation, in contravention of those general duties which the law of nature dictates to be due to the rest of the world. (*c*)

4. Right of Passage over Land. — Every nation is bound, in time of peace, to grant a passage for lawful purposes over their lands, rivers, and seas to the people of other states, whenever it can be permitted without inconvenience; and burdensome conditions ought not to be annexed to the transit of persons and property.

If, however, any government deems the introduction of
* 35 * foreigners or their merchandise injurious to the interests of their own people, they are at liberty to withhold the indulgence. The entry of foreigners and their effects is not an absolute right, but only one of imperfect obligation, and it is subject to the discretion of the government which tolerates it. (*a*)

(*b*) Chitty, Comm. Law, 40, 41, 42.

(*c*) It has been the policy of the United States to encourage, in its diplomatic intercourse with other nations, the most perfect freedom and equality in relation to the right and interests of *navigation*. This is the principle contained in the commercial treaty between the United States and the federation of Central America, of the 5th December, 1825. By that treaty, whatever can be imported into, or exported from, the ports of the one country, in its own vessels, may, in like manner, and upon the same terms and conditions, be imported or exported in the vessels of the other country. The same rule is contained in the treaties of the United States with Denmark, Sweden, and the Hanseatic cities.

(*a*) Puff. b. 3, sec. 5, 6, 7; Rutherforth, b. 2, c. 9; Vattel, b. 2, c. 7, sec. 94; c. 8, sec. 100; c. 9, sec. 123, 130; c. 10, sec. 132; 1 Chitty, 84–89; M. Pinheiro-Ferreira

[1] This monopoly has been put an end to by treaties with various countries.

As to the history of the policy mentioned in note (*c*), *infra*, see Oldfield *v.* Marriott, 10 How. 146. See further the treaties with Peru, 10 U. S. St. at L. 926; and with the Argentine Confederation, ib. 1005.

The state may even levy a tax or toll upon the persons and property of strangers *in transitu*, provided the same be a reasonable charge, by way of recompense for the expense which the accommodation creates.(*b*) These things are now generally settled in commercial treaties, by which it is usually stipulated that there shall be free navigation and commerce between the nations, and a free entry to persons and property, subject to the ordinary revenue and police laws of the country, and the special terms and conditions prescribed by treaty. (*x*)

5. Right of Navigable Rivers. — A nation possessing only the upper parts of a navigable river is entitled to descend to the sea without being embarrassed by useless and oppressive duties or regulations. It is doubtless a right of imperfect obligation, but one that cannot be justly withheld without good cause. When Spain, in the year 1792, owned the mouth and both banks of the lower Mississippi, and the United States the left bank of the upper portion of the same, it was strongly contended on the part of the

(Cours de Droit Public, ii. 19, 20) complains vehemently of the checks created by passports and the preventive police of the continental governments of Europe upon emigration and the transit and sojourn of foreigners. He calls it legal tyranny, and contrasts such policy with that of the United States, "the classic land of civil liberty." But I am of opinion, notwithstanding, that every government has the right, and is bound in duty, to judge for itself, how far the unlimited power of emigration, and of the admission and residence of strangers and emigrants, may be consistent with its own local interests, institutions, and safety.

(*b*) Rutherforth, b. 2, c. 9; Vattel, b. 2, c. 10, sec. 124; 1 Chitty, 103–106.

(*x*) Neutralization of territory, although not often recognized by ancient nations, has been at times illustrated in modern history, as in the case of Belgium in the Franco-German war, &c. See 13 Law Mag. & Rev. (4th Series), 1; 9 Id. 19, 117; 8 id. 123.

With respect to such artificial waterways as the Suez Canal, the proposed inter-oceanic canal at Panama or in Nicaragua, the Baltic Canal at Kiel, and the Corinth Canal in Greece, the Convention of Constantinople of 1888 excluded the Suez Canal from the operations of war, leaving intact the territorial right of the riparian Power; and, by the Bulwer-Clayton Treaty of 1850, Great Britain and the United States guaranteed the neutrality of the proposed canal at Panama, exempting vessels from capture or blockade, and asserted the right of free passage therein. See 20 Revue de Droit International, 529; 27 id. 112, 223; 95 L. T. 426; 9 Law Mag. & Rev. (4th Series), 117; 18 Am. Law Rev. 79; 48 Albany L. J. 293; *infra*, p. 166; n. (*x*).

As to the isthmus of Panama, "the policy of this country is a canal under American control. The United States cannot consent to the surrender of this control to any European power, or to any combination of European powers." President Hayes's Message of Mar. 8, 1880. See 3 Wharton, Int. Law, ch. 12.

United States, that, by the law of nature and nations, we were entitled to the navigation of that river to the sea, subject only to such modifications as Spain might reasonably deem necessary for her safety and fiscal accommodation. It was further contended that the right to the end carried with it, as an incident, the right to the means requisite to attain the end; such, for instance, *36 as the right *to moor vessels to the shore, and to land in cases of necessity. The same clear right of the United States to the free navigation of the Mississippi through the territories of Spain to the ocean was asserted by the Congress under the confederation. (*a*) The claim in that case, with the qualifications annexed to it, was well grounded on the principles and authorities of the law of nations. (*b*) The like claim, and founded on the same principles of natural law, and on the authority of jurists and the conventional law of nations, has been made on behalf of the people of the United States to navigate the St.

(*a*) Instructions given to Mr. Jay in 1780, and again in 1785; Resolution of Congress of September, 1788; Report of the Secretary of State to the President, March 18, 1792.

(*b*) Grotius, lib. 2, c. 2, sec. 11, 12, 13, 15; c. 3, sec. 12; Puff. lib. 3, c. 3, sec. 5, 6, 8; Vattel, b. 1, sec. 292; b. 2, sec. 127, 129, 132. By the treaty of peace at Paris, in 1815, it was stipulated that the navigation of the Rhine and the Scheldt should be free; and at the Congress of Vienna, in 1815, the allied sovereigns agreed to the free navigation of the *great navigable rivers of Germany and ancient Poland*, to their mouths, in favor of all who should conform to the regulations under which the affranchisement was to be granted. The detailed conventions consequent on the act of the Congress of Vienna have applied the principles adopted by the Congress, founded on the Memoir of Baron Von Humboldt, to regulate the navigation of the Rhine, the Scheldt, the Meuse, the Moselle, the Elbe, the Oder, the Weser, the Vistula, the Danube, and the Po, with their confluent rivers. The English government, so late as 1830, continued to assert a right, under the treaty of Vienna, or federal act of 1815, to the free navigation of the Rhine, and to hold that it was accessible to the vessels of all nations, to the extent of its navigation, subject to moderate duties, for the preservation of the paths on the sides of the river and for the maintenance of the proper police. And by the convention concluded at Mayence, March 31, 1831, between all the riparian states of the Rhine, the navigation of that river was declared free, from the point where it becomes navigable into the sea, including its two principal outlets or mouths in the kingdom of the Netherlands, the *Leck* and the *Waal*, passing by Rotterdam and Briel, through the first-named outlet, and by Dordrecht and Hellevoetsluis, through the latter, with the use of the artificial canal of Voorn and Hellevoetsluis. The convention provides regulations of police and toll duties on vessels and merchandise passing to and from the sea, through the Netherlands, and by the different ports of the upper states on the Rhine. Wheaton's Elements of International Law, 3d ed. 243–247; his History of the Law of Nations in Europe and America, New York, 1845, 498–506.

Lawrence to and from the sea, and it has been discussed at large between the American and British governments. (*c*) [1] (*y*)

6. Surrender of Fugitives. — When foreigners are admitted into a state upon free and liberal terms, the public faith becomes pledged for their protection. The courts of justice ought to be freely open to them as a resort for the redress of their grievances. But strangers are equally bound with natives to obedience to the laws of the country during the time they sojourn in it, and they are equally amenable for infractions of the law. It has sometimes been made a question how far one government was bound by the law of nations, and independent of treaty, to surrender, upon demand, fugitives from justice, who, having com-

(*c*) Mr. Wheaton in his Elements of International Law, 3d ed. 248–257, and in his History of the Law of Nations, 506, 517, has given the substance of the arguments, *pro* and *con*, taken from congressional documents of the sessions of 1827 and 1828. It was insisted on the part of Great Britain that this right of passage was not an absolute natural right, but an imperfect right, restricted to the right of transit for purposes of innocent utility, to be exclusively determined by the local sovereign. The commissioners and diplomatists of the United States, in 1805 and afterwards, stated, as a principle of international law, that when any European nation took possession of any extent of sea-coast, that possession extended into the interior country to the sources of the rivers emptying into that coast and to their mouths, with the bays and entrances formed by their junction with the sea, and to all the tributary streams or branches, and the country they covered. The authority of Vattel, b. 1, p. 266, is in support of that principle in a qualified degree, and is to be confined to the rivers *so far as they flow within the territory*. Mr. Wheaton, in his Elements of International Law, 3d ed. 1842, very justly confines such a claim of dominion of the state to the seas and rivers *entirely enclosed within its limits*.

[1] The right to navigate great rivers is frequently made the subject of treaty. See the Reciprocity Treaty, now terminated, 10 U. S. St. at L. 1089, 1091, art. 4, as to the St. Lawrence ; and, generally, treaties of the United States with Argentine Confederation, ib. 1005 ; Mexico, ib. 1031 ; Bolivia, 12 U. S. St. at L. 1003, art. 27 ; Paraguay, ib. 1091, art. 2, &c. Also Halleck, Int. Law, c. 6, § 28 *et seq.*

(*y*) Where a nation owns both banks of a navigable river it doubtless may, as a matter of strict legal right, exclude other nations at will, though enlightened policy may dictate a different course. See Hall, Int. Law, § 39. "Navigable watercourses which traverse the dominions of two or more sovereigns and on the freedom of which the commerce of the world in part depends, cannot, without a wrong to the commercial world as a whole, be permanently obstructed by any one of the sovereigns by whom their banks are controlled. This was the position taken by the United States in its controversy with Denmark as to the sound, and such is now the view of the leading European powers as to all great thoroughfares of trade not inclosed entire within the realm of one particular sovereign." Wharton, Int. Law, §§ 40, 147, 150 *e*, 287.

mitted crimes in one country, flee to another for shelter. It is declared by some of the most distinguished public jurists, (*d*)

(*d*) Grotius, b. 2, c. 21, sec. 3, 4, 5, and Heineccius, Com. h. t. Burlamaqui, ii. pt. 4, c. 3, sec. 23–29 ; Rutherforth, b. 2, c. 9, ii. 496 ; Vattel, b. 2, c. 6, sec. 76, 77. See Questions de Droit, tit. Etranger, par Merlin, for discussions on this subject in France. P. Voet, de Statutis, p. 297, says that the surrender of criminals is denied according to the usage of almost all Christian nations, except in cases of humanity (*nisi ex humanitate*), and Martens is of the same opinion. Martens, Law of Nations, b. 3, c. 3, sec. 23. The English decisions in support of the right and practice of surrender of fugitives charged with atrocious crimes are, Rex *v.* Hutchinson, 3 Keble, 785 ; Case of Lundy, 2 Vent. 314 ; Rex *v.* Kimberly, Str. 848 ; s. c. 1 Barnard. K. B. 225 ; Fitzgib. 111 ; East India Co. *v.* Campbell, 1 Ves. 246; Heath, J., in Mure *v.* Kay, 4 Taunt. 34 ; Eunomus, Dialog. 3, sec. 67 ; Serjeant Hill's opinion (and his authority and learning as a lawyer were pre-eminent), given to government in 1792. See Edin. Review, No. 83, pp. 129, 139, 141. Lord Coke, however, held that the sovereign was not bound to surrender up fugitive criminals from other countries. 3 Inst. 180. The American decisions on the question are, In the Matter of Washburn, 4 Johns. Ch. 106 ; Commonwealth *v.* Deacon, 10 Serg. & Rawle, 125 ; Rex *v.* Ball, decided by Ch. J. Reid, at Montreal, and reported in Amer. Jur. 297 ; Case of José Ferreire dos Santos, 2 Brock. 493. Two of those, viz., that in 4th Johnson and before Ch. J. Reid, are for the duty of surrender, and the other two against it, unless specially provided for by treaty. Mr. Justice Story cites the conflicting authorities, both foreign and domestic, on this interesting question, but intimates no opinion. 3 Comm. on the Constitution, pp. 675, 676 ; Comm. Conflict of Laws, pp. 520–522. But afterwards, in the United States *v.* Davis, 2 Sumner, 486, Judge Story expressed great doubts whether, upon principles of international law, and independent of statute or treaty, any court of justice is authorized to surrender a fugitive from justice. In the spring of 1839, George Holmes, being charged with the crime of murder, committed in Lower Canada, fled into the State of Vermont, and his surrender was demanded by the Governor-General of Canada. Application was made by authority in Vermont, to the President of the United States, who declined to act through an alleged want of power, and the case came back to the Governor of Vermont. After hearing counsel and giving the subject great consideration, Governor Jennison decided that it was his duty to surrender the fugitive. The case was afterwards, and before any actual surrender, carried up before the Supreme Court of that state upon *habeas corpus*, and elaborately argued in July, 1839, and the decision of the governor affirmed. The case was afterwards carried up to the Supreme Court of the United States, in the winter of 1840, and the court declared that they had no jurisdiction in the case. Holmes *v.* Jennison, 14 Peters, 540. Holmes was thereupon brought up before the Supreme Court of Vermont by *habeas corpus*, in April, 1840, and the question solemnly argued, and the decision was, that the state had no authority to surrender the prisoner, and he was accordingly discharged from custody. Case *Ex parte* Holmes, 12 Vermont, 631. It may be here properly observed that, according to the official opinion of the Attorney-General of the United States, 1797, it was the *duty* of the United States to deliver up, on due demand, heinous offenders, being fugitives from the dominions of Spain, and that, as the existing laws of the Union had not made any specific provision for the case, the defect ought to be supplied. Opinions of the Attorneys-General, i. 46. But afterwards, in 1821, the then Attorney-General of the United States,

that every *state is bound to deny an asylum to criminals, *37 and, upon application and due examination of the case, to surrender the fugitive to the foreign state where the crime was in an elaborate opinion given to the President, declared that the modern usage and practice of nations had been contrary to the doctrines of the early jurists, and that it was not now the law and usage of nations to deliver up fugitives from justice, whatever may be the nature or atrocity of the crime, unless it be in pursuance of a treaty stipulation. Opinions, &c. i. 384–392. If there be no treaty, he was of opinion that the government of the United States could not act on the subject, without authority conferred by an act of Congress, and which it would be expedient to grant, as the law is imperfect as it stands. Ibid. ii. 832, 902. When it is declared as the settled rule that the United States are not justified in the surrender of fugitives from justice, except in pursuance of a treaty stipulation, the United States are thus in effect declared, by national and state authorities, to be a safe asylum for all sorts of criminals, from all governments and territories, near or distant. So, also, all the high law authorities in Westminster Hall, in the case of The Creole, gave their opinions, in the British House of Lords, in February, 1842, that the English law and international law did not authorize the surrender of fugitive criminals of any degree, and that the right to demand and surrender must be founded on treaty, or it does not exist. (*x*)

(*x*) This case, which is discussed in 64 Hansard, 27–30, 317 *et seq.*; 6 Law Quarterly Rev. 38, established the principle in England that an alien friend will be expelled only under statutory authority. The Creole, laden with tobacco and slaves, left one port of the United States in 1841 for another, a voyage then lawful by American and International Law. Upon the high seas, the slaves seized the ship, killing one passenger, and forced the mate and crew to navigate the ship to Nassau. The United States demanded the surrender of the slaves for murder and piracy, maintaining also that the ship had touched at Nassau only under stress of circumstances. This demand was fully discussed in the House of Lords and at Westminster Hall, and was refused.

The United States and Great Britain hold criminal jurisdiction to be strictly territorial; but other nations, such as Russia, Norway, Portugal, and Germany, claim a criminal jurisdiction over all offences committed by their own subjects anywhere, even in foreign countries, whether against the State, its subjects, or foreigners. See Cobbett's Int. Law Cases (2d ed.), 34. An aggrieved state appears to have the right to demand the fulfilment of an international duty such as preventing foreign subjects from disturbing its internal peace, but it has no right to ask for an alteration of the municipal law, and must leave it to the sovereign State to adopt its own means for the fulfilment of its international duties. See 10 L. J. 438. Territorial legislation cannot give jurisdiction recognizable by any foreign court against absent foreigners owing no allegiance or obedience to the legislating State. Sirdar Gurdyal Singh *v.* Rajah of Faridkote, [1894] A. C. 670.

Crime is usually said to be local to the country where it is committed; and one country does not execute another's penal laws. Macleod *v.* Att.-Gen. [1891] A. C. 455; 17 Law Mag. & Rev. (4th Series), 250; 30 Cent. L. J. 261. So penalties can be recovered only in the jurisdiction where they are created. Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, where Mr.

committed. The language of those authorities is clear and explicit, and the law and usage of nations, as declared by them, rest on the plainest principles of justice. It is the duty of the government to surrender up fugitives upon demand, after the civil magistrate shall have ascertained the existence of reasonable grounds for the charge, and sufficient to put the accused upon his trial.

Justice Gray says: The rule applies also "to all suits in favor of a State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties." But the question whether a statute of one State, which is penal in some aspects, is also penal in this international sense, which depends upon its purpose, either to punish an offence against its public justice, or to afford a private remedy to a person injured by a wrongful act, is to be determined by the court called upon to enforce it, and in deciding this question that court must carefully observe the requirement that full faith, credit and effect are to be given to the judgments of other States. Huntington *v.* Attrill, 146 U. S. 657; 70 Md. 191; see 30 Cent. L. J. 262; 7 Times L. R. 341. Under the U. S. Constitution, it is an offence against the "Law of Nations" to counterfeit foreign securities, whether national or corporate, and Congress may legislate against such counterfeiting, though the notes are issued by a foreign corporation and not by a foreign nation; and a State has power to so legislate concurrently. United States *v.* Arjona, 120 U. S. 479; United States *v.* White, 27 Fed. Rep. 200. So a statute which enables personal representatives to sue for negligence causing death, being penal in its nature, is not enforceable out of the jurisdiction where the statute was enacted, though it has been held that such a right is suable when the State, in which the suit is brought, has also a statute substantially similar. O'Reilly *v.* New York & New England R. Co., 16 R. I. 388; Burns *v.* Grand Rapids & I. R. Co., 113 Ind. 169; see Davis *v.* New York & New England R.Co. 143 Mass. 301; 58 Am. Rep. 138, and note; Nelson *v.* Chesapeake & O. R. Co., 88 Va. 971. *Contra*, as to the qualifying clause. Usher *v.* West Jersey R. Co., 126 Penn. St. 206. A statute which allows damages for causing a person's death gives no right of action for an injury inflicted in another country, though death takes place within the jurisdiction. De Harn *v.* Mexican N. R. Co., 86 Texas, 68.

Bigamy and polygamy, being criminal under the laws of all civilized and Christian countries, are not protected by the First Amendment of the U. S. Constitution, which prohibits laws respecting the establishment of religion. Davis *v.* Benson, 133 U. S. 333.

In Cutting's case, a newspaper article, libellous by the laws of Mexico, was published in that country by an American citizen who, being there arrested therefor, signed a "reconciliation," or withdrawal of the charge. Afterwards, when in Texas, in a newspaper there published, and known to be circulated in Mexico, Cutting repeated his statement in a more offensive form, for which he was again arrested and prosecuted in Mexico. Upon a demand for his release from our State Department on the ground that the offence was committed in this country, the prosecution was discontinued. The legal questions thus raised are discussed in 20 Am. L. Rev. 918; 23 id. 329; 20 Revue de Droit Int. 559; 22 id. 234; Snow's Int. Law, 172.

The guilty party cannot be tried and punished by any other jurisdiction than the one whose laws have been violated, and, therefore, the duty of surrendering him applies as well to the case of the subjects of the state surrendering, as to the case of subjects of the power demanding the fugitive. The only difficulty, in the absence of positive agreement, consists in drawing the line between the class of offences to which the usage of nations does, and to which it does not apply, inasmuch as it is understood, in practice, to apply only to crimes of great atrocity, or deeply affecting the public safety. (*y*) The act of the legislature of New

(*y*) International extradition cannot be granted by the several States. Holmes *v.* Jennison, 14 Peters, 540; Tarble's Case, 13 Wall. 397; *Ex parte* Morgan, 20 Fed. Rep. 298; People *v.* Curtis, 50 N. Y. 321. It is a privilege of the foreign government, and not the right of individuals. *Re* Ferrelle, 24 Blatch. 155.

Recent decisions of the U. S. Supreme Court establish that upon extradition of a fugitive from justice to a foreign country, under a treaty which specifies the offences subject to the extradition, he cannot be tried for any other offence than that named in the extradition proceedings against him: United States *v.* Rauscher, 119 U. S. 407; but, upon the surrender by one State to another of a person accused of crime, he may, by the weight of authority, be tried for offences not named in the requisition. Ibid.; Lascelles *v.* Georgia, 148 U. S. 537; State *v.* Glover, 112 N. C. 896; State *v.* Patterson, 116 Mo. 505; *In re* Cannon, 47 Mich. 481; State *v.* Hall, 40 Kansas, 338; 35 Cent. L. J. 301; 40 id. 148, and note. See *In re* Noyes, 17 Alb. L. J. 407; 28 Am. L. Rev. 568; *Ex parte* McKnight, 48 Ohio St. 588; Pooley *v.* Whetham, 15 Ch. D. 435; Commonwealth *v.* Hawes, 13 Bush, 697; State *v.* Stewart, 60 Wis. 587; People *v.* Cross, 135 N. Y. 536; Reid *v.* Ham, 54 Minn. 305; Commonwealth *v.* Wright, 158 Mass. 49; 19 L. R. A. 206, and note; Williams *v.* Weber, 1 Col. App. 191; Carr *v.* State (Ala.), 16 So. Rep. 150, 155; Ham *v.* State, 4 Tex. App. 645.

In *Ex parte* Foss, 102 Cal. 347, the State Supreme Court held that the existence of a treaty with a foreign nation which specifies certain extraditable offences, does not limit the right of the nation, to which application is made, to grant or deny an asylum to the fugitive within its jurisdiction. A person extradited to this country for an offence named in a foreign treaty cannot be convicted here for a minor offence included therein but not included in the terms of the treaty. People *v.* Stout, 30 N. Y. Sup. 898; People *v.* Hannan, id. 370.

Though the practice differs in different nations, yet in the United States foreign extradition will be made only under a treaty and in such cases and upon such terms as are therein specified. See 6 A. G. Op. 85, 431; 14 id. 288; Holmes' Case, 14 Peters, 583; United States *v.* Watts, 8 Sawyer, 370. See *Ex parte* McCabe, 46 Fed. Rep. 363; *In re* Reinitz, 39 id. 204; Ker *v.* Illinois, 119 U. S. 443; Ker *v.* People, 110 Ill. 627.

The constitutional rules against bills of attainder and *ex post facto* laws appear to have no bearing on extradition treaties, which may, therefore, operate retrospectively, so as to apply to crimes committed before they went into effect. See Balfour's Case, as discussed in 49 Albany L. J. 137–139, 164; 50 id. 262; 11 Law Quart.

York of the 5th April, 1822, c. 148, gave facility to the surrender of fugitives, by authorizing the governor, in his discretion, on requisition from a foreign government, to surrender up fugitives charged with murder, forgery, larceny, or other crimes, which, by the laws of this state, were punishable with death or imprisonment in the state prison; provided the evidence of criminality was sufficient, by our laws, to detain the party for trial on a like charge. (*a*) Such a legislative provision was requisite, for the judicial power can do no more than cause the fugitive to be arrested and detained, until sufficient means and opportunity have been

(*a*) The N. Y. Revised Statutes, i. 164, sec. 8, 9, 10, 11, have adopted and continued the same provision.

Rev. 378; see Re De Giacomo, 12 Blatch. 391; 24 Revue de Droit International, 553, 563. In Reg. *v.* Ashforth, 36 Sol. Journ. 234, the English Divisional Court refused to extradite a prisoner for new extradition offences, under the treaty of 1890 with this country, which were not clearly shown to have been committed after the time when that treaty came into force.

Under U. S. Rev. Stats. § 5270, the evidence before the examining magistrate need not be such as would be required at the trial of the accused, but should amount to probable cause for believing him guilty; under that statute, and our treaty with Salvador, the jurisdiction to hold fugitives from that country, whose surrender is demanded, is not affected by the manner in which they entered this country; and the evidence of their criminality is to be judged by the laws both of the United States and of the State in which they are arrested. *In re* Ezeta, 62 Fed. Rep. 964, 972; see 28 Am. L. Rev. 784, 879.

In foreign extradition, the accused may be arrested, without a requisition from the foreign government, upon a warrant issued by a U. S. commissioner, on complaint of a consul of such government. Benson *v.* McMahon, 127 U. S. 457; *In re* Luis Oteiza, 136 U. S. 330; *In re* Herres, 33 Fed. Rep. 165; *In re* Adutt, 55 id. 376; *In re* Mineau, 45 id. 188. If certain of the alleged offences are extraditable, it is immaterial that others are not. *Re* Bellencontre, [1891] 2 Q. B. 122. When the accused is held for foreign extradition on a charge of theft, the stolen property cannot, it seems, be held for the purposes of the trial abroad. The Queen *v.* Lushington, [1894] 1 Q. B. 420. Delay for several years to prosecute abroad an offender reformed meanwhile in England is there regarded with suspicion. Francicis's Case, 30 L. J. 196.

Whether the offence is "of a political character," within the meaning of a treaty is a mixed question of law and fact; a "political crime" is a crime "incidental to and forming a part of political disturbances." *In re* Castioni, [1891] 1 Q. B. 149, 157, 166.

Complicity in the Anarchist use of explosives in Paris has recently been held not to be a political offence giving an asylum in England; the court of first instance regarding it as aimed at all governments, and the Queen's Bench Division regarding the outrages as directed primarily at citizens, and as not an attempt to impose government by a party. See *In re* Meunier, [1894] 2 Q. B. 415; [1894] W. N. 118; 10 Law Quart. Rev. 269. As to political offences, see also 24 Revue de Droit Int., 17; 11 id. 475; 14 id. 403; 1 Moore on Extradition, ch. 8.

afforded for the discharge of this duty to the proper organ of communication with the power that makes the demand. (*b*) [1]

(*b*) The Constitution of the United States has provided for the surrender of fugitives from justice as *between the several states*, in cases "of treason, felony, or other crime;" but it has not designated the specific *crimes* for which a surrender is to be

[1] Wheat. p. 2, c. 2, Dana's note 73. A judicial tribunal has not authority, independently of statute or treaty, to make extradition of a criminal. It was done in the case of Arguelles, 1864, by Mr. Seward, as an executive act, but the right of the executive power to do so is perhaps still open to question. *In re* Kaine, 14 How. 103, 112. It would seem clear that a state is under no obligation to surrender a criminal, unless it has agreed to do so by treaty. See further Halleck, c. 7, § 28; Twiss, pt. 1, § 221.

As to the surrender of fugitives as between the several states, see Matter of Voorhees, 3 Vroom (32 N. J.), 141; Kentucky *v.* Dennison, 24 How. 66; Matter of Clark, 9 Wend. 312; *post*, ii. 32, n. 1.

The United States have now extradition treaties with nearly all civilized nations. Dana's Wheaton, note 73; Lawrence's Wheaton, note 78. Some interesting questions have arisen under them in the courts of this country and of England. In Anderson's case, a slave killed a man in Missouri, and escaped to Canada, where he was demanded as a person charged with murder. The act did not amount to murder by the common law or law of England, and after the provincial court of Queen's Bench had ordered his surrender (20 U. C. Q. B. 124), it is said that the Canada Common Pleas discharged the prisoner. Dana's Wheaton, note 75; Abdy's Kent, 128, citing 11 Canada, C. P. 1; [see also 30 L. J. N. S. Q. B. 129; 6 B. & S. 525;] and also referring to Müller's Case, Times, Sept. 9 and 13, 1864.

Probably in general the terms of the treaty with England are to be construed as applying to those acts which are recognized throughout the United States and England as constituting the specified crime. It has been held that they do not apply to an offence made forgery by a state law only. Windsor's Case, 6 Best & Sm. 522. Other cases on forgery are Muller's Case, 5 Phila. 289; s. c. Op. Att.-Gen. x. 501; United States *v.* Warr, 3 N. Y. Leg. Obs. 346; Matter of Heilbronn, 12 id. 65; *In re* Farez, 7 Blatchf. 345 (under the treaty with Switzerland). On the other hand, the treaty has been held not to cover piracy *jure gentium*, because that is an offence punishable by all nations; but only acts made piracy by the municipal law of the nation making the demand. *In re* Tivnan, 5 Best & Sm. 645. [See Att.-Gen. *v.* Kwok-a-Sing, L. R. 5 P. C. 179.] Prisoners charged with a piracy created by act of Parliament may be given up without a statute carrying out the treaty, and before indictment. The British Prisoners, 1 W. & M. 66. See Matter of Metzger, 5 N. Y. Leg. Obs. 83 (s. c. 5 How. 176); Muller's Case, 5 Phila. 289; s. c. Op. Att.-Gen. x. 501. See generally Wheat. Dana's notes 74, 75; Lawrence's note 78; Matter of Kaine, 10 N. Y. Leg. Obs. 257; s. c. 14 How. 103. As to the conduct of proceedings. *In re* Henrich, 5 Blatchf. 414. As to state extradition, see People *v.* Curtis, 50 N. Y. 321. [The President's mandate is not necessary to the beginning of extradition proceedings. *In re* Hermann Thomas, 12 Blatchf. 370; *In re* Kelley, 2 Low. 339. A person may be extradited under a treaty, though the crime was committed and though the criminal had reached the extraditing country before the treaty was made, unless the treaty provides otherwise. *In re* Angelo De Giacomo, 12 Blatchf. 391.— B.]

The European nations, in early periods of modern history, made provision by treaty for the mutual surrender of criminals

made, and this has led to difficulties as between the states. Thus, for instance, in 1839, the Governor of Virginia made application to the Governor of New York for the surrender of three men, charged by affidavit as being fugitives from justice, in *feloniously stealing and taking away from one Colley, in Virginia, a negro slave, Isaac, the property of Colley.* The application was made under the act of Congress of February 12, 1793, c. 7, sec. 1, founded on the Constitution of the United States, art. 4, sec. 2, as being a case of "treason, felony, *or other crime*," within the Constitution and the law, and certified as the statute directed. The Governor of New York refused to surrender the supposed fugitives, on the ground that slavery and property in slaves did not exist in New York, and that the offence was not a *crime* known to the laws of New York, and consequently not a crime within the meaning of the Constitution and statute of the United States. But the legislature of New York, by concurrent resolutions of the 11th of April, 1842, declared their opinion to be, that stealing a slave within the jurisdiction and against the laws of Virginia was a crime within the meaning of the 2d section of the 4th article of the Constitution of the United States. The executive and legislative authorities of Virginia also considered the case to be within the provision of the Constitution and the law, and that the refusal was a denial of right. It was contended, that the Constitution of the United States recognizes the lawful existence of slaves as property, for it apportions the representation among the states on the basis of distinction between free persons and other persons; and it provides, in art. 4, sec. 2, for their surrender, when escaping from one state to another: — that slaves were regarded by law as property in nearly all the states, and protected as such, and particularly in New York, when the constitution was made; that the repeal of those laws, and renunciation of that species of property, in one state, does not affect the validity of the laws, and of that species of property in another state; and that the refusal to surrender felons who steal that property in Virginia, and flee with it or without it to New York, on the ground that blacks are no longer regarded as property in New York, is a violation of the federal compact, and of the act of Congress founded thereon. This case and that of Holmes, mentioned in a preceding note, involve very grave considerations. I have read and considered every authority, document, and argument on the subject that were within my command, and in my humble view of the questions, I cannot but be of opinion that the claim of the Canadian authorities in the one case, and of the Governor of Virginia in the other case, were equally well founded, and entitled to be recognized and enforced. In the case from Canada, the jurisdiction of it belonged exclusively to the authorities of Vermont. The United States have no jurisdiction in such cases, except under a treaty provision. The duty of surrendering on due demand from the foreign government, and on due preliminary proof of the crime charged, is part of the common law of the land, founded on the law of nations as part of that law; and the state executive is to cause that law to be executed, and to be assisted by judicial process, if necessary. The statute of New York is decisive evidence of the sense of that state, and it was in every respect an expedient, just, and wise provision, in no way repugnant to the Constitution or law of the United States, for it was "no agreement or compact with a foreign power." The whole subject is a proper matter of state concern, under the guidance of municipal law (stipulations in national treaties always excepted), and if there be no express statute provision, the exercise of the power must rest in sound legal dis-

seeking refuge from justice. Treaties of this kind were made between England and Scotland in 1174, * and England and * 38 France in 1308, and France and Savoy in 1378; and the last treaty made special provision for the surrender of criminals, though they should happen to be subjects of the state to which they had fled. Mr. Ward (*a*) considers these treaties as evidence of the advancement of society in regularity and order. (*b*)

cretion, as to the nature of the crime and as to the sufficiency of the proof. The law of nations is not sufficiently precise to dispense with the exercise of that discretion. But private *murder*, as in the Vermont case, is free of all difficulty, and it would be dealing unjustly with the aggrieved foreign government, and be eminently disgraceful to the character of the state and to our constitutional authorities, to give an asylum to fugitives loaded with such atrocity. If there be no authority in this country, state or national, to surrender such a fugitive, then it is idle to talk about the authority of the law of nations as part of the common law. Then "public law, the personification, as it were, of natural justice, becomes a mere nonentity, the beautiful figment of philosophers, and destitute of all real influence on the fortunes of mankind."

(*a*) History of the Law of Nations, ii. 318–320.

(*b*) By the treaty of amity, commerce, and navigation between Great Britain and the United States, in November, 1795, it was by the 27th article agreed, that persons charged with murder or forgery, seeking an asylum in the dominions of either party, should be delivered up on due requisition, provided the evidence of criminality be sufficient to justify apprehension and commitment for trial, if the offence had been committed in the jurisdiction where the requisition is made. But this treaty, on this and other points, expired by its own limitation after the expiration of twelve years. The provision was happily renewed by the treaty between the United States and the United Kingdom of Great Britain and Ireland, signed at Washington, August 9, 1842, and afterwards duly ratified. This treaty terminates the question, so far as the two countries are concerned, which had long embarrassed the councils and courts in this country. By the 10th article of the treaty it is declared, that the two powers respectively, upon requisitions by the due authorities, should deliver up to justice all persons who, being charged with the crime of murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged papers, committed within the jurisdiction of either, should seek an asylum, or should be found within the territories of the other; provided, that this should only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged should be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed. A similar convention was made between the United States and France, and ratified at Washington, April 12, 1844; but the provision was extended to the crime of an attempt to commit murder, and to rape, and embezzlement by public officers, when the same is punishable with infamous punishment. The treaty provisions would seem to require statute provisions of the several governments to carry the treaties for surrendering fugitives more promptly into effect. The act of 8 & 9 Vict. c. 120, has such a provision in respect to the treaty of Washington in 1842; without any special provision on the subject, the power and duty of duly carrying into effect treaties of that kind would belong, exclusive of the state authorities, to the courts and magistrates of federal jurisdiction. The legisla-

7. **Ambassadors.** — Ambassadors form an exception to the general case of foreigners resident in the country, and they are exempted absolutely from all allegiance, and from all responsibility to the laws of the country to which they are deputed. (*x*) As they are representatives of their sovereigns, and requisite for negotiations and friendly intercourse, their persons, by the consent of all nations, have been deemed inviolable, and the instances are rare in which popular passions or perfidious policy have violated this immunity. Some very honorable examples of re-

ture of the Kingdom of Belgium, by a law of the 1st of October, 1833, authorized the surrender of fugitives from foreign countries upon the charge of murder, rape, arson, counterfeiting the current coin or forging public bank paper, perjury, robbery, theft, peculation by public trustees and fraudulent bankrupts; but with the proviso that the law of the foreign country be reciprocal in the case, and that the judgment or judicial accusation be duly authenticated, and the demand be made within the time of limitation prescribed by the Belgic law. M. Pinheiro-Ferreira severely condemns this law, and contends for protection to the fugitive, and that the tribunals of the country to which he resorts should take cognizance of criminal cases equally as of matters of contract! See Cours de Droit Public, par Le Comm. S. Pinheiro-Ferreira, Paris, 1830, ii. 24–34; Revue Étrangère de Législation, et d'Économie Politique, No. 2, Paris, December, 1833. Some other foreign jurists, of more established reputation, maintain the same doctrine, and hold that crimes committed in one state may, if the criminal be found in another state, be, upon demand, punished there. Hurtius, de Collis. Leg. P. Voet, de Statut. cited in Story's Comm. on the Conflict of Laws, 516–520; Martens, Law of Nations, b. 3, c. 3, sec. 22, 23; Grotius de Jure, B. & P. b. 2, c. 21, sec. 4. The latter says, that every government is bound to punish the fugitive criminal on demand, or deliver him up. But the better opinion now is, both on principle and authority, that the prosecution and punishment of crimes are left exclusively to the tribunals of the country where they are committed. Kames, Princip. of Equity, ii. 326; Merlin, Répertoire, Souveraineté, sec. 5, n. 7, pp. 757, 758; Pardessus, Droit Comm. v. art. 1467. If, indeed, the fugitive is to be tried and punished for a crime committed out of the territory, the punishment must be according to the law of the place where the offence was committed. Delicta puniuntur juxta mores loci commissi delicti, et non loci ubi de crimine cognoscitur. Bartholus, cited in Henry on Foreign Law, 47. It is, however, a decided and settled principle in the English and American law, that the penal laws of a country do not reach, in their disabilities or penal effects, beyond the jurisdiction where they are established. Folliott *v.* Ogden, 1 H. Black. 123, 135; Lord Ellenborough, Wolff *v.* Oxholm, 6 M. & S. 99; Commonwealth of Massachusetts *v.* Green, 17 Mass. 514, 539–543; Scoville *v.* Canfield, 14 Johns. 338, 440.

(*x*) By the act of Mar. 1, 1893, ch. 182, (27 St. L. 497) our diplomatic representative in a foreign country may be designated of the same grade as is given by that country to its representative here.

The rule of public law prevailing among the European monarchies that an ambassador's authority expires on the death, deposition, or abdication of the reigning prince, does not apply as between the American republics, in which the executive power is permanent and uninterrupted. 7 A. G. Op. 582.

spect for the rights of ambassadors, even when their privileges would seem in justice to have been forfeited on account of the gross abuse of them, are to be met with in the ancient Roman annals, notwithstanding the extreme arrogance of their pretensions and the intemperance of their military spirit. (*c*) If, however, ambassadors should be so regardless of their duty, and of the object of their privilege, as to insult or openly attack the laws or government of the nation to whom they are sent, their functions may be suspended by a refusal to treat with them, or application can be made to their own sovereign for their recall; or they may be dismissed and required to depart within a reasonable time. (*d*) We have had instances, within our own times, of all these modes of dealing with ministers who had given offence; and it is not to be denied that every government has a perfect right to judge for itself whether the language or conduct of a foreign minister be admissible. The writers on public law go still further, and allow force to be applied to confine or send away *an ambassador when the safety of the state, which is *39 superior to all other considerations, absolutely requires it, arising either from the violence of his conduct, or the influence and danger of his machinations. This is all that can be done, for ambassadors cannot, in any case, be made amenable to the civil or criminal jurisdiction of the country; and this has been the settled rule of public law, ever since the attempt made in the reign of Elizabeth to subject the Scotch and Spanish ambassadors to criminal jurisdiction, and the learned discussions which that case excited. (*a*) [1] By fiction of law, an ambassador is considered

(*c*) Livy, b. 2, c. 4; b. 30, c. 25.

(*d*) In 1797, it was considered by the Attorney-General of the United States, in his letter to the Secretary of State, to be a contempt of the government, for a foreign minister, while a resident minister in the United States, to communicate his sentiments to the people of the United States through the press. His intercourse and correspondence of that kind is to be with the executive department of the government exclusively. Opinions of the Attorneys-General, i. 43.

(*a*) Grotius, b. 2, c. 18, sec. 4, Bynk. de Foro Legatorum, c. 8, 17, 18; Vattel, b. 4, c. 7, sec. 92–103, Ward's History, ii. 486–552; Marshall, Ch. J., in the case of the Schooner Exchange *v.* M'Faddon, 7 Cranch, 138; Mr. Wheaton, in his History of the Law of Nations in Europe and America, New York, 1845, pp. 236–261, has

[1] The general privilege of a minister having no real estate in the foreign country is to be exempt from suit there, although neither his person nor goods are touched, and although the liability arises out of business engaged in there. Magdelena Steam Nav. Co. *v.* Martin, 2 El. & El. 94. See Valarino *v.* Thompson, 3 Seld.

as if he were out of the territory of the foreign power; and it is an implied agreement among nations, that the ambassador, while he resides within the foreign state, shall be considered as a member of his own country, retaining his original domicile, and the government he represents has exclusive cognizance of his conduct and control of his person. (*b*) An ambassador is also deemed under the protection of the law of nations in his passage through the territories of a third and friendly power, while upon his public mission in going to and returning from the government to which he is deputed. To arrest him under such circumstances would be a breach of his privileges as a public minister. (*c*) (*x*)

given an analysis or summary of Bynkershoek's treatise De Foro Legatorum, and which is justly regarded as an excellent work and of high authority. It is contained in the 2d volume of Bynkershoek's works, published in 2 volumes, folio, at Leyden, 1767.

(*b*) Grotius, b. 2, c. 18, sec. 1–6; Wicquefort, de l'Ambassadeur, liv. 1, sec. 27; Vattel, b. 4, c. 7, sec. 81–135; Bynk. de Foro Legat. c. 8. If an ambassador be concerned in trade, his property in that trade is liable to seizure, as in the case of any individual. Bynk. de Foro Legat. c. 14; Vattel, b. 4, c. 8.

(*c*) Vattel, b. 4, c. 7, sec. 63, 84; Holbrook *v.* Henderson, 4 Sandf. 619. In this case, Henderson, the minister from the Republic of Texas to France, was arrested in New York for debt, while on his return from France to Texas, by the way of New York, and the court discharged him from the arrest. It was held that an entry into the country in time of peace did not require, for the protection of the person, a passport, though the law assumes that passports may be granted by the government of the United States. Act of Congress, April 30, 1790, sec. 27. Passports, though named in our law, are unknown in practice. The protection is implied by natural and municipal law, and it is the duty of the courts of justice, when cases arise before them, to enforce the law of nations on this subject, as part of the law of the land. The doctrine of international law, as laid down by Vattel, is founded in good sense and public policy, and sustained by the interests and courtesy of nations. Grotius says, b. 2, c. 18, sec. 5, that the obligation to protect ambassadors extends only to the power to whom the embassy is sent, and does not extend to the power through whose territories the ambassador presumes to pass without a passport. But that harsh and narrow rule is now justly exploded.

(7 N. Y.) 576; Halleck, c. 9, §§ 14, 19 *et seq.* It has been held otherwise, if he voluntarily attorns to the jurisdiction in such a case. Taylor *v.* Best, 14 C. B. 487. But see Valarino *v.* Thompson, 3 Seld. 576. He cannot waive his immunity from arrest. United States *v.* Benner, 1 Baldw. 234, *post*, 182, n. (*b*). See Wheat. Dana's note 129; Halleck, c. 9, § 16 *et seq;* [Hall, Int. Law, pt. 2, c. 9.]

(*x*) A foreign minister is exempt from service of process in a civil action when passing through this country to his post in another. Wilson *v.* Blanco, 4 N. Y. S. 714. His immunity from process does not cease upon his recall and the appointment of his successor, but continues for a reasonable time to enable him to wind up his official business and prepare for his return home. Musurus Bey *v.* Gadban,

The attendants of the ambassador attached to his person, and the effects in his use, and the house in which he resides, and his domestic servants, are under his protection and privilege, and

[1894] 1 Q. B. 533 ; 2 id. 352 ; *q. v.* also as to the effect of the Statute of Limitations upon his rights. In England, an ambassador's privileges appear to be wider than those of his sovereign, inasmuch as, under the statute of Anne, service of a writ upon him appears to be void, and since he cannot waive his privilege, as his sovereign may, he can be held upon a counter-claim, when he sues as plaintiff, only to the extent that it is strictly a defence to the suit. See 10 Law Quarterly Rev. 295.

The immunity is not personal, but is the privilege of his government ; hence his assent to any infringement of that privilege is immaterial. United States *v.* Benner, Baldw. 234. The privilege extends to the domestic servants and the secretary and attaché of the ambassador who perform *bona fide* and substantial services for him. Hopkins *v.* De Robeck, 3 T. R. 79 ; Parkinson *v.* Potter, 16 Q. B. D. 152 ; *Ex parte* Cabrera, 1 Wash. 232 ; United States *v.* Lafontaine, 4 Cranch, C. C. 173 ; United States *v.* Jeffers, id. 704 ; Respublica *v.* De Longchamps, 1 Dallas, 111 ; Barr's Int. Law, 492 n. In *Re* Cloete, 65 L. T. 102 ; 7 T. L. R. 565, a British subject, who was appointed honorary attaché of the Persian embassy in London, was held not entitled to use such appointment to shield him from a petition in bankruptcy, or other civil process relating to business carried on in London. But in general a British subject, so accredited by a foreign government, is exempt from the local jurisdiction in the absence of an express condition that such jurisdiction is retained. Macartney *v.* Garbutt, 24 Q. B. D. 368. An attaché to a foreign ambassador in England is not liable for rates assessed on his private residence. Parkinson *v.* Potter, 16 Q. B. D. 152. As to the proof of such relation to a foreign embassy as will exempt from suit, see also *In re* Baiz, 135 U. S. 403 ; Hollander *v.* Baiz, 41 Fed. Rep. 732 ; *Ex parte* Hitz, 111 U. S. 766.

A foreign minister is exempt from a mechanic's lien law only as to his personal residence. Byrne *v.* Herran, 1 Daly, 344. He is also exempt from distress for rent : Wheaton's Case, Wheaton's Int. Law (3d ed.) 225 ; and from process to compel his attendance and testimony as a witness before the courts. Dubois's Case, Sen. Ex. Doc. No. 21, 34th Congress, 3d Session; Dillon's Case, 1 Wharton's Digest, 665 ; see Ibid. 669.

A foreign minister and those strictly belonging to the embassy are in general exempt from the criminal jurisdiction of the country to which they go. See Nitchencoff's Case, 10 Sol. J. 56 ; Respublica *v.* De Longchamps, 1 Dallas, 111 ; United States *v.* Liddle, 2 Wash. C. C. 205; United States *v.* Ortega, 4 id. 531 ; 11 Wheat. 467. But an ambassador may be arrested and imprisoned if he engages in acts dangerous to the safety of the State to which he is accredited ; and if he intermeddles in the local affairs of such State, as by suggesting how the elective franchise should there be exercised, his recall may properly be requested. See Cobbett's Int. Law Cases (2d ed.), 109, and Lord Sackville's Case (1888), there cited. Where fault is justly found with the conduct of a foreign ambassador, the usage of nations is to address a note to the Government of the offender, intimating that his continued presence in his official capacity would be unacceptable, and requesting that he may be recalled. But in cases of great urgency, summary expulsion may be resorted to, as where the ambassador's conduct amounts to actual conspiracy against, or causes

equally exempt from the foreign jurisdiction, though there are strong instances in which their inviolability has been denied and invaded. (*d*) The distinction between ambassadors, ministers plenipotentiary, envoys extraordinary, and resident ministers relates to diplomatic precedence and etiquette, and not to their essential powers and privileges. (*e*)

(*d*) Rutherforth, b. 2, c. 9; Ward's History, ii. 552, 553; Vattel, b. 4, c. 8, sec. 113; United States *v.* Hand, 2 Wash. 435; Opinions of the Attorneys-General of the United States, Washington, 1841, i. 89–91. The immunities of a public minister are considered as not extending to debtors, as to debts incurred prior to their entering into the minister's service, nor to fugitive slaves, nor to persons who were under previous duties, as soldiers, sailors, apprentices, minors, a wife, &c., nor does the privilege of immunity protect a laborer engaged to work in the garden attached to the minister's residence. Ib. The duties and privileges of a public minister are detailed at large by Mr. Wheaton, in his Elements of International Law, 3d edition, 264–387, and afterwards in his larger work on the History of the Law of Nations in Europe and America, New York, 1845, 236–261; and from his long residence at two of the European courts in a diplomatic character, his authority on the subject acquires additional force.

(*e*) Martens, 201–207; Vattel, b. 4, c. 6. Chargé d'affaires is a diplomatic representative or minister of the fourth grade; and a resident minister seems not to be equal to a minister plenipotentiary. Nor is a minister plenipotentiary of equal rank and dignity with an ambassador, who represents the person of his sovereign. The great powers, at the Congress of Vienna in 1815 and of Aix la Chapelle in 1818, by an arrangement, divided diplomatic agents into four classes: 1. Ambassadors, papal legates, or nuncios. 2. Envoys, ministers, and other agents accredited to the sovereigns. 3. Ministers resident, accredited to sovereigns. 4. Chargés d'affaires, accredited to the department of foreign relations. A minister extraordinary has not by that title any superiority of rank. The Comm. Pinheiro-Ferreira, the Portuguese publicist,

serious danger to, the government; and, in very extreme cases, the imperilled government may even be justified in seizing the minister's person and papers. See 14 Law Mag. & Rev. (4th Series), 113; Leslie's Case, 2 Ward's Law of Nations, 486; Mendoza's Case, id. 522; Da Sa's Case, id. 537; Gyllenborg's Case, id. 548; Prince Cellamare's Case, 1 Marten's Causes Célèbres, 149; Sackville's Case, *supra*.

The English courts have jurisdiction to try a crime committed in a foreign embassy by a person not belonging to it, and they have exclusive jurisdiction if the offender is a British subject. This is also maintained by both France and Germany, and is now a principle of International Law. See 20 Law Mag. & Rev. (4th Series), 49.

A contract to bribe or corruptly influence officers of a foreign government will not be enforced in the courts of this country; and where the consul-general of a foreign nation, residing here, contracted, for commissions, to use his influence, in favor of a manufacturer of fire-arms, for their purchase by the examining agent of his government, the contract was held void as against public policy, and although only the general issue was pleaded to his suit, the court of its own motion directed a verdict against the claimant. Oscanyan *v.* Arms Co., 103 U. S. 261; Lee *v.* Johnson, 116 U. S. 48, 52; Higgins *v.* McCrea, id. 671, 685.

*A government may, in its discretion, lawfully refuse to *40 receive an ambassador, and without affording any just cause for war, though the act would, probably, excite unfriendly disposition, unless accompanied with conciliatory explanations.[1] The refusal may be upon the ground of the ambassador's bad character, or former offensive conduct, or because the special subject of the embassy is not proper, or not convenient for discussion. (*a*) A state may also be divided and distracted by civil wars, so as to render it inexpedient to acknowledge the supremacy of either party. Bynkershoek says, (*b*) that this right of sending ambassadors belongs to the ruling party, in whom *stet rei agendi potestas.* This is placing the right where all foreign governments

and himself a ministre d'état, in his Cours de Droit Public classes together chargés d'affaires, ministers resident, or simply ministers or residents, as diplomatic agents of the third class. The United States are usually represented at the courts of the great powers of the first class by ministers plenipotentiary, and at those of an inferior class by a chargé d'affaires; and they have never sent a person of the rank of ambassador in the diplomatic sense. The Prince of Orange once expressed to Mr. Adams his surprise that the United States had not put themselves, in that respect, on a level with the crowned heads. Diplomatic Correspondence, edited by Mr. Sparks, vii. 108. The questions concerning precedence among the members of the diplomatic corps at foreign courts were all happily settled by the Congress of Vienna, in 1815, and signed by the representatives of the eight principal European powers. It was agreed that diplomatic agents of the respective classes take rank according to the date of the official notice of their arrival, and that the order of signature of ministers to acts or treaties between several powers that allow of the alternat, should be determined by lot. Recueil des Pièces Officielles, viii. No. 17; Wheaton's Elements of International Law, 265; his History of the Law of Nations in Europe and America, New York, 1845, 496.

(*a*) Rutherforth, b. 2, c. 9; Bynk. de Foro Legatorum, c. 19, sec. 7.

(*b*) Quest. J. Pub. lib. 2, c. 3.

[1] Dana's Wheaton, note 137; Annual Register, 1843, p. 160; 1856, p. 277, &c.

The government of a revolted state which has not yet been recognized, sometimes sends out diplomatic agents, who, although not invested with the representative character, nor entitled to diplomatic honors, may be clothed with the powers and enjoy the immunities of ministers. Despatch of Earl Russell to Lord Lyons, Jan. 23, 1862; North Am. Pap. Nov. 4, 1862, p. 234, cited Abdy's Kent, 135; cited Dana's Wheat. note 121, as Parl. Pap. N. A. No. 5. But Mr. Seward has stated, in the case of the Mexican Empire, that the government of the United States holds no official intercourse, or unofficial or private interviews, with agents of parties in any country which stand in an attitude of revolution antagonistic to the sovereign authority in the same country with which the United States are on terms of friendly intercourse. Memoranda of March 13 and July 17, 1865; Ex. Doc. 20, 39th Cong. 1st Sess., cited Dana's Wheaton, note 41; Despatch of Mr. Seward to Mr. Bigelow, March 13, 1865; Dip. Corr. 1865, pt. 3, 378.

See, as to recognition, *ante*, 25, n. 1.

place it, in the government *de facto*, which is in the actual exercise of power; but the government to whom the ambassador is sent may exercise its discretion in receiving or refusing to receive him.

It sometimes becomes a grave question, in national discussions, how far the sovereign is bound by the act of his minister. This will depend upon the nature and terms of his authority. (*c*) It is now the usual case for every government to reserve to itself the right to ratify or dissent from the treaty agreed to by its ambassador. A general letter of credence is the ordinary letter of attorney, or credential of the minister; and it is not under-
*41 stood to confer a power *upon the minister to bind his sovereign conclusively. To do so important an act would require, at least, a distinct and special power, containing an express authority to bind the principal definitively, without the right of review, or the necessity of ratification on his part. (*a*) This is not the ordinary or prudent course of business. Ministers always act under instructions which are confidential, and which it is admitted they are not bound to disclose; (*b*) and it is a well-grounded custom, as Vattel observes, (*c*) that any engagement which the minister shall enter into is of no force among sovereigns, unless ratified by his principal. This is now the usage, although the treaty may have been signed by plenipotentiaries. (*d*)

8. **Consuls.** — Consuls are commercial agents, appointed to reside in the seaports of foreign countries, with a commission to watch over the commercial rights and privileges of the nation

(*c*) The discretion and reserve with which a public minister ought to act in relation to the country in which he resides is strongly exemplified in the case of The Sally Ann, Stewart's Vice-Adm. R. 367. It was held, that a license granted by the British minister at New York, after the commencement of the war of 1812, to an American citizen, to export provisions to a British island, was inconsistent with his diplomatic character and duty, and void; and the decision was declared to be correct and proper, by the Lords Commissioners on appeal.

(*a*) Bynk. Q. Jur. Pub. lib. 2, c. 7.

(*b*) Wicquefort's L'Amb. i. sec. 14; Martens, 217.

(*c*) B. 4, c. 6, sec. 77.

(*d*) Bynk. *ubi supra;* Vattel, b. 2, c. 12, sec. 156; Martens, b. 2, c. 1, sec. 3; The Eliza Ann, 1 Dodson, 244. Both Vattel and Klüber agree that a treaty concluded under a full power cannot, in honor, be rejected without very sufficient reasons, as by violation of instructions, mutual error, a moral or physical impossibility, &c. Wheaton's Elements, 3d ed. 303–306. See in Wheaton's Elements, 3d ed. 335, a reference to the most respectable writers on diplomatic history.

deputing them. The establishment of consuls is one of the most useful of modern commercial institutions. They were appointed about the 12th century, in the opulent states of Italy, such as Pisa, Lucca, Genoa, and Venice, and their origin has been ascribed to the necessity for extraordinary assistance in those branches of commerce formerly carried on with barbarous and uncivilized nations. (*e*) The utility of such a mercantile officer has been perceived and felt by all trading nations, and the Mediterranean trade in particular stands highly in need of such accredited agents. (*f*) Consuls have been multiplied and extended to every part of the world where navigation and commerce can successfully penetrate, and their duties and privileges are now generally limited and defined in treaties of commerce, or by the *statute *42 regulations of the country which they represent. (*x*) In some places they have been invested with judicial powers over disputes between their own merchants in foreign ports; but in the commercial treaties made by Great Britain there is rarely any stipulation for clothing them with judicial authority, except in treaties with the Barbary powers; and in England it has been held that a consul is not strictly a judicial officer, and they have there no judicial power. (*a*) It has been urged by some writers, as a matter highly expedient, to establish rules requiring merchants abroad to submit their disputes to the judicial authority of their own consuls, particularly with reference to shipping concerns. But no government can invest its consuls with judicial power over their own subjects in a foreign country, without the consent of the government of the foreign country, founded on treaty; and there is no instance in any nation in Europe of the

(*e*) 1 Chitty Comm. Law, 48, 49.

(*f*) Jackson on the Commerce of the Mediterranean, p. 30, c. 4. Consuls were not unknown to the ancient Athenians, and they had them in the commercial ports in which they traded, to protect the interests and property of Athenian merchants. St. John's History of the Manners and Customs of Ancient Greece, iii. 282.

(*a*) Mansfield, Ch. J., in Waldron *v.* Coombe, 3 Taunt. 162; 1 Chitty, 50, 51.

(*x*) A consul may acquire a domicile in the country where he is stationed, if he intends to do so, but appointment to a consular office in one's own country, or residence abroad as such an officer, does not change the domicile. Sharpe *v.* Crispin, L. R. 1 P. & D. 611; Udny *v.* Udny, L. R. 1 H. L. Sc. 441; Westlake's Private Int. Law (2d ed.) § 257; *In re* Patience, 29 Ch. D. 976; Abd-ul-Messih *v.* Farra, 13 A. C. 431.

admission of criminal jurisdiction in foreign consuls. (*b*)[1] (*y*) The laws of the United States, on the subject of consuls and vice-

(*b*) Pardessus, Cours de Droit Comm. v. sec. 1450, 1451, 5th ed. ; Opinions of the Attorneys-General of the United States, i. 786.

[1] The act of June 22, 1860, 12 U. S. St. at L. 72, in pursuance of treaties, gives judicial powers to United States consuls in China, Japan, Siam, Turkey, Persia, Tripoli, Tunis, Morocco, and Muscat, and also in other uncivilized countries. Their jurisdiction, both civil and criminal, is to be in accordance with the laws of the United States and the common law, including equity and admiralty, and they are to supply defects by decrees. In some cases an appeal is given to the minister. See Lawrence's Wheaton, note 74. [As to the extent of such jurisdiction, see Dainese *v.* Hale, 91 U. S. 13 ; Dainese *v.* United States, 15 Ct. of Cl. 64. See, generally, Consular Convention between Austra-Hungary and United States of July 11, 1870 ; Hall, Int. Law, Appen. V. ; Revue de Droit International, 10, 285, and 11, 45, "Étude sur la Jurisdiction Consulaire." — B.]

Apart from statute or treaty, it seems that an ambassador has not now civil or criminal jurisdiction, *virtute officii*, even among his suite. Wheat. Dana's note 128; Twiss, pt. 1, § 202.

But consuls of Christian states in countries not Christian have been thought to be general administrative and judicial agents of their nation as towards their countrymen. Mr. Att.-Gen. Cushing in 7 Att.-Gen. Op. 342 ; *vide* ib. 18, 495, 565-8 Att.-Gen. Op. 380 ; 1 Vattel, Pradier Fodéré, 625 ; Wheat. Lawrence's notes 73, 74. So, as to British consuls in Turkey. The Laconia, 1 Br. & L. 117 ; s. c. 2 Moore, P. C. N. S. 161. See Barber *v.* Lamb, 8 C. B. N. S. 95.

The consul of a decedent's country can intervene of right, apart from treaty, only by way of *surveillance*, and without jurisdiction. 8 Op. Att.-Gen. 98. See act of Aug. 18, 1856, § 29 ; 11 St. at L. 52, 63.

The consular certificates mentioned in the text are not evidence, except so far as made so by statute. Levy *v.* Burley, 2 Sumn. 355 ; Brown *v.* The Independence, Crabbe, 54 ; Johnson *v.* The Coriolanus, Crabbe, 239 ; Catlett *v.* Pacific Ins. Co., 1 Paine, 594.

(*y*) "Neither under international law, nor under the statute law of the United States, has a consular officer of a foreign government a right to sit as judge or arbitrator within our territory, and render decrees or orders affecting personal liberty, which orders or decrees the courts of the United States are authorized or required to enforce, unless the consent of the United States to such jurisdiction has been given, either by express statute or treaty stipulation." Pardee, J. in *Re* Aubrey, 26 Fed. Rep. 848, 851.

A judge of a Consular Court, vested by treaty with plenary civil jurisdiction over all British subjects within the jurisdiction, although such court is not expressly made a court of record, is not liable in damages for dismissing judicially, but without proof, an action which he holds to be vexatious. Haggard *v.* Pelicier Frères, [1892] A. C. 61. Jurisdiction conferred upon consuls or consular courts by treaties, in the absence of a government by British authority existing in the locality (such as exists in India) does not give rise to a change of domicile when British subjects permanently abide there under British protection. *In re* Tootal's Trusts, 23 Ch. D. 532 ; Abd-ul-Messih *v.* Farra, 13 A. C.

consuls, (*c*) specially authorize them to receive the protests of masters and others relating to American commerce, and they declare that consular certificates, under seal, shall receive faith and credit in the courts of the United States. It is likewise made their duty, where the laws of the country permit, to administer on the personal estates of American citizens, dying within their consulates, and having no legal representative, and to take charge of and secure the effects of stranded American vessels, in the absence of the master, owner, or consignee; and they are bound to provide for destitute seamen within their consulates, and to send them, at the public expense, to the United States. It is made the duty of American consuls and commercial agents to reclaim deserters and discountenance insubordination, and to lend their aid to the local authorities for that purpose, and to discharge the seamen cruelly treated. (*d*) It is also made the duty of masters of American vessels, on arrival at a foreign port, to deposit their registers, sea-letters, and passports with the consul, vice-consul, or commercial agent, if any,

(*c*) Acts of Congress of 14th April, 1792, c. 24, and of February 28, 1803, c. 62.

(*d*) Act U. S. 20th July, 1840, c. 23, sec. 11, 17. See *infra*, iii. 199, the treaty between the United States and Hanover, to the same effect.

431; *Ex parte* Limehouse Board of Works, 24 Ch. D. 177. The judgment of a consular court is, like other foreign judgments, only examinable by other courts for fraud or lack of jurisdiction. Messina *v.* Petrococchino, L. R. 4 P. C. 144. See also, as to consular courts, Piggott on Extraterritoriality, 59; 3 Jurid. Rev. 256; 25 Revue de Droit Int. 79, 213, 338; 23 id. 5, 176; 27 id. 313.

The government of the United States has power to make treaties with foreign powers providing tribunals for the exercise of judicial authority by its officials residing in their countries; but, as the Federal Constitution is not operative beyond our territory, its guarantees of presentment by a grand jury and trial by jury do not extend to these courts. *In re* Ross, 140 U. S. 453; 44 Fed. Rep. 185; see People *v.* Kernan (Japan), 22 Am. L. Rev. 126; The Ping On *v.* Blethen, 11 Fed. Rep. 607. Such a tribunal has jurisdiction to try, for an offence committed on an American vessel, when within its jurisdiction, the subject of a foreign nation who has enlisted in its crew. Ibid.; Ross *v.* McIntyre, 140 U. S. 453. But, where there is no treaty provision, a seaman committed in the United States by a foreign consul may be discharged by the courts. *Re* Aubrey, 26 Fed. Rep. 848; see Ellis *v.* Mitchell, Snow's Int. Law, 133; The Marie, 49 Fed. Rep. 286; The T. F. Oakes, 36 id. 442; Williams *v.* The Welhaven, 55 id. 80. A vice-consul's unrevoked *exequatur* entitles him to recognition by the courts, although the government which sent him has been overthrown by a revolution. United States *v.* Trumbull, 48 Fed. Rep. 94. As to the right of a consul of a foreign government to intervene and claim a vessel as its property, see The Conserva, 38 Fed. Rep. 431.

at the port; though this injunction only applies when the vessel shall have come to an entry, or transacted business at the port. (*e*) These particular powers and duties are similar to those prescribed by British consuls, and to consuls under the consular convention between the United States and France, in 1788; and they are in accordance with the usages of nations, and are not to be construed to the exclusion of others, resulting from the nature of the consular appointment. (*a*)[1] The consular convention between France and this country, in 1778, allowed consuls to exercise police over all vessels of their respective nation, "within the interior of the vessels," and to exercise a species of civil jurisdiction, by determining disputes concerning wages, and between the masters and crews of vessels belonging to their own country. The jurisdiction claimed under the consular convention with France was merely voluntary, and altogether exclusive of any coercive authority; (*b*) and we have no treaty at present which concedes even such consular func-

*43 *43

(*c*) Toler *v.* White, Ware, 277; Matthews *v.* Offley, 3 Sumner, 115. American consuls, having no judicial power, cannot take cognizance of the offences of seamen in foreign ports, nor exempt the master from his own responsibility. The Wm. Harris, Ware, 367. But when an American vessel puts into a port of necessity for repairs, a survey to ascertain the damage may, it seems, according to usage, be directed by the American consul, as part of his official duty. Potter *v.* The Ocean Ins. Co., 3 Sumner, 27. The English Prerogative Court, before Sir Herbert Jenner, in 1839, in the case of Aspinwall *v.* The Queen's Proctor, 2 Curteis, 241, held that an American consul was not, in that capacity, permitted by the law of England to administer upon the personal estate of a domiciled citizen of the United States dying in England. The Crown takes charge of the property in trust, for payment of debts and distribution, according to the law of the owner's domicile.

(*a*) Beawes's L. M. i. tit. Consuls, 292, 293.

(*b*) Mr. Pickering to Mr. Pinckney, January 16, 1797.

[1] See act of Congress of August 18, 1856, 11 U. S. St. at L. 52 *et seq.* c. 127.

As to the duties of British consuls, see Abdy's Kent, 148 *et seq.*

The act of Congress of June 11, 1864, makes provisions for carrying out the exclusive jurisdiction of foreign consuls and like officials over controversies between officers and any of the crew, or between any of the crew, of vessels of their nation, where such jurisdiction has been provided for by treaty. 13 U. S. St. at L. c. 116, p. 121. A list of such treaties will be found in Lawrence's Wheaton, note 73.

As to the consul's intervention on behalf of individuals of his nation, see The Adolph, 1 Curt. 87; Robson *v.* The Huntress, 2 Wall. Jr. 59; The Elizabeth, Blatchf. Pr. 250. As to his protest against the admiralty court's taking jurisdiction in certain cases, *post*, iii.; Becherdass Ambaidass, 1 Lowell, 569, 6 Am. Law Rev. 74; The Nina, L. R. 2 P. C. 38. (*x*)

(*x*) The Leon XIII., 8 P. D. 121.

tions. (*c*) The doctrine of our courts is, (*d*) that a foreign consul, duly recognized by our government, may assert and defend, as a competent party, the rights of property of the individuals of his nation, in the courts of the United States, and may institute suits for that purpose, without any special authority from the party for whose benefit he acts. But the court, in that case, said that they could not go so far as to recognize a right in a vice-consul to receive actual restitution of the property, or its proceeds, without showing some specific power for the purpose, from the party in interest.

No nation is bound to receive a foreign consul, unless it has agreed to do so by treaty, and the refusal is no violation of the peace and amity between the nations. Consuls are to be approved and admitted in the usual form; and if any consul be guilty of illegal or improper conduct, he is liable to have his *exequatur*, or written recognition of his character, revoked, and to be punished according to the laws of the country in which he is consul; or he may be sent back to his own country, at the discretion of the government *which he has offended. *44 The French consuls are forbidden to be concerned in commerce, and, by the act of Congress of February 28, 1803, American consuls residing on the Barbary coast are forbidden also; but British and American consuls are generally at liberty to be concerned in trade; and in such cases the character of consul does not give any protection to that of merchant, when these characters are united in the same person. (*a*)[1] Though the

(*c*) By the treaties of commerce and navigation between the United States and the Kingdom of Hanover, May 20, 1840, article 6, and between the United States and Portugal, of 23d April, 1841, it was provided that consuls, vice-consuls, and commercial agents should have the right, as such, to sit as judges and arbitrators in differences between the masters and crews of the vessels belonging to the nation whose interests were committed to their charge, without the interference of the local authorities, unless the conduct of the crews or of the captain should disturb the tranquillity of the country, or the consuls should require such assistance, to cause their decisions to be carried into effect or supported. By the same treaties, foreign consuls may apply for the arrest and surrender of seamen deserting from their public and private vessels in port. See also treaties to the like effect with Sweden, Prussia, and Russia.

(*d*) The Bello Corrunes, 6 Wheaton, 168.

(*a*) Beawes's L. M. i. tit. Consuls, 291; 1 Chitty, 57, 58; The Indian Chief, 3 Rob. Adm. 27; Vattel, b. 4, sec. 114; Arnold and Ramsay *v.* U. Ins. Co., 1 Johns.

[1] Coppell *v.* Hall, 7 Wall. 542; The Pioneer, Blatchf. Pr. 666; The Baltica, 11 Moore, P. C. 141; The Aina, 1 Spinks, Ec. & Ad. 313, 28 E. L. & Eq. 600. By the

functions of a consul would seem to require that he should not be a subject of the state in which he resides, yet the practice of the maritime powers is quite lax on this point, and it is usual, and thought most convenient, to appoint subjects of the foreign country to be consuls at its ports.

A consul is not such a public minister as to be entitled to the privileges appertaining to that character, nor is he under the special protection of the law of nations. He is entitled to privileges to a certain extent, such as for safe-conduct, but he is not entitled to the *jus gentium*. Vattel thinks (*b*) that his functions require that he should be independent of the ordinary *criminal* jurisdiction of the country, and that he ought not to be molested, unless he violates the law of nations by some enormous crime; and that, if guilty of any crime, he ought to be sent home to be punished. (*c*) But no such immunities have been conferred on consuls by the modern practice of nations; and it may be con-

Cas. 363. The treaties of commerce and navigation between the United States and Hanover, May 20, 1840, art. 6, and between the United States and Portugal, of 23d of April, 1841, art. 10, afford a sample of the stipulation usual in commercial treaties on this subject: "If any of the said consuls shall carry on trade, they shall be subjected to the same laws and usages to which private individuals of their nation are subjected in the same place." American consuls abroad have no salaries, and are paid by fees of office, except the consul at London, who has a salary of $2,000. A suggestion was made in Congress in March, 1840, that it would be advisable to change our consular system in that respect, by confining consuls to their business of consuls, and to allow them salaries. The Secretary of State of the United States, in his report to Congress of the 12th December, 1846, strongly recommended a revision and amendment of the consular system of the United States; and that the number, appointment, and compensation of consuls be regulated, and their duties and fees defined. He recommended the establishment of consuls-general, especially in respect to the Barbary states and some of the ports in the Levant; and he suggested a provision for 74 consuls and 55 vice-consuls, and also for consular agents; and that those in the more important ports be paid by salaries out of the public treasury, and with a prohibition to engage in mercantile pursuits. American consuls[hips] were generally held by commission merchants residing abroad; and foreign commerce ought not to be taxed with consular fees, except for limited purposes; and the fees ought to be regulated by the tonnage of the vessel. A consular code ought to define the powers and duties of consuls.

(*b*) B. 2, c. 2, sec. 34.

(*c*) De Steck, Essai sur les Consuls, sec. 7, p. 62, Berlin, 1790, draws the same conclusion from the commercial treaties in Europe since 1664.

act of Congress of Aug. 18, 1856, 11 U. S. St. at L. c. 127, pp. 52, 55, § 5, American consuls in a large number of places are forbidden to trade, and such seems to be the modern English policy. Abdy's Kent, 142, note 2, citing Report, July 27, 1858, H. of C. No. 482.

sidered as settled law, that consuls do not enjoy the protection of the law of nations, any more than other persons who enter the country under a safe-conduct. In civil and criminal cases they are equally subject to the laws of the country in which they reside. (*d*) The same doctrine, declared by the public *jurists, has been frequently laid down in English and *45 American courts of justice. (*a*) It seems, however, from some decisions in France, mentioned by Mr. Warden, (*b*) that foreign consuls cannot be prosecuted before a French tribunal, for acts done by them in France, by order of their government, and with the authorization of the French government, and that, in general, a consul cannot be prosecuted without the previous consent of his government. Consular privileges are much less extensive in Christian than in Mahometan countries. In the latter they cannot be imprisoned for any cause whatever, except by demanding justice against them of the Porte, (*c*) and they partake very considerably of the character and importance of resident ministers. They are diplomatic agents under the name of consuls, and enjoy the rights and privileges which the Ottoman Porte recognizes in relation to the foreign ministers resident at Constantinople. (*d*) By treaty, an entire immunity is usually given

(*d*) Wicquefort's L'Amb. b. 1, c. 5; Bynk. de Foro Legat. c. 10; Martens's Summ. b. 4, c. 3, sec. 8; Beawes, L. M. i. tit. Consuls; Barbuit's Case, Talbot's Cases, 281; Valin's Ord. i. liv. 1, tit. 9, de Consuls; Pardessus, Droit Comm. iv. 148, 183; Opinions of the Attorneys-General of the United States, i. 45, 302, Washington, 1841.

(*a*) Viveash *v.* Becker, 3 Maule & Selw. 284; Clarke *v.* Cretico, 1 Taunt. 106; United States *v.* Ravara, 2 Dallas, 297; The Commonwealth *v.* Cosloff, 5 Serg. & Rawle, 545; De La Foret's Case, 2 Nott & M'Cord, 217.

(*b*) On Consuls, 108–116.

(*c*) 1 Chitty, 71.

(*d*) Callier de la Manière de Négocier avec les Souverains, pt. i. 94, London ed. 1750. The whole Frank quarter of Smyrna is at this day under the jurisdiction of European consuls, and all matters touching the rights of foreign residents fall under the exclusive cognizance of the respective consuls. So the consuls of Barcelona, in the middle ages, were clothed with many of the functions of modern resident ministers. In the negotiations of the American minister, Mr. Cushing, with the Chinese government, in 1844, the former observed that, in the intercourse between Christian and Mahometan states the Christian foreigner was exempted from the jurisdiction of the local authorities, and subjected to the jurisdiction of the minister, consul, or other authorities of his own government. It was observed, in the Report of the Secretary of State, in 1846, already referred to, that by treaties of the United States with Turkey and China, offences committed by American citizens in those countries were to be tried and punished by the consuls; and the gov-

to the persons, domestics, and effects of the resident consuls, and no consuls reside with the Barbary states but under the protection of treaties. (*e*)

Considering the importance of the consular functions, and the activity which is required of them in all great maritime ports, and the approach which consuls make to the efficacy and dignity of diplomatic characters, it was a wise provision in the Constitution of the United States which gave to the Supreme Court original jurisdiction in all cases affecting consuls, as well as ambassadors and other public ministers; and the federal jurisdiction is understood to be exclusive of the state courts. (*f*)[1] (*x*)

ernments of the countries, when required, were to afford aid to enforce consular decisions. [*Ante*, 42, n. 1.]

(*e*) Shaler's Sketches of Algiers, 39, 307. By the treaty of amity and commerce between the United States and the Sultan of Muscat, in Arabia, ratified on the 30th of June, 1834, American consuls may be appointed to reside in the ports of the Sultan, where the principal commerce is carried on (and which, of course, may include ports on the African coast, and in the island of Zanzibar, within the domains of the Sultan). Such consuls are to be exclusive judges of all disputes in suits wherein American citizens shall be engaged with each other, and to receive the property of American citizens dying within his dominions; and the persons and property of the consuls and of their households are to be inviolate. The consular establishment of the United States is very imperfect, and especially in relation to the countries in the East Indian regions. The claims of commerce, as well as the character of the United States, would seem to require that the functions of consuls, and the provision for their support, should be better regulated, and that they ought not to be left to the necessity of making their consular duties subsidiary to their business as merchants and factors. See a valuable plan in relation to consular establishments in the countries east of the Cape of Good Hope, in a pamphlet entitled "Outline of a Consular Establishment for the United States of America in Eastern Asia," and which is noticed in the North American Review for October, 1838, followed by some judicious reflections on the subject.

Consuls residing in the five free ports of China, established by the treaty of peace between Great Britain and China in 1842, have, by the subsequent commercial treaty in 1843, between those powers, enlarged consular functions, including those which are in some respects judicial and executive.

(*f*) Commonwealth *v.* Kosloff, 5 Serg. & Rawle, 545; Hall *v.* Young, 3 Pick. 80; Davis *v.* Packard, 7 Peters, 276; Sartori *v.* Hamilton, 1 Green (N. J.), 107. See also, *infra*, 298, 304.

[1] A foreign consul cannot waive his exemption from suit in a state court, Valarino *v.* Thompson, 3 Seld. (7 N. Y.) 576; Griffin *v.* Dominguez, 2 Duer, 656; such courts have no jurisdiction, although there are other defendants, Naylor *v.*

(*x*) The U. S. Rev. Stats., § 563, cl. 17, conferring upon the District Courts jurisdiction of all suits against consuls and vice-consuls (except for certain offences) is constitutionally valid. Börs *v.* Preston, 111 U. S. 252; *Re* Baiz, 135 U.

Hoffman, 22 How. Pr. 510. But they have jurisdiction of suits brought by consuls, Sagory *v.* Wissman, 2 Benedict, 240; and the United States courts have jurisdiction of suits against them, Gittings *v.* Crawford, Taney, 1; St. Luke's Hospital *v.* Barklay, 3 Blatchf. 259; Graham *v.* Stucken, 4 Blatchf. 50; Bixby *v.* Janssen, 6 Blatchf. 315. Thus a consul may be sued in the United States District Court by one of his own nation to recover fees improperly exacted. Lorway *v.* Lousada, 1 Lowell, 77; 1 Am. Law Rev. 92. [See Wheat. Lawrence's note 143, as to the privileges of consuls in various countries.

S. 403. Formerly the U. S. Courts had an exclusive jurisdiction of such suits under that section and § 711, cl. 8, but the repeal of the latter statute by the act of 1875, ch. 80, results in a concurrent jurisdiction in the State courts. Börs *v.* Preston, 111 U. S. 261; Froment *v.* Duclos, 30 Fed. Rep. 385; Miller *v.* Sels, 66 Cal. 341; De Give *v.* Grand Rapids F. Co., 94 Ga. 605. A foreign consul is not presumed to be an alien. Börs *v.* Preston, 111 U. S. 252.

A foreign consul has, as incident to his office, power to receive, for heirs residing abroad in his country, their shares of the estate of a person who died in this country. *In re* Tartaglio's estate, 33 N. Y. S. 1121.

Ambassadors, consul-generals, consuls, and commercial agents are not entitled to their salaries, or to be sent to their post, until they have qualified by taking oath and giving bond. Williams *v.* United States, 23 Ct. Cl. 46. Commissions received by a consul for settling a private estate, fees for "cattle-disease certificates," and for such exceptional matters as are not covered by the acts of Congress or the consular regulations, belong to the consul. United States *v.* Mosby, 133 U. S. 273; United States *v.* Badeau, 31 Fed. Rep. 697. So of fees which he receives for acting under the authority of a State government, and which are independent of his relation to the general government. United States *v.* Badeau, 33 Fed. Rep. 572. The government is entitled to the interest on "public moneys" deposited by a consul in bank. United States *v.* Mosby, 133 U. S. 273. By the Acts of Jan. 27, 1879 and June 18, 1888 (20 St. at L. 267; 25 id. 186) consular officers are to report market prices, duties, and port charges, rates of wages, &c. By the Quarantine Act of Feb. 15, 1893 (27 St. at L. 450) consular bills of health are required for vessels sailing to this country from foreign ports, and reports are to be made by consuls of the sanitary condition of foreign ports and places from which contagious or infectious diseases are or may be imported into the United States.

LECTURE III.

OF THE DECLARATION, AND OTHER EARLY MEASURES OF A STATE OF WAR.

IN the last Lecture we considered the principal rights and duties of nations in a state of peace; and if those duties were generally and duly fulfilled, a new order of things would arise, and shed a brighter light over the history of human affairs. Peace is said to be the natural state of man, and war is undertaken for the sake of peace, which is its only lawful end and purpose. (*a*) War, to use the language of Lord Bacon, (*b*) is one of the highest trials of right; for, as princes and states acknowledge no superior upon earth, they put themselves upon the justice of God by an appeal to arms. The history of mankind is an almost uninterrupted narration of a state of war, and gives color to the extravagant theory of Hobbes, (*c*) who maintains that the natural state of man is a state of war of all against all; and it adds plausibility to the conclusions of those other writers, who, having known and studied the Indian character, insist that continual war is the natural instinct and appetite of man in a savage state. It is doubtless true that a sincere disposition for peace, and a just appreciation of its blessings, are the natural and necessary result of science and civilization.

* 48 * The right of self-defence is part of the law of our nature, and it is the indispensable duty of civil society to protect its members in the enjoyment of their rights, both of person and property. This is the fundamental principle of the social compact. An injury, either done or threatened, to the perfect rights of the nation, or of any of its members, and susceptible of no other redress, is a just cause of war. The injury may consist,

(*a*) Cic. de Off. 1, 11 and 23; Grotius, b. 1, c. 1; Burlamaqui, pt. 4, c. 1, sec. 4; Vattel, b. 4, c. 1.

(*b*) Bacon's Works, iii. 40.

(*c*) Leviathan, pt. 1, c. 13.

not only in the direct violation of personal or political rights, but in wrongfully withholding what is due, or in the refusal of a reasonable reparation for injuries committed, or of adequate explanation or security in respect to manifest and impending danger. (*a*) Grotius condemns the doctrine that war may be undertaken to weaken the power of a neighbor, under the apprehension that its further increase may render him dangerous. This would be contrary to justice, unless we were morally certain, not only of a capacity, but of an actual intention, to injure us. We ought rather to meet the anticipated danger by a diligent cultivation and prudent management of our own resources. We ought to conciliate the respect and good will of other nations, and secure their assistance, in case of need, by the benevolence and justice of our conduct. War is not to be resorted to without absolute necessity, nor unless peace would be more dangerous and more miserable than war itself. An injury to an individual member of a state is a just cause of war, if redress be refused; but a nation is not bound to go to war on so slight a foundation; for it may of itself grant indemnity to the injured party, and if this cannot be done, yet the good of the whole is to be preferred to the welfare of a part. (*b*) Every milder method of redress is to be tried, before the nation makes an appeal to arms; and this is the sage and moral precept of the writers on natural law.

*If the question of right between two powers be in any *49 degree dubious, they ought to forbear proceeding to extremities; and a nation would be condemned by the impartial voice of mankind, if it voluntarily went to war upon a claim of which it doubted the legality. But on political subjects we cannot expect, and are not to look for, the same rigorous demonstration as in the physical sciences. Policy is a science of calculations and combinations, arising out of times, places, and circumstances, and it cannot be reduced to absolute simplicity and certainty. We must act according to the dictates of a well-informed judgment, resting upon a diligent and careful examination of facts; and every pacific mode of redress is to be tried faithfully and perseveringly, before the nation resorts to arms.

1. Assistance to Allies in War. — If one nation be bound by treaty to afford assistance, in case of war between its ally and a

(*a*) Grotius, b. 2, c. 1 and 22; Rutherforth, b. 2, c. 9; Vattel, b. 3, c. 3, sec. 26.
(*b*) Grotius, b. 2, c. 22–25; Rutherforth, b. 2, c. 9.

third power, the assistance is to be given whenever the *casus fœderis* occurs; but a question will sometimes arise, whether the government which is to afford the aid is to judge for itself of the justice of the war on the part of the ally, and to make the right to assistance depend upon its own judgment. Grotius is of opinion (*a*) that treaties of that kind do not oblige us to participate in a war which appears to be manifestly unjust on the part of the ally; and it is said to be a tacit condition annexed to every treaty made in time of peace, and stipulating to afford succors in time of war, that the stipulation is only to apply to a just war. To give assistance in an unjust war on the ground of the treaty would be contracting an obligation to do injustice, and no such contract is valid. (*b*) But to set up a pretext of this kind to avoid a positive engagement is extremely hazardous, and it cannot be done, except in a very clear case, without exposing the nation to the imputation of a breach of public faith. In doubtful cases, the presumption ought rather to be in favor of our ally, and of the justice of the war.

* 50 * The doctrine that one nation is not bound to assist another, under any circumstances, in a war clearly unjust, is similar to the principle in the feudal law, to be met with in the Book of Feuds, compiled from the usages of the Lombards, and forming part of the common law of Europe during the prevalence of the feudal system. A vassal refusing to assist his liege lord in a just war, forfeited his feud. If the justice of the war was even doubtful, or not known affirmatively to be unjust, the vassal was bound to assist; but if the war appeared to him to be manifestly unjust, he was under no obligation to help his lord to carry it on offensively. (*a*)

A nation which has agreed to render assistance to another is not obliged to furnish it when the case is hopeless, or when giving the succors would expose the state itself to imminent danger. Such extreme cases are tacit exceptions to the obligation of the treaty; but the danger must not be slight, remote, nor contingent, for this would be to seek a frivolous case to violate a solemn engagement. (*b*) In the case of a defensive alliance, the condition

(*a*) B. 2, c. 25.
(*b*) Vattel, b. 2, c. 12, sec. 168; b. 3, c. 6, sec. 86, 87.
(*a*) Feud. lib. 2, tit. 28, sec. 1.
(*b*) Vattel, b. 3, c. 6, sec. 92.

of the contract does not call for the assistance, unless the ally be engaged in a *defensive* war; for in a defensive alliance the nation engages only to defend its ally, in case he be attacked, and even then we are to inquire whether he be not justly attacked. (*c*) The defensive alliance applies only to the case of a war first commenced, in point of fact, against the ally; and the power that first declares or actually begins the war makes what is deemed, in the conventional law of nations, an *offensive war*. (*d*) The treaty of alliance between France and the United States, in 1778, was declared, by the second article, * to be a defen- *51 sive alliance, and that declaration gave a character to the whole instrument; and, consequently, the guaranty, on the part of the United States, of the French possession in America, could only apply to future defensive wars on the part of France. Upon that ground, the government of this country, in 1793, did not consider themselves bound to depart from their neutrality, and to take part with France in the war in which she was then engaged. (*a*) The war of 1793 was first actually declared and commenced by France, against all the allied powers of Europe, and the nature of the guaranty required us to look only to that fact. (*b*)

2. Declaration of War. — In the ancient republics of Greece and Italy, the right of declaring war resided with the people, who

(c) Vattel, b. 3, c. 6, sec. 79, 83, 90.

(*d*) A war may be *defensive* in its principles, though *offensive* in its operations; as where attack is the best mode to repel a menaced invasion, and the *casus fœderis* of a *defensive* alliance will apply. He who first renders the application of force necessary is the aggressor, though he may not be the one who first actually applies it. Vattel, b. 3, c. 6, sec. 91, 100; Edin. Review, No. 39, pp. 244, 245.

(*a*) See Pacificus, written in 1793, by Mr. Hamilton, then Secretary of the Treasury; and see the Instructions from the Secretary of State to the American ministers to France, July 15, 1797.

(*b*) Several instances are mentioned in Wheaton's Elements of International Law, 3d ed. 325–334, of the occurrence of the *casus fœderis* in the case of a defensive alliance. A distinction is made, in the later writers on public law, between the *law of nations* and *international law*, originating, it is said, with Jeremy Bentham. Thus Mr. Wheaton calls one of his works the History of the Law of Nations, and the other, Elements of International Law. Chancellor d'Aguesseau long ago noticed the distinction between *Jus inter Gentes* and *Jus Gentium inter Civitates*. *International* law seems to relate more particularly to rights and duties arising from social, commercial, and pacific intercourse between different nations, and may be subdivided into public and private international law.[1]

[1] *Ante*, 1, note 1.

retained, in their collective capacity, the exercise of a large portion of the sovereign power. Among the ancient Germans it belonged also to the popular assemblies, (*c*) and the power was afterwards continued in the same channel, and actually resided in the Saxon Wittenagemote. (*d*) But in the monarchies of Europe, which arose upon the ruins of the feudal system, this important prerogative was generally assumed by the king, as appertaining to the duties of the executive department of government. Many publicists (*e*) consider the power as a part of the sovereign authority of the state, of which the legislative department is an essential branch. There are, however, several exceptions to the generality of this position; for in the limited monarchies of England, France, and Holland, the king alone declares war, and yet the power, to apply an observation of Vattel to the case, is but a slender prerogative of the crown, if the parliaments or legislative bodies of those kingdoms will act independently, since the king cannot raise the money requisite
*52 to carry on * the war without their consent. The wild and destructive wars of Charles XII. led the states of Sweden to reserve to themselves the right of declaring war; and in the form of government adopted in Sweden, in 1772, (*a*) the right to make war was continued in the same legislative body. This was the provision in those ephemeral constitutions which appeared in Poland and France the latter part of the last century; and as evidence of the force of public opinion on this subject, it may be observed, that in the constitution proposed by Bonaparte, on his reascension of the throne of France, in 1815, the right to levy men and money for war was to rest entirely upon a law to be proposed to the House of Representatives of the people, and assented to by them. In this country, the power of declaring war, as well as of raising the supplies, is wisely confided to the

(*c*) Tacit. de M. G. c. 11.

(*d*) Millar's View of the English Government, b. 1, c. 7. In the capitulation or great charter signed by Christopher II., King of Denmark, on his election to the throne in 1319, by the diet or assembly of the nobles, it was, among other things, declared that he should not make war without the advice and consent of the prelates and best men of the kingdom. Bishop Muller's Ancient History and Constitution of Denmark, reviewed in the Foreign Quarterly Review, No. 21.

(*e*) Puff. b. 8, c. 6, sec. 10; Vattel, b. 3, c. 1, sec. 4.

(*a*) Art. 48. But this free constitution of Sweden was overturned before the end of the year 1772, and a simple despotism established in its stead.

legislature of the Union; and the presumption is, that nothing short of a strong case deeply affecting our essential rights, and which cannot receive a pacific adjustment, after all reasonable efforts shall have been exhausted, will ever prevail upon Congress to declare war.

It has been usual to precede hostilities by a public declaration communicated to the enemy. It was the custom of the ancient Greeks and Romans to publish a declaration of the injuries they had received, and to send a herald to the enemy's borders to demand satisfaction, before they actually engaged in war; and invasions without notice were not looked upon as lawful. (*b*) War was declared with religious preparation and solemnity. According to Ulpian, (*c*) they *alone were reputed ene- *53 mies against whom the Roman people had publicly declared war. During the middle ages, a previous declaration of war was held to be requisite by the laws of honor, chivalry, and religion. Louis IX. refused to attack the Sultan of Egypt until he made a previous declaration to him by a herald at arms; and one of his successors sent a herald, with great formality, to the governor of the Low Countries, when he declared war against Spain, in 1635. (*a*) But, in modern times, the practice of a solemn declaration made to the enemy has fallen into disuse, and the nation contents itself with making a public declaration of war within its own territory, and to its own people. The jurists are, however, divided in opinion in respect to the necessity or justice of some previous declaration to the enemy in the case of offensive war. Grotius (*b*) considers a previous demand of satisfaction and a declaration as requisite to a solemn and lawful war; and Puffendorf (*c*) holds acts of hostility, which have not been preceded by a formal declaration of war, to be no better than acts of piracy and robbery. Emerigon (*d*) is of the same opinion; and he considered the hostilities exercised by England, in the year 1755, prior to any declaration of war, to have been in contempt of the law of nations, and condemned by

(*b*) Potter's Antiquities of Greece, b. 3, c. 7; Livy, b. 1, c. 32; Cic. de Off. b. 1, c. 11; De Repub. lib. 3.

(*c*) Dig. 49. 15. 24. Cicero says that under the Roman kings it was instituted law that the war was unjust and impious. unless declared and proclaimed by the heralds under religious sanction. De Repub. lib. 2, 17.

(*a*) Emerigon, Traité des Ass. i. 561.

(*b*) B. 1, c. 3, sec. 4.

(*c*) B. 8, c. 6, sec. 9.

(*d*) Traité des Ass. i. 563.

all Europe. Vattel strongly recommends (*e*) a previous declaration of war, as being required by justice and humanity; and he says that the fecial law of the Romans gave such moderation and religious solemnity to a preparation of war, and bore such marks of wisdom and justice, that it laid the solid foundation of their future greatness.

Bynkershoek has devoted an entire chapter to this ques-
*54 tion, (*f*) *and he maintains that a declaration of war is not requisite by the law of nations, and that though it may very properly be made, it cannot be required as a matter of right. The practice rests entirely on manners and magnanimity, and it was borrowed from the ancient Romans. All that he contends for is, that a demand of what we conceive to be due should be previously made. We are not bound to accompany that demand with threats of hostility, or to follow it with a public declaration of war; and he cites many instances to show that within the last two centuries wars have been frequently commenced without a previous declaration. Since the time of Bynkershoek, it has become settled by the practice of Europe that war may lawfully exist by a declaration which is unilateral only, or without a declaration on either side. It may begin with mutual hostilities. (*a*) After the peace of Versailles, in 1763, formal declarations of war of any kind seem to have been discontinued, and all the necessary and legitimate consequences of war flow at once from a state of public hostilities, duly recognized and explicitly announced by a domestic manifesto or state paper. In the war between England and France, in 1778, the first public act on the part of the English government was recalling its minister; and that single act was considered by France as a breach of the peace between the two countries. There was no other declaration of war, though each government afterwards published a manifesto in vindication of its claims and conduct. The same thing may be said of the war which broke out in 1793, and again in 1803; and, indeed, in the war of 1756, though a solemn and formal declaration of war, in the ancient style, was made in June, 1756, vigorous hostilities had been carried on between England and France for a year preceding. In the war declared by the United States against England, in 1812, hostilities were imme-

(*e*) B. 3, c. 4, sec. 51.
(*a*) Sir Wm. Scott, 1 Dodson, 247.
(*f*) Quæst. J. Pub. b. 1, c. 2.

diately commenced on our part *as soon as the act of Con- *55
gress was passed, without waiting to communicate to the English government any notice of our intentions. (*x*)

But though a solemn declaration, or previous notice to the enemy, be now laid aside, it is essential that some formal public act, proceeding directly from the competent source, should announce to the people at home their new relations and duties growing out of a state of war, and which should equally apprise neutral nations of the fact, to enable them to conform their conduct to the rights belonging to the new state of things. War, says Vattel, (*b*) is at present published and declared by manifestoes. Such an official act operates from its date to legalize all hostile acts, in like manner as a treaty of peace operates from its date to annul them. As war cannot lawfully be commenced on the part of the United States without an act of Congress, such an act is, of course, a formal official notice to all the world, and equivalent to the most solemn declaration.[1]

(*b*) B. 3, c. 4, sec. 64.

[1] But during the late rebellion it was laid down that when the regular course of justice had been interrupted, so that the courts of the United States could not be kept open, a civil war existed, without the necessity of a formal declaration or of legislative sanction. Nelson, J., in his dissenting opinion, cited the above passage. Prize Cases, 2 Black, 635; s. c. The Amy Warwick, 2 Sprague, 123, and The Hiawatha, Blatchf. Pr. 1. See on the subject generally, Twiss, L. of N. War, § 35 *et seq.* As to the Crimean war, see Annual Register, 1854, 256 *et seq.*, and State Papers, 531; Annual Register, 1859, 215 *et seq.* For the beginning of the war with Denmark, in 1864, see Ann. Reg. 1864, 218; for that of the war between Prussia and Austria, Ann. Reg. 1866, 219; between France and Prussia, Ann. Reg.

(*x*) The tendency is to regard a declaration of war as desirable and necessary. See 28 Am. L. Rev. 754. In The Teutonia, L. R. 3 Adm. & Ecc. 394, 409 (affirmed L. R. 4 P. C. 171), Sir Robert Phillimore said: "I think that there can be no doubt that war may exist *de facto* so as to affect at least the subjects of the belligerent state, either without a declaration on either side, or before a declaration, or with a unilateral declaration only." With respect to third parties, notice of the war should be given, or be apparent from notoriety, in order to throw upon them the duties of neutrality; and until such notice the conduct of neutrals is entitled to the most favorable construction. 1 Halleck's Int. Law (Baker's 3d ed., 1893), p. 542.

An Indian war depends simply upon the existence of hostilities, no formal declaration of war by Congress, or proclamation by the President, being necessary. Marks *v.* United States, 28 Ct. Cl. 147.

Belligerency may be recognized expressly, as by proclamation, or impliedly by acts of war, such as a blockade, or tacitly, by acquiescing in the exercise of belligerent rights. The Ambrose Light, 25 Fed. Rep. 408. War dates from action by Congress. Thayer's Const. Law Cases, 2352.

When war is duly declared, it is not merely a war between this and the adverse government in their political characters. Every man is, in judgment of law, a party to the acts of his own government, and a war between the governments of two nations is a war between all the individuals of the one and all the individuals of which the other nation is composed. Government is the representative of the will of all the people, and acts for the whole society. This is the theory in all governments; and the best writers on the law of nations concur in the doctrine, that when the sovereign of a state declares war against another sovereign, it implies that the whole nation declares war, and that all the subjects of the one are enemies to all the subjects of the other. (*c*) Very important consequences concerning the obligations of subjects are deducible from this principle.

*56 **3. Protection to Enemy's Property.** — * When hostilities have commenced, the first objects that naturally present themselves for detention and capture are the persons and property of the enemy found within the territory on the breaking out of the war. According to strict authority, a state has a right to deal as an enemy with persons and property so found within its power, and to confiscate the property, and detain the persons as prisoners of war. (*a*) No one, says Bynkershoek, ever required that notice should be given to the subjects of the enemy to withdraw their property, or it would be forfeited. The practice of nations is to appropriate it at once, without notice, if there be no special convention to the contrary. But though Bynkershoek lays down this, as well as other rules of war, with great harshness and severity, he mentions several instances, aris-

(*c*) Grotius, b. 3, c. 4, sec. 9; c. 4, sec. 8; Burlamaqui, pt. 4, c. 4, sec. 20; Vattel, b. 3, c. 5, sec. 70; [Small's Adm. *v.* Lumpkins's Exec., 28 Gratt. 832.] [See Hall, Int. Law. pt. 1, c. 3, § 18, where the opinions of continental jurists, holding that only the states as such, and not the individuals of each, become enemies, are reviewed. — B.]

(*a*) Grotius, b. 3, c. 9, sec. 4; c. 21, sec. 9; Bynk. Quæst. J. Pub. c. 2 and 7; Martens, b. 8, c. 2, sec. 5.

1870, 94. [The Rebellion did not suspend commercial intercourse, and hence did not dissolve a partnership. Such intercourse was not suspended until the proclamation of August 16, 1861. Matthews *v.* McStea, 91 U. S. 7. See, generally, Hall, Int. Law, pt. 3, c. 1, § 123; The Teutonia, L. R. 4 P. C. 171, 178, 179. For the beginning of the war between Russia and Turkey, see Ann. Reg. 1877, 248. As to the time when the civil war ended, see Nelson *v.* Manning, 53 Ala. 549; Batesville Institute *v.* Kauffman, 18 Wall. 151. — B.]

ing in the seventeenth, and one as early as the fifteenth century, of stipulations in treatics, allowing foreign subjects a reasonable time after the war breaks out to recover and dispose of their effects, or to withdraw them. Such stipulations have now become an established *formula* in commercial treaties. (*b*) Emerigon (*c*) considers such treaties as an affirmance of common right, or the public law of Europe, and the general rule laid down by some of the latter publicists is in conformity with that provision. (*d*) The sovereign who declares war, says Vattel, can neither detain those subjects of the enemy who are in his dominions at the time of the declaration of war, nor their effects. They came into the country under the sanction of public faith. By permitting them to enter his territories, and continue *there, the sovereign tacitly promised them protection and *57 security for their return. He is, therefore, to allow them a reasonable time to retire with their effects, and if they stay beyond the time, he has a right to treat them as disarmed enemies, unless detained by sickness or other insurmountable necessity, and then they are to be allowed a further time. It has been frequently provided by treaty that foreign subjects should be permitted to remain, and continue their business, notwithstanding a rupture between the governments, so long as they conducted innocently; and when there was no such treaty, such a liberal permission has been often announced in the very declaration of war. (*a*) [1] Sir Michael Foster (*b*) mentions several in-

(*b*) A liberal provision of this kind is inserted in the treaty of amity and commerce between the United States and the Republic of Colombia, which was ratified at Washington, May 27, 1825, and between the United States and the Republic of Venezuela, by the treaty of friendship and commerce in May, 1836.

(*c*) [Traité des Ass. i. 566], 567.

(*d*) Vattell, b. 3, c. 4, sec. 63; Azuni, pt. 2, c. 4, art. 2, sec. 7; Le Droit Public de l'Europe, par Mably Œuvres, vi. 334; Burlamaqui, pt. 4, c. 7, sec. 6.

(*a*) Vattel, b. 3, c. 4, sec. 63. See the treaty of commerce between the United States and the Republic of Chili, May, 1832, art. 23, which affords that permanent protection.

(*b*) Discourse of High Treason, 185, 186.

[1] See treaties of the United States with Guatemala, 10 U. S. St. at L. 873, art. 25; Costa Rica, ib. 916, art. 11; Peru, ib. 926, art. 32; Argentine Confederation, ib. 1005, art. 12.

By orders in council of the British government, at the beginning of the war with Russia, Russian merchant vessels in British ports were allowed six weeks to load their cargoes and depart. March 29, 1854. It was further ordered that any Russian merchant vessel which, prior to

stances of such declarations by the King of Great Britain, and he says that aliens were thereby enabled to acquire personal chattels, and to maintain actions for the recovery of their personal rights, in as full a manner as alien friends. (*x*)

Besides those stipulations in treaties, which have softened the rigors of war by the civilizing spirit of commerce, many governments have made special provision, in their own laws and ordinances, for the security of the persons and property of enemy's subjects, found in the country at the commencement of war. (*c*)

It was provided by Magna Charta (*d*) that, upon the breaking

(*c*) By the Spanish decree of February, 1829, making Cadiz a free port, it was declared that, in the event of war, foreigners who had established themselves there for the purposes of commerce, and becoming alien enemies by means of the war, were to be allowed a proper time to withdraw, and their property was to be sacred from all sequestration or reprisal.

(*d*) Ch. 30.

certain dates, should have sailed from any foreign port for any port in her Majesty's dominions, might enter such port, discharge her cargo, and depart without molestation. March 29, 1854, April 15, 1854. These and other orders are given in 1 Spinks, Ec. & Ad. R. app.; Cong. Doc. 33 Cong., 1 Sess. H. R. No. 103, p. 5. See Clemontson *v.* Blessig, 11 Exch. 135; [Hall, Int. Law, pt. 3, c. 1, § 126.]

(*x*) War suspends the right to sue, but does not work a forfeiture of property or obligations. Lamar *v.* Micou, 112 U. S. 452, 464. In time of war, the President may submit to a court what amount of damages should be allowed for a capture, without the authority of an act of Congress. The Neustra Senora De Regla, 108 U. S. 92. Property taken and used by the government may, when equitable and just, be treated as taken under an implied contract of payment, but when the taking or use amounts to its seizure or destruction for the public good and safety, or as incident to the ravages of war, the owner bears the loss, but, on the other hand, he is not liable for any military works improving his property. United States *v.* Pacific R. Co., 120 U. S. 227; United States *v.* Atlantic & Pacific R. Co., id. 241; Heflebower *v.* United States, 21 Ct. Cl. 228. Hence, as the government is not responsible for property destroyed by its military operations in war, so private owners cannot be charged for works constructed on their property by the government to facilitate such operations. United States *v.* Pacific R. Co., 120 U. S. 227. In time of peace, army officers are liable, like private citizens, for the use of private lands of which they take possession. Stanley *v.* Schwalby, 85 Texas, 348.

Acts done in their own country by the civil or military agents of a foreign revolutionary government under its directions cannot be made the subject of a suit here, though such government is afterwards established and is recognized by the United States. Underhill *v.* Hernandez, 65 Fed. Rep. 577.

In this country it is the province of the President, by proclamation, and of Congress, but not of the judiciary, to declare what is hostile territory. Heflebower *v.* United States, 21 Ct. Cl. 228.

out of war, foreign merchants found in England, and belonging to the country of the enemy, should be attached, "without harm of body or goods," until it should be known how English merchants were treated by the enemy; "and if our *mer- *58 chants," said the charter, "be safe and well treated there, theirs shall be likewise with us." It has been deemed extraordinary that such a liberal provision should have found a place in a treaty between a feudal king and his barons; and Montesquieu (*a*) was struck with admiration at the fact that a protection of that kind should have been made one of the articles of English liberty. But this provision was confined to the effects of alien merchants who were within the realm at the commencement of the war, and it was understood to be confined to the case of merchants domiciled there. (*b*) It was accompanied, also, with one very ominous qualification; and it was at least equalled, if not greatly excelled, by an ordinance of Charles V. of France a century afterwards, which declared that foreign merchants who should be in France at the time of the declaration of war should have nothing to fear, for they should have liberty to depart freely with their effects. (*c*) The spirit of the provision in Magna Charta was sustained by a resolution of the judges, in the time of Henry VIII., when they resolved, that if a Frenchman came to England before the war, neither his person nor goods should be seized. (*d*) The statute of staples, of 27 Edw. III. c. 17, made a still more liberal and precise enactment in favor of foreign merchants residing in England, when war commenced between their prince and the King of England. They were to have convenient warning of forty days, by proclamation, to depart the realm with their goods; and if they could not do it within that time, by reason of accident, they were to have forty days more to pass with their merchandise, and with liberty, in the meantime, to sell the same. The act of Congress of the 6th of July, 1798, c. 73, was dictated by the same humane and enlightened policy. It authorized the President, in *case *59 of war, to direct the conduct to be observed towards subjects of the hostile nation, being aliens, and within the United States, and in what cases, and upon what security, their resi-

(*a*) Esprit des Lois, 20, 14. (*b*) 1 Hale's P. C. 93.
(*c*) Henault's Abreg. Chron. i. 338.
(*d*) Bro. ti: Property, pl. 38; Jenk. Cent. 201, case 22.

dence should be permitted; and it declared, in reference to those who were to depart, that they should be allowed such reasonable time as might be consistent with the public safety, and according to the dictates of humanity and national hospitality, "for the recovery, disposal, and removal of their goods and effects, and for their departure." [1]

4. Confiscation of Property. — But however strong the current of authority in favor of the modern and milder construction of the rule of national law on this subject, the point seems to be no longer open for discussion in this country; and it has become definitively settled, in favor of the ancient and sterner rule, by the Supreme Court of the United States. (*a*) The effect of war upon British property found in the United States, on land, at the commencement of the war, was learnedly discussed and thoroughly considered in the case of *Brown;* and the Circuit Court of the United States at Boston decided, (*b*) as upon a settled rule of the law of nations, that the goods of the enemy found in the country, and all the vessels and cargoes found afloat in our ports, at the commencement of hostilities, were liable to seizure and confiscation; and the exercise of the right rested in the discretion of the sovereign of the nation. When the case was brought up, on appeal, before the Supreme Court of the United States, the broad principle was assumed that war gave to the sovereign full right to take the persons and confiscate the property of the enemy wherever found; and that the mitigations of this rigid rule, which the wise and humane policy of modern times had introduced into practice, might, more or less, affect the exercise of the right, but could not impair the right itself. Commercial nations have always considerable

*60 property in *the possession of their neighbors; and, when war breaks out, the question, what shall be done with enemy's property found in the country, is one rather of policy than of law, and is one properly addressed to the consideration of the legislature, and not to the courts of law. The strict right of confiscation of that species of property existed in Congress, and without a legislative act authorizing its confiscation it could

(*a*) Brown *v.* The United States, 8 Cranch, 110. See also ibid. 228, 229.
(*b*) The Cargo of the Ship Emulous, 1 Gallison, 563.

[1] *Ante*, 57, n. 1.

not be judicially condemned; and the act of Congress of 1812, declaring war against Great Britain, was not such an act. Until some statute directly applying to the subject be passed, the property would continue under the protection of the law, and might be claimed by the British owner at the restoration of peace.[1]

Though this decision established the right, contrary to much of modern authority and practice, yet a great point was gained over the rigor and violence of the ancient doctrine, by making the exercise of the right to depend upon a special act of Congress.

The practice, so common in modern Europe, of imposing embargoes at the breaking out of hostilities has, apparently, the effect of destroying that protection to property which the rule of faith and justice gives to it, when brought into the country in the course of trade and in the confidence of peace. Sir William Scott, in the case of the *Boedes Lust*, (*a*) explains this species of embargo to be an act of a hostile nature, and amounting to an implied declaration of war, though liable to be explained away and annulled by a subsequent accommodation between the nations. The seizure is an act at first equivocal, as to the effect, though hostile in the mere execution, and if the matter in dispute terminates in reconciliation, the seizure becomes a mere civil embargo; but if it terminates otherwise, the subsequent hostilities have a retroactive effect, and render the embargo a hostile measure, *ab initio*. The property detained is deemed enemy's property, and liable to condemnation. This * species * 61 of reprisal for some previous injury is laid down in the books as a lawful measure, according to the usage of nations; but it is often reprobated; and it cannot well be distinguished from the practice of seizing property found within the territory upon the declaration of war. It does not differ in substance from the conduct of the Syracusans, in the time of Dionysius the elder (and which Mitford considered to be a gross violation of the law of nations), for they voted a declaration of war against Carthage, and immediately seized the effects of Carthaginian traders in their warehouses, and Carthaginian richly laden vessels

(*a*) 5 C. Rob. 233.

[1] The Juanita, Newberry, 352; United States *v.* 1756 Shares of Capital Stock, 5 Blatchf. 231, 237; *post*, 91, n. 1.

in their harbor, and sent a herald to Carthage to negotiate. (*a*) But this act of the Syracusans, near four hundred years before the Christian era, was no more than what is the ordinary practice in England, according to the observation of Lord Mansfield, in *Lindo* v. *Rodney*. (*b*) "Upon the declaration of war, or hostilities, all the ships of the enemy," he says, "are detained in our ports, to be confiscated as the property of the enemy, if no reciprocal agreement is made."

Reprisals by commission, or letters of marque and reprisal, granted to one or more injured subjects, in the name and by the authority of a sovereign, is another mode of redress for some specific injury, which is considered to be compatible with a state of peace, and permitted by the law of nations. The case arises when one nation has committed some direct and palpable injury to another, as by withholding a just debt, or by violence to person or property, and has refused to give any satisfaction. The reprisals may be made in support of the rights of a subject as well as those of the sovereign, and for the acts of the subject as well as for those of the sovereign. The commission is not to be issued except in a case clearly just — *in re minime dubia;* and it authorizes the seizure of the property of the subjects as well as of the sovereign of the offending nation, and to bring it in to be detained as a pledge, or disposed of under judicial sanction, in like manner as if it were a process of distress under national authority for some debt or duty withheld. (*c*) These letters

(*a*) Mitf. Hist. of Greece, v. 402–404. (*b*) Doug. 613.

(*c*) Bynk. Q. J. Pub. c. 24; Vattel, b. 2, c. 18, sec. 342, 344, 347, 353; Puff. Droit des Gens, par Barbeyrac, b. 8, c. 6, sec. 13, n. 1; Valin, Comm. ii. tit. des Lettres de Marque, 414, 416; Traité des Prises, 331; Emerigon, Traité des Ass. i. 569; Message of the President of the United States to Congress, December 1, 1834. The right of government to enforce the just claims of its subjects against a foreign government, for debts duly contracted and unjustly withheld, is not to be questioned. It is admitted by statesmen and jurists, and was so stated by Lord Palmerston in the British Parliament, in July, 1847, that governments had a right to enforce by reprisals the claims of their subjects for debts against the subjects of other governments, if relief be denied by the non-execution or the improper administration of the laws in the foreign courts. Protection is due from government to its subjects in their persons and property; but the interference on the part of government to enforce that duty must always be a question of expediency. The government of the United States expressly acknowledged, and in one or more instances acted upon, that principle. President Jackson, in 1834, suggested such a measure against France; and in 1847, one ground of the war between the United States and Mexico was the non-payment by Mexico of debts due to American citizens.

of reprisal, as being applicable to a state of peace, have been frequently recognized and regulated by treaty. (*d*) The French ordinance of the marine of 1681 (*e*) regulates minutely this remedial process, and the judicial sanction requisite to the proceedings under letters of reprisal, and which Valin considers to be sage precautions, proper to temper the rigor of this perilous mode of redress. (*f*) General reprisals upon the persons and property of the subjects of another power are equivalent to open war; but these special letters of marque and reprisal, limited to a specific object, are spoken of generally, and even in the articles of confederation of the United States, in 1781, (*g*) as issuing "in times of peace." They are, however, regarded by Barbeyrac, Emerigon, and other publicists as a species of hostility, an imperfect war, and usually a prelude to open hostilities. The favorable or adverse issue of the hazardous experiment will depend, in some degree, upon the matter in demand, and, in a much greater degree, upon the relative situation, character, strength, and spirit of the nations concerned. (*h*)

5. Confiscation of Debts. — *The claim of a right to confis- *62 cate debts, contracted by individuals in time of peace, and which remain due to subjects of the enemy at the declaration of war, rests very much upon the same principles as that concerning enemy's tangible property, found in the country at the open-

(*d*) See, for this purpose, the treaty of Munster, between Spain and Holland, in 1648; the treaties between England and Holland, in 1654 and 1667; the treaty of Ryswick, art. 9; the treaty of Utrecht, art. 16; treaty between the United States and the Republic of Colombia, in 1825.

(*e*) Liv. 3, tit. 10, des Réprisailles.

(*f*) In the time of Edward II., and for some succeeding reigns, the power of granting letters of marque and reprisals against the subjects of a foreign state that refused to render justice to the subjects of the crown of England was vested in the Court of Chancery. It was in the nature of a judicial process and of a private remedy. The capture was in the nature of a security to obtain justice. Lord Campbell, Lives of the Lord Chancellors, i. 205.

(*g*) Art. 9.

(*h*) War does not exist merely on the suspension of the usual relations of peace. Commerce may be suspended or interdicted between the subjects of different states without producing a state of war. Reprisals and embargoes are forcible measures of redress, but do not *per se* constitute war, nor does the furnishing of specific assistance to one of the parties at war, according to a previous stipulation. *Vide infra*, 116. Mr. Manning, in his Commentaries on the Law of Nations, p. 98, after showing the imperfect definitions given by publicists, defines an open and solemn war to be "the state of nations among whom there is an interruption of all pacific relations, and a general contention by force, authorized by the sovereign."

ing of the war; though I think the objection to the right of confiscation, in this latter case, is much stronger. In former times, the right to confiscate debts was admitted as a doctrine of national law, and Grotius, Puffendorf, and Bynkershoek pronounced in favor of it. (*a*) It had the countenance of the civil law; (*b*) and even Cicero, in his Offices, (*c*) when stating the cases in which promises are not to be kept, mentions that of the creditor becoming the enemy of the country of the debtor. Down to the year 1737, the general opinion of jurists was in favor of the right; but Vattel says that a relaxation of the rigor of the rule has since taken place among the sovereigns of Europe, and that, as the custom has been generally received, he who should act contrary to it would injure the public faith; for strangers trusted his subjects only from a firm persuasion that the general custom would be observed. (*d*) There has frequently been a stipulation in modern treaties that debts or moneys in the public funds should not be confiscated in the event of war; and these conventional provisions are evidence of the sense of the governments which are parties to them, and that the right of

confiscation of debts and things in action is against good *63 policy, and ought *to be discontinued. The treaties between the United States and Colombia in 1825, and Chili in 1832, and Venezuela in 1836, and the Peru-Bolivian Confederation in 1838, and Ecuador in 1839, contain such a provision; but the treaty between the United States and Great Britain, in 1795, went further, and contained the explicit declaration, that it was "unjust and impolitic" that the debts of individuals should be impaired by national differences. A very able discussion of this assumed right to confiscate debts was made by Mr. Hamilton, in the numbers of Camillus, published in 1795. He examined the claim to confiscate private debts, or private property in banks or in public funds, on the ground of reason and principle, on those of policy and expediency, on the opinion of jurists, on usage, and on conventional law; and his argument against the justice and policy of the claim was exceedingly powerful. He contended it to be against good faith for a government to lay its hands on

(*a*) Grotius, b. 1, c. 1, sec. 6; b. 3, c. 8, sec. 4; Puff. lib. 8, c. 6, 19, 20; Bynk. lib. 1, c. 7. Lord Hale also laid it down to be the law of England. 1 Hale's P. C. 95.

(*b*) Dig. 41. 1 and 49. 15.

(*c*) Lib. 3, c. 26.

(*d*) Vattel, b. 3, c. 5, sec. 77.

private property, acquired by the permission or upon the invitation of the government, and under a necessarily implied promise of protection and security. Vattel says, that everywhere, in case of a war, funds credited to the public are exempt from confiscation and seizure. Emerigon (*a*) and Martens (*b*) make the same declaration. The practice would have a very injurious influence upon the general sense of the inviolability and sanctity of private contracts; and with debtors who had a nice and accurate sense of justice and honor, the requisition of government would not be cheerfully or readily obeyed. Voltaire has given (*c*) a striking instance of the impracticability of confiscating property deposited in trust with a debtor, and of the firmness of Spanish faith. When war was declared between France and Spain, in 1684, the King of Spain endeavored to seize the property of the French in Spain, but *not a single Spanish factor would *64 betray his French correspondent. (*a*)

Notwithstanding the weight of modern authority, and of argument, against this claim of right on the part of the sovereign, to confiscate the debts and funds of the subjects of his enemy during war, the judicial language in this country is decidedly in support of the right. In the case of *Brown* v. *The United States*, (*b*) already mentioned, Judge Story, in the Circuit Court in Massachusetts, laid down the right to confiscate debts and enemy's property found in the country, according to the rigorous doctrine of the elder jurists; and he said the opinion was fully confirmed by the judgment of the Supreme Court in *Ware* v. *Hylton*, (*c*) where the doctrine was explicitly asserted by some of the judges, reluctantly admitted by others, and denied by

(*a*) Des Ass. i. 567. (*b*) 8, c. 2, sec. 5.

(*c*) Essai sur les Mœurs et l'Esprit des Nations.

(*a*) The English Court of K. B. declared, in the case of Wolff *v.* Oxholm, 6 Maule & Selw. 92, that an ordinance of Denmark, in 1807, pending hostilities with England, which sequestered debts due from Danish to English subjects, and caused them to be paid over to the Danish government, was not a defence to a suit in England for the debt, and that the ordinance was not conformable to the usage of nations, and was void. It was observed by the court that the right of confiscating debts, contended for on the authority of Vattel, b. 2, c. 18, sec. 344; b. 3, c. 5, sec. 77, was not recognized by Grotius (see Grot. lib. 3, c. 7, sec. 4, and c. 8, sec. 4), and was impugned by Puffendorf (b. 8, c. 6, sec. 22) and others; and that no instance had occurred of the exercise of the right, except the ordinance in question, for upwards of a century.

(*b*) 8 Cranch, 110. (*c*) 3 Dallas, 199.

none. Chief Justice Marshall, in delivering the opinion of the Supreme Court, in the case of *Brown*, observed, that between debts contracted under the faith of laws, and property acquired in the course of trade on the faith of the same laws, reason drew no distinction, and the right of the sovereign to confiscate debts was precisely the same with the right to confiscate other *65 property found in the country. This right, *therefore, was admitted to exist as a settled and decided right, *stricto jure*, though, at the same time, it was conceded to be the universal practice to forbear to seize and to confiscate debts and credits. We may, therefore, lay it down as a principle of public law, so far as the same is understood and declared by the highest judicial authorities in this country, that it rests in the discretion of the legislature of the Union, by a special law for that purpose, to confiscate debts contracted by our citizens, and due to the enemy; but, as it is asserted by the same authority, this right is contrary to universal practice, and it may, therefore, well be considered as a naked and impolitic right, condemned by the enlightened conscience and judgment of modern times.[1]

If property should have been wrongfully taken by the state before the war, and be in the country at the opening of the war, such property cannot be seized, but must be restored; because to confiscate that species of enemy's property would be for the government to take advantage of its own wrong. The celebrated Report of the English law officers of the crown, 1753, in answer to the Prussian Memorial, stated, that French ships taken before the war of 1741 were, during the heat of the war with France, as well as afterwards, restored by sentences of the admiralty courts to the French owners. (*a*) No such property

(*a*) The case of the Silesia[n] loan contains, in the discussions between the Prussian and British courts, in 1752, a memorable exposition of the law of nations on the subject of belligerent rights and duties. The report of the high and distinguished law officers of the crown, in answer to the Prussian Memorial, made in 1753, was declared by such eminent writers as Vattel and Montesquieu, to be an excellent and unanswerable tract on the law of nations. See the substance of the discussion in Wheaton's History of the Law of Nations, ed. N. Y. 1845, 206–217, and the Report, at large Collectanea Juridica, i. 95. The case is worthy of special notice, not only for the authority of the work, but for the recognition of the sanctity of private debts and contracts, in opposition to the pretensions of the rights of war and conquest.

[1] *Sed vide post*, 91, n. 1. An interesting old case is Hamilton *v.* Eaton, U. S. C. C. 1792, Martin's R. (N. C.) pt. 2, p. 1.

was ever attempted to be confiscated; for had it not been for the wrong done, the property would not have been within the king's dominions. And yet even such property is considered to be subject to the rule of vindictive retaliation; and Sir William Scott observed, in the case of the *Santa Cruz*, (*b*) that it was the constant practice of England to condemn property seized before the war, if the enemy condemns, and to restore if the enemy restores. (*x*)

6. Interdiction of Commerce.—*One of the immediate *66 and important consequences of the declaration of war is

In that case, a loan of money was made by British creditors to the Emperor of Germany, in 1735, and for the better security of the payment of the loan, with interest, he mortgaged his revenues of the Duchies of Silesia; and when Silesia was conquered by Prussia, the Empress Queen, who had succeeded to the sovereignty of the country, before its conquest, ceded the Duchies to the King of Prussia, upon condition that the king should be responsible for the debt; and he assumed the payment of it. The king afterwards seized the revenues, by way of reprisal and indemnity against losses by British cruisers, under lawful capture and condemnation by the laws of war. The Report showed, unanswerably, as Montesquieu admitted, that the King of Prussia could not lawfully seize the mortgaged revenues or debt, by way of reprisal, and that he was bound by the law of nations, and every principle of justice, to pay the British creditors. The King of Prussia, by treaty in 1756, agreed to take off the sequestration laid on the Silesian debt, and pay the capital and interest due to the British creditors.

(*b*) 1 C. Rob. 50.

(*x*) Cases construing the confiscation acts passed during the civil war, are Kirk *v.* Lynd, 106 U. S. 315; French *v.* Wade, 102 U. S. 132; Young *v.* United States, 97 U. S. 39; Conrad *v.* Waples, 96 U. S. 279; Risley *v.* Phenix Bank, 83 N. Y. 318. The Confiscation Act of Aug. 6, 1861 was directed at the confiscation of specific property used with the owner's consent to aid the insurrection; it had no reference to the owner's guilt and applied only to visible, tangible property which had been so used. Phœnix Bank *v.* Risley, 111 U. S. 125. Being a proceeding *in rem*, there was no necessity for a jury trial, or of personal service of notice of process upon a non-resident. Pasteur *v.* Lewis, 39 La. Ann. 5.

A decree confiscating real estate under the Confiscation Act of 1862 did not affect the interest of a mortgagee in the confiscated property. Avegno *v.* Schmidt, 113 U. S. 293. Under that act, upon the owner's death, his heirs, though not named in the statute, took the confiscated property by descent from him and not by gift or grant from the Government. Ibid.; Shields *v.* Schiff, 124 U. S. 351; Illinois Central R. Co. *v.* Bosworth, 133 U. S. 92. See further upon the Confiscation Acts, Jenkins *v.* Collard, 145 U. S. 546; Briggs *v.* United States, 143 U. S. 346; 25 Ct. Cl. 391. General language in the government's deed to a purchaser at a sale under that act did not operate as a warranty that the offender had any estate in the property at the time it was seized. Waples *v.* United States, 110 U. S. 630. The acts of 1861 and 1862 did not authorize the confiscation of corporate property. Ellis *v.* Phenix Bank, 12 Daly (N. Y.), 177.

the absolute interruption and interdiction of all commercial correspondence, intercourse, and dealing between the subjects of the two countries. The idea that any commercial intercourse or pacific dealing can lawfully subsist between the people of the powers at war, except under the clear and express sanction of the government, and without a special license, is utterly inconsistent with the new class of duties growing out of a state of war. (*a*) The interdiction flows necessarily from the principle already stated, that a state of war puts all the members of the two nations respectively in hostility to each other; and to suffer individuals to carry on a friendly or commercial intercourse, while the two governments were at war, would be placing the act of government and the acts of individuals in contradiction to each other. It would counteract the operations of war, and throw obstacles in the way of the public efforts, and lead to disorder, imbecility, and treason. Trading supposes the existence of civil contracts and relations, and a reference to courts of justice; and it is, therefore, necessarily contradictory to a state of war. It affords aid to the enemy in an effectual manner, by enabling the merchants of the enemy's country to support their government, and it facilitates the means of conveying intelligence, and carrying on a traitorous correspondence with the enemy. These considerations apply with peculiar force to maritime states, where the principal object is to destroy the marine and commerce of the enemy, in order to force them to

(*a*) The doctrine goes to the extent of holding it unlawful, after the commencement of war, except under the special license of the government, to send a vessel to the enemy's country to bring home, with their permission, one's own property, which was there when the war broke out. It would be liable to seizure, *in transitu*, as enemy's property. The Rapid, 8 Cranch, 155; Potts *v.* Bell, 8 T. R. 548. In the case of The Juffrow Catharina, 5 C. Rob. 141, and of The Hoop, 1 C. Rob. 196, Sir William Scott inculcated very strictly the duty of applying in all cases for the protection of a license, where property is to be withdrawn from the country of the enemy, as being the only safe course. Mr. Duer, in his Treatise on Insurance, i. 561–566, ably and successfully contends that, when a subject finds himself in an enemy's country on the breaking out of war, he may return diligently to his country, *with his property*, without rendering it justly liable to confiscation by the prize courts of his own country; though the language of Mr. Justice Story, in the case of The Rapid in 1 Gallison, 309, and The Mary, [ib.] 621, goes to the extent of the severe denial of that right under any circumstances. If the adverse belligerent allow such a right, as see *supra*, 56, surely his own country ought to exercise the same lenity. Such was the decision of the Supreme Court of New York in Amory *v.* McGregor, 15 Johns. 24.

peace.(b) It is a well settled doctrine in the English courts, and with the English jurists, that there cannot exist, at the same time, a war for arms and a peace for commerce. The war puts an end at once to all dealing and all communication with each other, and places every individual of the respective governments as * well as the governments themselves, *67 in a state of hostility.(a) This is equally the doctrine of all the authoritative writers on the law of nations, and of the maritime ordinances of all the great powers of Europe. It is equally the received law of this country, and was so decided frequently by the Congress of the United States during the Revolutionary war, and again by the Supreme Court of the United States during the course of the last war; and it is difficult to conceive of a point of doctrine more deeply or extensively rooted in the general maritime law of Europe, and in the universal and immemorial usage of the whole community of the civilized world.

It follows as a necessary consequence of the doctrine of the illegality of all intercourse or traffic, without express permission, that all contracts with the enemy, made during war, are utterly void.[1] The insurance of enemy's property is an illegal contract,

(b) 1 Chitty Comm. Law, 378.

(a) Potts *v.* Bell, 8 T. R. 548; Willison *v.* Patteson, 7 Taunt. 439; Story, J., in The Joseph, 1 Gall. 549, 550; in The Julia, ib. 601–603; Jonge Pieter, 4 C. Rob. 79; The Hoop, 1 C. Rob. 199, 217; The Rapid, 1 Gall. 305.

[1] This language has been thought too broad in at least one important decision.

During the late rebellion, a citizen and resident of Mississippi made a lease of a cotton plantation there to a citizen of Massachusetts, who was then in Mississippi. The lessee took possession and paid rent under the lease, but was afterwards driven off by rebel soldiers. In an action for the rent in arrear, the Supreme Court of Massachusetts held the lease valid. The court say, "that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries; and that this includes any act of voluntary submission to the enemy, or receiving his protection; as well as any act or contract which tends to increase his resources; and every kind of trading, or commerical dealing or intercourse, whether by transmission of money or goods, or orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy. Beyond the principle of these cases the prohibition has not been carried by judicial decision." Kershaw *v.* Kelsey, 100 Mass. 561, 572. In this case all the authorities are reviewed. *Inter alia* the remarks in Jecker *v.* Montgomery, 18 How. 110, and

because it is a species of trade and intercourse with the enemy. The drawing of a bill of exchange by an alien enemy, on a subject of the adverse country, is an illegal and void contract, be-

Hanger *v.* Abbott, 6 Wall. 532, are said to be *obiter dicta*, and the Ouachita Cotton, 6 Wall. 521, is explained as a case of a sale of merchandise which was strictly an act of commercial intercourse. Perhaps similar explanations would suffice for Coppell *v.* Hall, 7 Wall. 542; United States *v.* Grossmayer, 9 Wall. 72 (appointment of an agent during the war); Hennen *v.* Gilman, 20 La. An. 241; Graham *v.* Merrill, 5 Coldw. 622. Among the strongest cases against the doctrine of Kershaw *v.* Kelsey are Hyatt *v.* James, 2 Bush (Ky.), 463; Phillips *v.* Hatch, 1 Dillon, 571; Filor's Case, 3 Ct. of Cl. 25; iii. 256, n. 1. [Kershaw *v.* Kelsey is cited with apparent approval in Montgomery *v.* United States, 15 Wall. 395, which also holds that the line of division between friendly and hostile country is that of actual military control, and not that of states which may be friendly or hostile. See also United States *v.* Lapène, 17 Wall. 601. It has been held that the question of legality is to be determined by the legal domicile of the parties. Hence where a person went from the Union into the Rebel lines, and traded there, but did not change his domicile, and afterwards returned to the Union lines, held, such trading was illegal and void. Mitchell *v.* United States, 21 Wall. 350; Desmare *v.* United States, 93 U. S. 605; Quigley *v.* United States, 13 Ct. of Cl. 367. This, it is to be noted, is a different test from that stated in Kershaw *v.* Kelsey, and it seems that *both* tests are to be applied before a contract is held valid. If the latter were the *only* test, two persons retaining their domiciles in the same country might trade across the lines. Either country will recognize as valid contracts entered into wholly between parties domiciled and resident in one of the countries, and which do not contemplate any trading across the lines. Conrad *v.* Waples, 96 U. S. 279; Mitchell *v.* United States, *supra*; Brown *v.* Gardner, 4 Lea, 145. This was held in Conrad *v.* Waples, *supra*, though the property sold was within the enemy's lines. But see dissenting opinion of Clifford, J., in Burbank *v.* Conrad, 96 U. S. 291, 293. Either country may license trading with the other under such restrictions as it may deem best. Hamilton *v.* Dillin, 21 Wall. 73; Snell *v.* Dwight, 120 Mass. 9. Contracts having for their object to aid the enemy are of course void. Brickell *v.* Halifax County Commissioners, 81 N. C. 240. As to the dissolution of partnerships of which part of the partners were domiciled in enemy's country, see Matthews *v.* McStea, 91 U. S. 7; Taylor *v.* Hutchinson, 25 Gratt. 536. In general, as to the position held by the states in rebellion, see Horn *v.* Lockhart, 17 Wall. 570; Coleman *v.* Tennessee, 97 U. S. 509; Berry *v.* Bellows, 30 Ark. 198; Shattuck *v.* Daniel, 52 Miss. 834; Pennywit *v.* Foote, 27 Ohio St. 600. — B.]

The distinction as to contracts made before the war seems to be that suggested by the text; that those contracts are dissolved which cannot be performed except in the way of commercial intercourse. The William Bagaley, 5 Wall. 377, 407; and cases *infra*; 1 Duer Ins. Lect. 4, note 2 *ad fin.* p. 478; De Wahl *v.* Braune, 1 Hurlst. & N. 178, 182. Thus the relation of principal and agent between one in the North and another in the South was not suspended or dissolved during the rebellion. Monsseaux *v.* Urquhart, 19 La. An. 482. See Robinson *v.* International Life Ass. Co., 42 N. Y. 54; United States *v.* Grossmayer, 9 Wall. 72, 75. Nor were contracts of insurance. Manhattan Life Ins. Co. *v.* Warwick, 20 Gratt. 614, 634;

cause it is a communication and contract. The purchase of bills on the enemy's country, or the remission and deposit of funds there, is a dangerous and illegal act, because it may be cherishing the resources and relieving the wants of the enemy. The remission of funds in money or bills to subjects of the

New York Life Ins. Co. *v.* Clopton, 7 Bush, 179. On the other hand, a charter-party by which an Italian ship (neutral property in the subsequent war) was to proceed from England to Odessa, and there be furnished with a cargo by a British subject, was held to be dissolved by the breaking out of war between England and Russia, as it *prima facie*, at least, involved trading with the enemy. Esposito *v.* Bowden, 7 El. & Bl. 763; Barrick *v.* Buba, 2 C. B. N. S. 563; Reid *v.* Hoskins, Avery *v.* Bowden, 6 El. & Bl. 953. See further, iii. 256, n. 1.

Other cases on the inability of an alien enemy to sue (*x*) are Alcinous *v.* Nigreu, 4 El. & Bl. 217; Whelan *v.* Cook, 29 Md. 1; De Wahl *v.* Braune 1, H. & N. 178; United States *v.* 1756 Shares of Stock, 5 Blatchf. 231. The last case lays it down that he may appear as claimant in a prize case, and contest the allegations of the libel, a doctrine since sustained by the Supreme Court in a confiscation case. McVeigh *v.* United States, 11 Wall. 259. *Contra*, The Froija, Spinks, Pr. Ca. 37. It is clear that he may be sued. Dorsey *v.* Kyle, 30 Md. 512; ib. 522; Mixer *v.* Sibley, 53 Ill. 61; Ludlow *v.* Ramsey, 11 Wall. 581.

(*x*) Upon the commencement of a war, proceedings then pending in the courts should be continued, and not dismissed. *Ex parte* Boussmaker, 13 Ves. 71; Elgee *v.* Lovell, 1 Woolw. 102; Levine *v.* Taylor, 12 Mass. 8; Bishop *v.* Jones, 28 Texas, 294; *contra*, Howes *v.* Chester, 33 Ga. 89. An alien enemy may be sued, and is entitled to all the usual means of defence. Masterson *v.* Howard, 18 Wall. 99; McNair *v.* Toler, 21 Minn. 175. He may be bound, like other non-residents, by notice by publication. University *v.* Finch, 18 Wall. 106; Lee *v.* Rogers, 2 Sawyer, 549; Seymour *v.* Bailey, 66 Ill. 288; Selden *v.* Preston, 11 Bush, 191. He cannot defend, on the ground that he is an alien enemy. Dorsey *v.* Kyle, 39 Md. 512; see Herbert *v.* Rowles, id. 271. Where a person voluntarily left his home to engage in rebellion, it was held that neither he nor his heirs could complain that his absence deprived him of notice and power to defend judicial proceedings resulting in the sale of his land. Jenkins *v.* Hannan, 26 Fed. Rep. 657.

A merchant who at the commencement of the civil war departed from his residence in Georgia to loyal territory, where he remained until the close of the war, but who left an agent behind who collected money for him and therewith purchased cotton for him, afterwards captured and sold by the United States, was held entitled to recover therefor in the Court of Claims, as he did not trade with the enemy across the lines. United States *v.* Quigley, 103 U. S. 595. A mortgage made in Confederate territory to a loyal citizen is not *ipso facto* such unlawful intercourse as avoids it without further proof of violation of the non-intercourse act and the President's proclamation thereunder. Carson *v.* Dunham, 121 U. S. 421; see Hart's Case, 16 Ct. Cl. 459.

War does not terminate or suspend the obligation of a belligerent State to pay interest on its debts, even to alien enemies. See Cobbett's Int. Law Cases (2d ed.), 160. But war supersedes treaties and makes the subjects of the hostile States enemies in law. Valk's Case, 29 Ct. Cl. 62.

enemy is unlawful. The inhibition reaches to every communication, direct or circuitous. All endeavors at trade with the enemy, by the intervention of third persons, or by partnerships, have equally failed, and no artifice has succeeded to legalize the trade, without the express permission of the government. (*b*)

Every relaxation of the rule tends to corrupt the allegiance
* 68 of the subject, and prevents * the war from fulfilling its end. The only exception to this strict and rigorous rule of international jurisprudence is the case of ransom bills, and they are contracts of necessity, founded on a state of war, and engendered by its violence. (*a*) It is also a further consequence of the inability of the subjects of the two states to commune or carry on any correspondence or business together, that all commercial partnerships existing between the subjects of the two parties prior to the war are dissolved by the mere force and act of the war itself; though other contracts existing prior to the war are not extinguished, but the remedy is only suspended, and this from the inability of an alien enemy to sue or to sustain, in the language of the civilians, a *persona standi in judicio.* The whole of this doctrine, respecting the illegality of any commercial intercourse between the inhabitants of two nations at war was extensively reviewed, and the principal authorities, ancient and modern, foreign and domestic, were accurately examined, and the positions which have been laid down established, in the case of *Griswold* v. *Waddington,* (*b*) decided in the Supreme Court of New York, and afterwards affirmed on error.

This strict rule has been carried so far in the British admiralty as to prohibit a remittance of supplies even to a British colony during its temporary subjection to the enemy, and when the colony was under the necessity of supplies and was only very partially and imperfectly supplied by the enemy. (*c*) The same

(*b*) Willison *v.* Patteson, *ubi supra ;* The Indian Chief, 3 C. Rob. 22 ; The Jonge Pieter, 4 C. Rob. 79 ; The Franklin, 6 C. Rob. 127.

(*a*) There is another exception to the general rule, in the case of a war contract arising out of a public necessity, created by the war itself. This is the case of a bill of exchange drawn upon England by a British prisoner in France, for his own subsistence, and indorsed to an alien enemy, and which the latter, on the return of peace, was allowed to enforce. Antoine *v.* Morshead, 6 Taunt. 237.

(*b*) 15 Johns. 57 ; 16 Johns. 438, s. c. ; Scholefield *v.* Eichelberger, 7 Peters, 586, s. p.

(*c*) Case of The Bella Guidita, in 1785, cited in the case of The Hoop, 1 C. Rob. 207.

interdiction of trade applies to ships of truce, or cartel ships, which are a species of navigation, intended for the recovery of the liberty of prisoners of war. Such a special and limited intercourse is dictated by policy and humanity, and it is indispensable that it be conducted with the most exact and exclusive attention to the original purpose, as being the only condition upon which the intercourse * can be tolerated. All trade, * 69 therefore, by means of such vessels is unlawful, without the express consent of both the governments concerned. (*a*) It is equally illegal for an ally of one of the belligerents, and who carries on the war conjointly, to have any commerce with the enemy. A single belligerent may grant licenses to trade with the enemy, and dilute and weaken his own rights at pleasure, but it is otherwise when allied nations are pursuing a common cause. The community of interests and object and action creates a mutual duty not to prejudice that joint interest; and it is a declared principle of the law of nations, founded on very clear and just grounds, that one of the belligerents may seize and inflict the penalty of forfeiture on the property of a subject of a co-ally, engaged in a trade with the common enemy, and thereby affording him aid and comfort whilst the other ally was carrying on a severe and vigorous warfare. It would be contrary to the implied contract in every such warlike confederacy, that neither of the belligerents, without the other's consent, shall do anything to defeat the common object. (*b*)

In the investigation of the rules of the modern law of nations, particularly with regard to the extensive field of maritime capture, reference is generally and freely made to the decisions of the English courts. They are in the habit of taking accurate and comprehensive views of general jurisprudence, and they have been deservedly followed by the courts of the United States on all the leading points of national law. We have a series of judicial decisions in England and in this country, in which the usages and the duties of nations are explained and declared with that depth of research, and that liberal and enlarged inquiry, which strengthen and embellish the conclusions of reason. They contain more intrinsic argument, more full and precise details, * more accurate illustrations, and * 70

(*a*) The Venus, 4 C. Rob. 355; The Carolina, 6 C. Rob. 336.
(*b*) The Nayade, 4 C. Rob. 251; The Neptunus, 6 C. Rob. 403.

are of more authority than the loose *dicta* of elementary writers. When those courts in this country which are charged with the administration of international law have differed from the English adjudications, we must take the law from domestic sources; but such an alternative is rarely to be met with; and there is scarcely a decision in the English prize courts at Westminster, on any general question of public right, that has not received the express approbation and sanction of our national courts. We have attained the rank of a great commercial nation, and war, on our part, is carried on upon the same principles of maritime policy which have directed the forces and animated the councils of the naval powers of Europe. When the United States formed a component part of the British empire, our prize law and theirs was the same; and after the Revolution it continued to be the same, as far as it was adapted to our circumstances, and was not varied by the power which was capable of changing it. The great value of a series of judicial decisions, in prize cases, and on other questions depending on the law of nations, is, that they render certain and stable the loose general principles of that law, and show their application, and how they are understood in the country where the tribunals are sitting. They are, therefore, deservedly received with very great respect, and are presumptive, though not conclusive, evidence of the law in the given case. This was the language of the Supreme Court of the United States so late as 1815; (*a*) and the decisions of the English High Court of Admiralty, especially since the year 1798, have been consulted and uniformly respected by that court, as enlightened commentaries on the law of nations, and affording a vast variety of instructive precedents for the applications of the principles of that law. They have also this to recommend them, that they are pre-eminently distinguished
*71 for sagacity, wisdom, and learning, as * well as for the chaste and classical beauties of their composition.[1]

Many of the most important principles of public law have been brought into use, and received a practical application, and been reduced to legal precision, since the age of Grotius and Puffendorf; and we must resort to the judicial decisions of the prize

(*a*) 9 Cranch, 198.

[1] Historicus, Int. Law, 53, 84 (on M. Hautefeuille's work).

tribunals in Europe and in this country for information and authority on a great many points on which all the leading text-books have preserved a total silence.(*x*) The complexity of modern commerce has swelled beyond all bounds the number and intricacy of questions upon national law, and particularly upon the very comprehensive head of maritime capture. The illegality and penal consequences of trade with the enemy; the illegality of carrying enemy's despatches, or of engaging in the coasting, fishing, or other privileged trade of the enemy; the illegality of transfer of property *in transitu* between the neutral and belligerent; the rules which impress upon neutral property a hostile character, arising either from the domicile of the neutral owner, or his territorial possessions, or his connection with a house in trade in the enemy's country, — are all of them doctrines in the modern international law, which are either not to be found at all, or certainly not with any fulness of discussion and power of argument, anywhere, but in the judicial investigations to which I have referred, and which have given the highest authority and splendor to this branch of learning.

(*x*) The Monroe doctrine, recently much discussed, although not yet recognized and defined in the Law of Nations, appears, apart from alliance with other American republics, to rest upon the right of self-defence and self-protection, illustrated in the case of the three-mile zone and arms of the sea as enclosed waters, which the author suggests, *supra*, p. 30, in the case of the United States should be liberally extended by lines drawn from one distant headland to another. See 29 Am. L. Rev. 419, 839, 887; 1 Wharton's Digest, § 57; Tucker's Monroe Doctrine; the recent debates in Congress, and Pres. Diaz's recent message and Mr. Phelps' address noticed in 62 Nation, 264, 280, &c.

LECTURE IV.

OF THE VARIOUS KINDS OF PROPERTY LIABLE TO CAPTURE.

It becomes important, in a maritime war, to determine with precision what relations and circumstances will impress a hostile character upon persons and property; and the modern international law of the commercial world is replete with refined and complicated distinctions on this subject. It is settled that there may be a hostile character merely as to commercial purposes, and hostility may attach only to the person as a temporary enemy, or it may attach only to property of a particular description. This hostile character, in a commercial view, or one limited to certain intents and purposes only, will attach in consequence of having possessions in the territory of the enemy, or by maintaining a commercial establishment there, or by a personal residence, or by particular modes of traffic, as by sailing under the enemy's flag or passport. This hostile relation, growing out of particular circumstances, assumes as valid the distinction which has been taken between a permanent and a temporary alien enemy. A man is said to be permanently an alien enemy when he owes a permanent allegiance to the adverse belligerent, and his hostility is commensurate in point of time with his country's quarrel. But he who does not owe a permanent allegiance to the enemy is an enemy only during the existence and continuance of certain circumstances. A neutral, for instance, said Ch. J. Eyre, (*a*) can be an alien enemy only with respect to his acts done under a local or temporary allegiance to a power at war, and when his temporary allegiance determines, his hostile character determines also.

It was considered by Sir William Scott, in the case of the *Phœnix*, (*a*) and again in the case of the *Vrow Anna Catha-*

(*a*) Sparenburgh *v.* Bannatyne, 1 Bos. & Pull. 163.

(*a*) 5 C. Rob. 20.

rina, (*b*) to be a fixed principle of maritime law, that the possession of the soil impressed upon the owner the character of the country, so far as the produce of the soil was concerned, wherever the local residence of the owner might be. The produce of a hostile soil bears a hostile character for the purpose of capture, and is the subject of legitimate prize when taken in a course of transportation to any other country. The enemy's lands are supposed to be a great source of his wealth, and perhaps the most solid foundation of his power; and whoever owns or possesses land in the enemy's country, though he may in fact reside elsewhere, and be in every other respect a neutral or friend, must be taken to have incorporated himself with the nation, so far as he is a holder of the soil; and the produce of that soil is held to be enemy's property, independent of the personal residence or occupation of the owner. (*x*) The reasonableness of this principle will be acceded to by all maritime nations; and it was particularly recognized as a valid doctrine by the Supreme Court of the United States, in *Bentzon* v. *Boyle*. (*c*) [1]

1. Domicile in the Enemy's Country. — If a person has a settlement in a hostile country by the maintenance of a commercial establishment there, he will be considered a hostile character, and a subject of the enemy's country, in regard to his commercial transactions connected with that establishment. The position is a clear one, that if a person goes into a foreign country,

(*b*) 5 C. Rob. 161.

(*c*) 9 Cranch, 191.

[1] The Crenshaw, Blatchf. Pr. 2, 27; The Mary Clinton, ib. 556.

(*x*) All property produced in the enemy's territory is stamped with the character of that country. Brigg's Case, 25 Ct. Cl. 126; 143 U. S. 346. Of "immovable property belonging to the conquered State, the conqueror has, by the rights of war, acquired the use so long as he holds them. The fruits, rents, and profits are, therefore, his; and he may lawfully claim and receive them. Any contracts or agreements, however, which he may make with individuals farming out such property, will continue only so long as he retains control of them, and will cease on the restitution to, or recovery by, their former owner." Halleck, Int. Law (3d ed.), ch. 33, § 4, approved by Hunt, J. in New Orleans *v.* Steamship Co., 20 Wall, 387, 397; see *supra*, p. 25, note (*x*). Although, during the civil war, the Government paid rent at Memphis upon proof of the owner's loyalty, such a contract cannot be made or implied, without the express sanction of the Government with an enemy for his property in the territory of its enemies. Stovall's Case, 26 Ct. Cl. 226; Osborne's Case, 24 id. 416. See White's Case, 29 id. 264; Austin's Case, 25 id. 437; 155 U. S. 417.

and engages in trade there, he is, by the law of nations, to be considered a merchant of that country, and a subject for all *75 civil purpose, * whether that country be hostile or neutral; and he cannot be permitted to retain the privileges of a neutral character, during his residence and occupation in an enemy's country. (*a*) [1] This general rule has been applied by the English courts to the case of Englishmen residing in a neutral country, and they are admitted, in respect to their *bona fide* trade, to the privileges of the neutral character. (*b*) In the case of the *Danous*, (*c*) the rule was laid down by the English House of Lords, in 1802, in unrestricted terms; and a British-born subject, resident in Portugal, was allowed the benefit of the Portuguese character, so far as to render his trade with Holland, then at war with England, not impeachable as an illegal trade. The same rule was afterwards applied (*d*) to a natural-born British subject domiciled in the United States, and it was held that he might lawfully trade to a country at war with England but at peace with the United States. (*x*)

This same principle, that, for all commercial purposes, the domicile of the party, without reference to the place of birth, becomes the test of national character, has been repeatedly and

(*a*) Wilson *v.* Marryat, 8 T. R. 31; M'Connell *v.* Hector, 3 Bos. & Pull. 113; The Indian Chief, 3 C. Rob. 12; The Anna Catharina, 4 C. Rob. 107; The President, 5 C. Rob. 277; Lord Stowell [in The Matchless,] 1 Hagg. Adm. 103, 104.

(*b*) M'Connell *v.* Hector, 3 Bos. & Pull. 113; The Emanuel, 1 C. Rob. 296.

(*c*) Cited in 4 C. Rob. 255, note.

(*d*) Bell *v.* Reid, 1 Maule & Selw. 726.

[1] *Ante*, 44, n. 1; The Abo, 1 Spinks, Ad. & Ec. 347; The Aina, ib. 313, 2 Eng. Law & Eq. 600; The Gerasimo, 11 Moore, P. C. 88; but sometimes, as in this case, it is a question whether the place of residence is enemy's country or not. A temporary occupation of neutral territory by an enemy's force does not necessarily give it a hostile character. But actual and firm possession by one power or the other determines the character of the place for the time being. Wheat. Dana's note 160.

As to domicile, see ii. 430, n. 1.

(*x*) Formerly a British subject in the covenanted service of the East India Company acquired thereby an Anglo-Indian domicile the same as if he had contracted for service abroad under a foreign Government; but British subjects resident in Chinese territory did not in like manner acquire an Anglo-Chinese domicile. See *In re* Tootal's Trusts, 23 Ch. D. 532. So a permanent residence, under British protection, at Cairo, which is not a British possession governed by English law, does not attract an English or Anglo-Egyptian domicile to one who is a Turk by origin and a member of the Chaldean Catholic community. Abd-ul-Messih *v.* Farra, 13 A. C. 431.

explicitly admitted in the courts of the United States. If he resides in a belligerent country, his property is liable to capture as enemy's property, and if he resides in a neutral country, he enjoys all the privileges, and is subject to all the inconveniences, of the neutral trade. He takes the advantages and disadvantages, whatever they *may be, of the country of his *76 residence. (*a*) The doctrine is founded on the principles of national law, and accords with the reason and practice of all civilized nations. *Migrans jura amittat ac privilegia et immunitates domicilii prioris.* (*b*) A person is not, however, permitted to acquire a neutral domicile that will protect such a trade in opposition to the belligerent claims of his native country, if he emigrate from that country *flagrante bello.* (*c*) Vattel (*d*) denies explicitly the right of emigration in a war in which his country is involved. It would be a criminal act. (*e*) This doctrine is considered as settled in the United States. (*f*)

The only limitation upon the principle of determining the character from residence is, that the party must not be found in hostility to his native country. He must do nothing inconsistent with his native allegiance; and this qualification is annexed to the rule by Sir William Scott, in the case of the *Emanuel*, and the same qualification exists in the French law, as well since as before their revolution. (*g*) It has been questioned whether the rule does not go too far, even with this restriction; but it appears to be too well and solidly settled to be now shaken.

2. Residence in the Enemy's Country. — It has been a question admitting of much discussion and difficulty, arising from the complicated character of commercial speculations, what state of facts constitutes a residence so as to change or fix the commercial character of the party. The *animus manendi* appears to have been the point to be settled. The presumption, arising from actual resi-

(*a*) Case of the Sloop Chester, 2 Dallas, 41; Murray *v.* Schooner Betsey, 2 Cranch, 64; Maley *v.* Shattuck, 3 Cranch, 488; Livingston *v.* Maryland Insurance Co., 7 Cranch, 506; The Venus, 8 Cranch, 253; The Frances, 8 Cranch, 363.

(*b*) Voet, Comm. ad Pand. i. 347.

(*c*) The Dos Hermanos, 2 Wheaton, 76. (*d*) B. 1, c. 19, sec. 220–223.

(*e*) See also, to the same effect, Grotius, lib. 2, c. 5, sec. 2. Puffendorf par Barbeyrac, b. 8, c. 11, sec. 3.

(*f*) Duer on Insurance, i. 521.

(*g*) 1 C. Rob. 296; Code Napoleon, Nos. 17, 21; Pothier's Traité du Droit de Propriété, No. 94.

dence in any place, is, that the party is there *animo manendi*, and it lies upon him to remove the presumption, if it should be requisite for his safety. (*h*) If the intention to establish *77 a permanent residence be ascertained, the recency * of the establishment, though it may have been for a day only, is immaterial. If there be no such intention, and the residence be involuntary or constrained, then a residence, however long, does not change the original character of the party, or give him a new and hostile one. (*a*) But the circumstances requisite to establish the domicile are flexible, and easily accommodated to the real truth and equity of the case. Thus it requires fewer circumstances to constitute domicile in the case of a native subject, who returns to reassume his original character, than it does to impress the national character on a stranger. (*b*) The *quo animo* is, in each case, the real subject of inquiry; and when the residence exists freely, without force or restraint, it is usually held to be complete, whether it be an actual or only an implied residence.

When the residence is once fixed, and has communicated a national character to the party, it is not divested by a periodical absence, or even by occasional visits to his native country. (*c*) Nor is it invariably necessary that the residence be personal, in order to impress a person with a national character. The general rule undoubtedly is, that a neutral merchant may trade in the ordinary manner to the country of a belligerent, by means of a stationed agent there, and yet not contract the character of a domiciled person. But if the principal be trading, not on the ordinary footing of a foreign merchant, but as a privileged trader of the enemy, such a privileged trade puts him on the same ground with their own subjects, and he would be considered as sufficiently invested with the national character by the residence of his agent. Sir William Scott, in the case of the *Anna* *78 *Catharina*, (*d*) applied this distinction to the case of *a neutral, invested with the privileges of a Spanish merchant, and the full benefit of the Spanish character; and this case has

(*h*) The Bernon, 1 C. Rob. 102.

(*a*) The Diana, 5 C. Rob. 60; The Ocean, 5 C. Rob. 90.

(*b*) La Virginie, 5 C. Rob. 99.

(*c*) 1 Acton, 116; 9 Cranch, 414; Marshall, Ch. J., The Friendschaft, 3 Wheaton, 14.

(*d*) 4 C. Rob. 107.

been followed to its fullest extent in this country. (*a*) It affords a sample of that piercing and unwearied investigation which the courts of admiralty have displayed in unravelling the intricate process by which an enemy's trade was attempted to be protected from hostile seizure, and in the application of sound principles of national law to new and complex cases. On the same ground it has been decided (*b*) that an American consul-general in Scotland, committing his whole duty to vice-consuls, was deemed to have lost his neutral character by engaging in trade in France; and it is well settled that if a foreign consul carries on trade as a merchant, in an enemy's country, his consular residence and character will not protect that trade from interruption by seizure and condemnation as enemy's property. (*c*)[1]

A national character, acquired by residence, may be thrown off at pleasure by a return to the native country. It is an adventitious character, and ceases by non-residence, or when the party puts himself in motion *bona fide*, to quit the country *sine animo revertendi*; and such an intention is essential, in order to enable the party to reassume his native character. (*d*)[2] In the

(*a*) The San Jose Indiano, 2 Gallison, 268. In this case, says Mr. Duer, in his work on Insurance, i. 527, the language of Mr. Justice Story reflects the spirit and emulates the style of the illustrious judge whose doctrines he adopts and defends.

(*b*) The Dree Gebroeders, 4 C. Rob. 232.

(*c*) Vattel, b. 4, c. 8, sec. 114; The Indian Chief, 3 C. Rob. 22; Albretcht *v.* Sussmann, 2 Ves. & Bea. 323; Arnold *v.* U. I. Company, 1 Johns. Cas. 363.

(*d*) The Indian Chief, 3 C. Rob. 12; The Friendschaft, 3 Wheaton, 14.

[1] Cases cited, *ante*, 44, n. 1.

[2] United States *v.* Guillem, 11 How. 47; The Amy Warwick, 2 Sprague, 143; s. c. 2 Black, 635, 674. A foreigner residing in a country, if a war breaks out between that country and another, is allowed a reasonable time for leaving it and withdrawing his business connections. The Gerasimo, 11 Moore, P. C. 88; The Ariel, ib. 119, 127. And a like rule was applied in favor of citizens of Northern States temporarily residing or having business relations with the South at the beginning of the late war. The Sarah Starr, Blatch. Pr. 69, 650; 52 Bales of Cotton, ib. 644; The John Gilpin, ib. 661; The William Bagaley, 5 Wall. 377; The Gray Jacket, ib. 342, 370; The Peterhoff, ib. 28, 60; [Gates *v.* Goodlce, 101 U. S. 612.] The property of persons remaining within the Southern lines was treated as enemy's property, without regard to personal disposition. See cases last cited, and the Prize Cases, 2 Black, 635; Mrs. Alexander's Cotton, 2 Wall. 404; Flying Scud, 6 Wall. 263; Miller *v.* United States, 11 Wall. 268, 306; Elgee *v.* Lovell, 1 Woolw. 102; The Adelso, 11 Op. Att.-Gen. 445, 451; cf. 15 U. S. St. at L. 75, § 3; and see El Telegrafo, Newb. 383.

case of the *Venus*, (*e*) the decisions of the English courts on the subject of national character acquired by residence, and on the consequences of such acquired character, were recognized as being founded on sound principles of public law. It was declared that the law of nations distinguishes between a
*79 temporary residence in a foreign *country for a special purpose, and a residence, accompanied with an intention to make it the party's domicile, or permanent place of abode; and that the doctrine of the prize courts, and the common-law courts of England, was the same on this subject with that of the public jurists. As a consequence of the doctrine of domicile, the court decided that if a citizen of the United States should establish his commercial domicile in a foreign country, and hostilities should afterwards break out between that country and the United States, his property, shipped before knowledge of the war, and while that domicile continued, would be liable to capture, on the ground that his permanent residence had stamped him with the national character of that country. The hostile character was deemed to attach to the American citizen only in respect to his property connected with his residence in the enemy's country; and the converse of the proposition was also true, that the subject of a belligerent state, domiciled in a neutral country, was to be considered a neutral by both the belligerents, in reference to his trade. The doctrine of enemy's property, arising from a domicile in an enemy's country, is enforced strictly; and equitable qualifications of the rule are generally disallowed, for the sake of preventing frauds on belligerent rights, and to give the rule more precision and certainty.

In the law of nations, as to Europe, the rule is, that men take their national character from the general character of the country in which they reside; and this rule applies equally to

(*e*) 8 Cranch, 253. In this case, Ch. J. Marshall dissented from the decision of the court, and contended that a commercial domicile, wholly acquired in time of peace, ceased at the commencement of hostilities, which superseded the motives that alone induced the foreign residence; that the presumption of an intention to return to the native country at the first opportunity was to be entertained; and that this presumption ought to shield the property from condemnation until delay or circumstances should destroy that presumption. Mr. Duer, in his Treatise on Insurance, i. 494–508, considers this opinion of the Ch. J. as exceedingly able, and he evidently concurs in that opinion. There is no doubt of its superior solidity and justice.

America. But in Asia and Africa an immiscible character is kept up, and Europeans, trading under the protection of a factory, take their national character from the establishment under which they live and trade. This rule applies to those parts of the world from obvious reasons of policy, because foreigners are not admitted there, as in Europe "and the western part of the world," into the general body and mass of the society of the nation, but they continue strangers and sojourners, not acquiring any national * character under the general * 80 sovereignty of the country. (*a*)

National character may be acquired in consideration of the traffic in which the party is concerned. If a person connects himself with a house of trade in the enemy's country, in time of war, or continues during a war a connection formed in a time of peace, he cannot protect himself by having his domicile in a neutral country. He is considered as impressed with a hostile character in reference to so much of his commerce as may be connected with that establishment.[1] The rule is the same, whether he maintains that establishment as a partner or as a sole trader. (*b*) The Supreme Court of the United States, referring to the English prize cases on this subject, observed, that they considered the rule to be inflexibly settled, and that they were not at liberty to depart from it, whatever doubt might have been entertained if the case was entirely new.

But though a belligerent has a right to consider as enemies all persons who reside in a hostile country, or maintain commercial establishments there, whether they be by birth neutrals, or allies, or fellow-subjects, yet the rule is accompanied with this equitable qualification, that they are enemies *sub modo* only, or in reference to so much of their property as is connected with that residence or establishment. This nice and subtle distinction allows a merchant to act in two characters, so as to protect his property connected with his house in a neutral country, and to subject to seizure and forfeiture his effects belonging to the establishment

(*a*) The Indian Chief, 3 C. Rob. 22; [*ante*, 42, n. 1.]

(*b*) The Vigilantia, 1 C. Rob. 1; The Portland, 3 C. Rob. 41; The San Jose Indiano, 2 Gallison, 268; The Antonia Johanna, 1 Wheaton, 159; The Friendschaft, 4 Wheaton, 105.

[1] The William Bagaley, 5 Wall. 377; The Gray Jacket, ib. 342; The Cheshire, 3 Wall. 231; s. c. Blatchf. Pr. 151.

in the belligerent country. So there may be a partnership between two persons, the one residing in a neutral, and the
* 81 other in a belligerent country, and the trade of one * of them with the enemy will be held lawful, and that of the other unlawful, and consequently the share of one partner in the joint traffic will be condemned, while that of the other will be restored. This distinction has been frequently sustained, notwithstanding the difficulties that may attend the discrimination between the innocent and the noxious trade, and the rule has been introduced into the maritime law of this country. (*a*)

3. Colonial Trade. — The next mode in which a hostile character may be impressed, according to the doctrine of the English courts, is by dealing in those branches of commerce which were confined, in time of peace, to the subjects of the enemy. There can be no doubt that a special license, granted by a belligerent to a neutral vessel, to trade to her colony, with all the privileges of a native vessel, in those branches of commerce which were before confined to native subjects, would warrant the presumption that such vessel was adopted and neutralized, or that such permission was granted in fraud of the belligerent right of capture, and the property so covered may reasonably be regarded as enemy's property. This was the doctrine in the case of *Berens* v. *Rucker*, as early as 1760. (*b*) But the English rule goes further, and it annexes a hostile character, and the penal consequences of confiscation, to the ship and cargo of a neutral engaged in the colonial or coasting trade of the enemy, not open to foreigners in time of peace, but confined to native subjects by the fundamental regulations of the state. This prohibition stands upon two grounds: 1st. That if the coasting or colonial trade, reserved by the permanent policy of a nation to its own subjects and vessels, be open to neutrals during war, the act

(*a*) The Portland, 3 C. Rob. 41 ; The Herman, 4 C. Rob. 228 ; The Jonge Klassina, 5 C. Rob. 297 ; The San Jose Indiano, 2 Gallison, 268. [Hall, Int. Law, pt. 3, c. 6, on "Enemy Character." It is to be observed that property may be liable to capture either because it is an enemy's property, or because it is itself hostile in origin or in the purpose to which it is intended to be put. Thus cotton within the enemy's lines was liable to capture though belonging to a British subject. Young *v.* United States, 97 U. S. 39. — B.]

(*b*) 1 Wm. Bl. 313. See also the case of The Princessa, 2 C. Rob. 52 ; The Anna Catharina, 4 C. Rob. 107 ; The Rendsborg, 4 C. Rob. 121 ; The Vrow Anna Catharina, 5 C. Rob. 15.

proceeds from the pressure of the naval force of the enemy, and to obtain relief from that pressure. The neutral who interposes to relieve the belligerent, under such circumstances, *rescues him from the condition to which the arms of his *82 enemy had reduced him, restores to him those resources which have been wrested from him by the arms of his adversary, and deprives that adversary of the advantages which successful war had given him. This the opposing belligerent pronounces a departure from neutrality, and an interference in the war, to his prejudice. 2d. If the trade be not opened by law, the neutral employed in a trade reserved by the enemy to his own vessels identifies himself with that enemy, and assumes his character. These principles first became a subject of interesting discussion in the war of 1756, and they are generally known in England and in this country by the appellation of the rule of 1756; but the rule is said to have been asserted before that period.

In the letter of Puffendorf to Groningius, published in 1701, (*a*) he says that the English and the Dutch were willing to leave to neutrals the commerce they were accustomed to carry on in time of peace, but were not willing to allow them to avail themselves of the war to augment it, to the prejudice of the English and the Dutch. The French ordinances of 1704 and 1744 (*b*) have been considered as founded upon the basis of the same rule, and regulations are made to enforce it, and to preserve to neutrals the same trade which they had been accustomed to enjoy in peace, and to prohibit them from engaging in the colonial trade of the enemy. There is some evidence, also, that in the reign of Charles II. neutral vessels were considered, both by England and Holland, to be liable to capture and condemnation for being concerned in the coasting trade of the enemy. The Dutch, at that day, contended for this neutral exclusion, on the authority of general reasoning and the practice of nations; and the same rule is said to have been asserted in the English courts, in the war of 1741, and the exclusion of neutral vessels from the coasting trade of the enemy was declared to stand upon * the *83 law of nations. (*a*) But it was in the war of 1756 that the rule awakened general and earnest attention. Mr. Jenkinson, in his "Discourse on the conduct of Great Britain in respect to

(*a*) Puff. Droit des Gens, par Barbeyrac, ii. 558.
(*b*) Valin, Comm. ii. 248, 250.

(*a*) 6 C. Rob. 74, note, and 252, note.

neutral nations," written in 1757, considered it to be unjust and illegal for neutrals to avail themselves of the pressure of war to engage in a new species of traffic, not permitted in peace, and which the necessities of one belligerent obliged him to grant to the detriment, or perhaps to the destruction, of the other. (*b*) On the other hand, Hübner, who published his treatise (*c*) in 1759, is of opinion that neutrals may avail themselves of this advantage presented by the war, though he admits the lawfulness of the trade to be a question of some uncertainty.

Thus seemed to stand the authority of the rule of 1756, (*d*) when it was revived and brought into operation by England, in the war of 1793, and again upon the renewal of war in 1803. The rule was enforced by her, under occasional relaxations, during the long course of the wars arising out of the French Revolution; and it was frequently vindicated by Sir William Scott, in the course of his judicial decisions, with his customary ability and persuasive manner, as a rule founded in natural justice and the established jurisprudence of nations. (*e*) On the other hand, the government of the United States constantly and earnestly protested against the legality of the rule, to the extent claimed by Great Britain; and they insisted, in their diplo-
*84 matic intercourse, that the *rule was an attempt to estab-
lish "a new principle of the law of nations," and one which subverted "many other principles of great importance which have heretofore been held sacred among nations." They insisted that neutrals were of right entitled "to trade, with the exception of blockades and contrabands, to and between all ports of the enemy, and in all articles, although the trade should not

(*b*) In the British Memorial, addressed to the Deputies of the States General of Holland, December 22, 1758, the injustice of neutrals in assuming the enemy's carrying trade was urged, and it was declared that their *high mightinesses had never suffered such a trade*, and that it had been opposed in all countries in like circumstances.

(*c*) De la Saisie des Batimens Neutres. Mr. Wheaton, in his History of the Law of Nations in Europe and America, New York, 1845, 219–228, has given a summary of the two small volumes of Hübner on neutral rights; and he says that the doctrines of Hübner found but little favor with the public jurists, his contemporaries. It is a work of inferior weight and authority.

(*d*) It stood upon loose grounds, in point of official authority, according to the able examination of the documentary evidence of the rule, given in a note to the first volume of Mr. Wheaton's Reports, App. note 3.

(*e*) The Immanuel, 2 C. Rob. 186, and C. Rob. Rep. *passim*.

have been opened to them in time of peace." (*a*) It was considered to be the right of every independent power to treat, in time of peace, with every other nation, for leave to trade with its colonies, and to enter into any trade, whether new or old, that was not of itself illegal and a violation of neutrality. One state had nothing to do with the circumstances or motives which induced another nation to open her ports. The trade must have a direct reference to the hostile efforts of the belligerents, like dealing in contraband, in order to render it a breach of neutrality. The rule of 1756, especially in respect to colonial trade, has also been attacked and defended by writers in this country, with ability and learning; and though the rule would seem to have received the very general approbation of British lawyers and statesmen, yet it was not exempt from severe criticism, even in distinguished publications in that country. The principle of the rule of 1756 may, therefore, very fairly be considered as one unsettled and doubtful, and open to future and vexed discussion. The Chief Justice of the United States, in the case of the *Commercen*, (*b*) alluded to the rule, but purposely avoided expressing any opinion on the correctness of the principle. It is very possible that, if the United States should hereafter attain that elevation of maritime power and influence which their rapid growth and great resources seem to indicate, * and which * 85 shall prove sufficient to render it expedient for her maritime enemy (if any such enemy shall ever exist) to open all his domestic trade to enterprising neutrals, we might be induced to feel more sensibly than we have hitherto done the weight of the arguments of the foreign jurists in favor of the policy and equity of the rule. (*a*)[1]

(*a*) Mr. Monroe's Letter to Lord Mulgrave, of September 23, 1805, and Mr. Madison's Letter to Messrs. Monroe and Pinckney, dated May 17, 1806.

(*b*) 1 Wheaton, 396.

(*a*) On the subject of neutral trade between the colony and the mother country of a belligerent power, it was a question discussed in the English admiralty, in the case of the Polly (1800), whether the fact of a cargo, consisting of Spanish colonial produce, imported from the Havana in an American ship to the United States, and after being landed and duties paid, re-exported in the same vessel to Spain, was

[1] On the subject of continuity of voyages, discussed in note (*a*), see The Hart, 3 Wall. 559; s. c. Blatchf. Pr. 387; Jecker *v.* Montgomery, 18 How. 110. The Bermuda, 3 Wall. 514, affirms the doctrine of Sir William Grant, and also that when several ships are successively engaged in one transaction of conveying a cargo to

Sailing under the flag and pass of an enemy is another mode by which a hostile character may be affixed to property; for if a neutral vessel enjoys the privileges of a foreign character, she

sufficient to break the continuity of the voyage from the enemy's colony to the mother country, and legalize the trade by the mere transshipment in the United States. Sir William Scott, in that case, thought that landing the goods and paying the duties was a sufficient test of the *bona fides* of the transaction. 2 C. Rob. 361. But afterwards, in the cases of the Essex and the Maria (5 id. 365, 369), it was held that merely *touching* at the neutral port, and paying a nominal duty, was a mere evasion, and not sufficient to exempt the voyage from the charge of a direct, continued, and unlawful trade between the mother country and the colony of the enemy. The question is one of intent. Did the *animus importandi* terminate at the intermediate port, or look to an ulterior port? Was it, under the circumstances, a

a blockaded belligerent port, and a ship is let by its owners for the first part of the voyage with a view to the ulterior destination of the cargo, or when a ship let as above is carrying a contraband cargo, destined to a belligerent port, under circumstances of bad faith, such ship may be condemned. See further The Peterhoff, 5 Wall. 28, 54; s. c. Blatchf. Pr. 463. See further, iii. 269, n. 1.

Professor Mountague Bernard, in his Neutrality of Great Britain during the American Civil War (c. 12, pp. 310, 311), says that these decisions extended Lord Stowell's doctrine of continuous voyages to breaches of blockade and to conveyance of articles contraband of war for the first time; and that before that war it had been commonly assumed that if a neutral port were the *bona fide* destination of the ship and the end of her outward voyage, both ship and goods were safe, and a prize court would not inquire what was the destination of the cargo.

In Hobbs *v.* Henning, 17 C. B. N. S. 791, which was a suit against the insurers of the Peterhoff's cargo, after the condemnation by our courts, it was held that a plea that the goods were contraband, and were shipped by the plaintiff for the purpose of being sent to a port in a state at war with the United States, &c., that defendant was ignorant of these facts at the time of insuring, and the vessel was seized by United States cruisers, which was the loss complained of, alleged only a mental process and not a participation in the unlawful transaction, and so did not show a concealment of material facts. iii. 269, n. 1.

As to the last part of note (*a*) see Katchenovsky's Prize Law, translated by Pratt, London, 1867, for criticism of the British rule.

The next passage in the text is cited and approved in The William Bagaley, 5 Wall. 377, 410. The share of a neutral in a ship sailing under the flag and pass of an enemy, though purchased before the war, is liable to condemnation. The Primus, 1 Spinks, Ec. & Ad. 353; The Industrie, ib. 444; same cases, 29 Eng. Law & Eq. 589; 33 id. 572.

By an order in council, which was passed at the beginning of the Crimean war, and which will be referred to again, 128, n. 1, it was signified not to be "her Majesty's intention to claim the confiscation of neutral property, not being contraband of war, found on board enemy's ships." 1 Spinks, Ec. & Ad. R. app. p. ix. No. 8. The French government, which had maintained a contrary doctrine, made a similar declaration. Wheat. Lawrence's note 228. See declaration of principles of the Congress of Paris, April 16, 1856; Ann. Reg. 1856, p. 221; Wheat. Lawrence's note 192; *post*, 128, n. 1.

must expect, at the same time, to be subject to the inconveniences attaching to that character. This rule is necessary to prevent the fraudulent mask of enemy's property. But a distinction is made, in the English cases, between the ship and the cargo. Some countries have gone so far as to make the flag and pass of the ship conclusive on the cargo also; but the English courts have never carried the principle to that extent, as to cargoes laden before the war. The English rule is, to hold the ship bound by the character imposed upon it by the authority of the government from which all the documents issue. But goods which have no such dependence upon the authority of the state may be differently considered; and if the cargo be laden in time of peace, though documented as foreign property in the same manner as the ship, the sailing under a foreign flag and pass has not been held conclusive as to the cargo. (*b*) The doctrine of the federal courts in this country has been very strict on this point, and it has been frequently decided that sailing under the license and passport of protection of the enemy, in furtherance of his views and interests, was, without regard to the object of the voyage or the port of destination, such an act of illegality as subjected both ship and cargo to confiscation as prize of war. (*c*)

bona fide importation, ending at the intermediate port, or a mere contrivance to cover the original scheme of the voyage to an ulterior port? This is the true principle of the cases, as declared by Sir William Grant, in the case of The William, 5 C. Rob. 385, and recognized in this country. Opinions of the Attorneys-General of the United States, i. 359–362, 394–396. It is understood that the English and American Commissioners at London, in 1806, came to an understanding as to the proper and defined test of a *bona fide* importation of cargo into the common stock of the country, and as to the difference between a continuous and an interrupted voyage. But the treaty so agreed on was withheld by President Jefferson from the Senate of the United States, and never ratified. The doctrine of the English admiralty is just and reasonable on the assumption of the British rule, because we have no right to do covertly and insidiously what we have no right to do openly and directly. That rule is, that a direct trade by neutrals, between the mother country and the colonies of her enemy, and not allowed in time of peace, is by the law of nations unlawful. But if that rule be not well founded, all the qualifications of it do not help it; and in the official opinion of Mr. Wirt to the executive department, while he condemns the legality of the rule itself, he approves, as just in the abstract, the English principle of continuity. Opinions of the Attorneys-General, i. 394–396.

(*b*) The Elizabeth, 5 C. Rob. 2; The Vreede Scholtys, cited in the note to 5 C. Rob. 5.

(*c*) The Julia, 1 Gallison, 605; s. c. 8 Cranch, 181; The Aurora, ib. 203; The Hiram, ib. 444; The Ariadne, 2 Wheaton, 143; The Caledonia, 4 Wheaton, 100.

* 86 The * federal courts placed the objection to these licenses on the ground of a pacific dealing with the enemy, and as amounting to a contract that the party to whom the license is given should, for that voyage, withdraw himself from the war, and enjoy the repose and blessings of peace. The illegality of such an intercourse was strongly condemned; and it was held that the moment the vessel sailed on a voyage, with an enemy's license on board, the offence was irrevocably committed and consummated, and that the *delictum* was not done away even by the termination of the voyage, but the vessel and cargo might be seized after arrival in a port of the United States, and condemned as lawful prize.

4. Property in Transitu. — Having thus considered the principal circumstances which have been held by the courts of international law to impress a hostile character upon commerce, it may be here observed, that property which has a hostile character at the commencement of the voyage cannot change that character by assignment, while it is *in transitu*, so as to protect it from capture. This would lead to fraudulent contrivances to protect the property from capture, by colorable assignments to neutrals. But if a shipment be made in peace, and not in expectation of war, and the contract lays the risk of the shipment on the neutral consignor, the legal property will remain to the end of the voyage in the consignor. (*a*) During peace, a transfer *in transitu* may be made; but when war is existing or impending, the belligerent rule applies, and the ownership of the property is deemed to continue as it was at the time of the shipment until actual delivery.[1] This illegality of transfer, during or in contemplation of

That an insurance is void, when made on a voyage so rendered illegal by sailing under an enemy's license, is considered as settled. Colquhoun *v.* N. Y. F. Ins. Co., 15 Johns. 352; Ogden *v.* Barker, 18 Johns. 87; Craig *v.* U. S. Ins. Co., 1 Peters, C. C. 410.

(*a*) Packet De Bilboa, 2 C. Rob. 133, 134; Anna Catharina, 4 id. 112.

[1] The Sally Magee, 3 Wall. 451, 460. See United States *v.* The Lilla, 2 Cliff. 169. But actual delivery terminates the *transitus*, so far as liability to capture is concerned. The Baltica, 11 Moore, P. C. 141; Baltazzi *v.* Ryder, The Panaghia Rhomba, 12 Moore, P. C. 168, 188. See The Ariel, 11 Moore, P. C. 119; The Law Mag. and Law Rev., Aug. 1870, xxix. 233, advocates still more liberal doctrines.

The above were cases of merchant vessels. The Georgia was a Confederate war steamer. After cruising a year or more, and doing a good deal of damage, she ran into Liverpool to escape the

war, is for the sake of the belligerent right, and to prevent secret transfers from the enemy to neutrals, in fraud of that right, and upon conditions and reservations which it might be impossible to detect. (*b*) So property shipped from a neutral to the enemy's country, under a contract to become the property of the enemy on arrival, may be taken *in transitu* as enemy's property; for capture is considered as delivery. The captor, by the rights of war, stands in the place of the enemy. (*c*) The prize courts will * not allow a neutral and belligerent, by a special agree- * 87 ment, to change the ordinary rule of peace, by which goods ordered and delivered to the master are considered as delivered to the consignee. All such agreements, though valid in time of peace, are in time of war, or in peace, if made in contemplation of war, and with intent to protect from capture, held to be constructively fraudulent; and if they could operate, they would go to cover all belligerent property, while passing between a belligerent and a neutral country, since the risk of capture would be laid alternately on the consignor or consignee, as the neutral factor should happen to stand in the one or the other of those relations. These principles of the English admiralty have been explicitly recognized and acted upon by the prize courts in this country. The great principles of national law were held to require that, in war, enemy's property should not change its hostile character, *in transitu;* and that no secret liens, no future elections, no private contracts looking to future events, should be able to cover private property while sailing on the ocean. (*a*) Captors disregard all equitable liens on enemy's property, and lay their hands on the gross tangible property, and rely on the simple title in the name and possession of the enemy. If they were to open the door to equitable claims, there would be no end

(*b*) Vrow Margaretha, 1 C. Rob. 336; Jan Frederick, 5 C. Rob. 128. See also 1 C. Rob. 1, 101, 122; 2 C. Rob. 137; 1 C. Rob. 16, note; 4 C. Rob. 32; The Boedes Lust, 5 C. Rob. 233; Story, J., in The Ann Green, 1 Gallison, 291.

(*c*) The Anna Catharina, 4 C. Rob. 107; The Sally Griffiths, 3 C. Rob. 300, *in notis.*

(*a*) The Francis, 1 Gallison, 445; 8 Cranch, 335, 359, s. c.

Kearsarge and other United States vessels, which were in search of her. While in port, she was *bona fide* dismantled, and sold to a British subject for commercial purposes. But she was watched and seized as soon as she came out. The Supreme Court affirmed a decree condemning her as good prize. The Georgia, 7 Wall. 32; s. c. 1 Lowell, 96.

to discussion and imposition, and the simplicity and celerity of proceedings in prize courts would be lost. (*b*) [1] All reservation of risk to the neutral consignors, in order to protect belligerent consignees, are held to be fraudulent; and these numerous and strict rules of the maritime jurisprudence of the prize courts are intended to uphold the rights of lawful maritime capture, and to prevent frauds, and to preserve candor and good faith in the intercourse between belligerents and neutrals. (*c*) The modern cases contain numerous and striking instances of the acuteness of the captors in tracking out deceit, and of the dexterity of the claimants in eluding investigation. (*d*) [2]

(*b*) The Josephine, 4 C. Rob. 25; The Tobago, 5 id. 218; The Marianna, 6 id. 24; and the American cases, *ubi supra*. It is the general rule and practice in the admiralty, on questions depending upon title to vessels, to look to the legal title, without taking notice of equitable claims. The Sisters, 5 C. Rob. 155; The Valiant, 1 Wm. Rob. 64.

(*c*) The prize law, as declared by the English admiralty as early as 1741, and by the decisions of the prize courts in this country, in the case of property *in transitu*, during war, is clearly and correctly stated and ably enforced by Mr. Duer in his Treatise on Insurance, i. 478–484.

(*d*) The purchase of ships is a branch of trade neutrals may lawfully engage in, when they act in good faith, though from its nature it is liable to great suspicion, and the circumstances of the case are examined in the prize courts with a jealous and sharp vigilance. Duer on Insurance, i. 444, 445, 573.[1]

[1] The Sally Magee, 3 Wall. 451; s. c. Blatchf. Pr. 382; The Battle, 6 Wall. 498; The Ida, Spinks, Prize Cas. 26. And a like principle was applied against a *bona fide* mortgagee not in possession, although a citizen of the country whose courts decided the case. The Hampton, 5 Wall. 372. See The Aina, Spinks, Ec. & Ad. 313; The Maria, 11 Moore, P. C. 271, 287, commented on in The Amy Warwick, 2 Sprague, 150, 158. Enemy's liens on neutral ships are to be equally disregarded, and will not render them liable to capture. The Ariel, 11 Moore, P. C. 119.

[2] See, generally, The Ariel, 11 Moore, P. C. 119; The Baltica, ib. 141; Ernst Merck, Spinks, Prize Cas. 98; s. c. 2 Spinks, Ec. & Ad. 87.

LECTURE V.

OF THE RIGHTS OF BELLIGERENT NATIONS IN RELATION TO EACH OTHER.

THE end of war is to procure by force the justice which cannot otherwise be obtained; and the law of nations allows the means requisite to the end. The persons and property of the enemy may be attacked and captured, or destroyed, when necessary to procure reparation or security. There is no limitation to the career of violence and destruction, if we follow the earlier writers on this subject, who have paid too much deference to the violent maxims and practices of the ancients and the usages of the Gothic ages. They have considered a state of war as a dissolution of all moral ties, and a license for every kind of disorder and intemperate fierceness. An enemy was regarded as a criminal and an outlaw, who had forfeited his rights, and whose life, liberty, and property lay at the mercy of the conqueror. Everything done against an enemy was held to be lawful. He might be destroyed, though unarmed and defenceless. Fraud might be employed as well as force, and force without any regard to the means. (*a*) But these barbarous rights of war have been questioned and checked in the progress of civilization. Public opinion, as it becomes enlightened and refined, condemns all cruelty, and all wanton destruction of life *and property, as * 90 equally useless and injurious; and it controls the violence of war by the energy and severity of its reproaches.

1. Moderation a duty. — Grotius, even in opposition to many of his own authorities, and under a due sense of the obligations of religion and humanity, placed bounds to the ravages of war, and mentioned [maintained?] that many things were not fit and commendable, though they might be strictly lawful; and that the law

(*a*) Grotius, b. 3, c. 4 and 5; Puff. lib. 2, c. 16, sec. 6; Bynk. Q. J. Pub. b. 1, c. 1, 2, 3; Burlamaqui, pt. 4, c. 5.

of nature forbade what the law of nations (meaning thereby the practice of nations) tolerated. He held that the law of nations prohibited the use of poisoned arms, or the employment of assassins, or violence to women, or to the dead, or making slaves of prisoners; (*a*) and the moderation which he inculcated had a visible influence upon the sentiments and manners of Europe. Under the sanction of his great authority men began to entertain more enlarged views of national policy, and to consider a mild and temperate exercise of the rights of war to be dictated by an enlightened self-interest as well as by the precepts of Christianity. And notwithstanding some subsequent writers, as Bynkershoek and Wolfius, restored war to all its horrors, by allowing the use of poison and other illicit arms, yet such rules became abhorrent to the cultivated reason and growing humanity of the Christian nations. Montesquieu insisted (*b*) that the laws of war gave no other power over a captive than to keep him safely, and that all unnecessary rigor was condemned by the reason and conscience of mankind. Rutherforth (*c*) has spoken to the same effect, and Martens (*d*) enumerates several modes of war and species of arms as being now held unlawful by the laws of war. Vattel (*e*) has entered largely into the subject, and he argues with
*91 great strength *of reason and eloquence against all unnecessary cruelty, all base revenge, and all mean and perfidious warfare; and he recommends his benevolent doctrines by the precepts of exalted ethics and sound policy, and by illustrations drawn from some of the most pathetic and illustrious examples. (*x*)

(*a*) B. 3, c. 4, 5, 7.
(*b*) Esprit des Louis, b. 15, c. 2.
(*c*) Inst. 2, c. 9.
(*d*) Summary, b. 8, c. 3, sec. 3.
(*e*) B. 3, c. 8.

(*x*) The sentiment of the age condemns the employment of such instruments or weapons as will cause a useless shedding of blood. It is now considered a violation of right if weapons of war are turned against non-combatants or unfortified cities or towns, or if a captured city is sacked or demolished; and the bombardment of forts and other fortified places is regarded as a measure of extreme rigor, justifiable only when it is impossible to secure a surrender by other means. Wheaton says that usage, which has acquired the force of law, excepts from the operations of war churches, public edifices exclusively devoted to the civil service, monuments of art, museums, and scientific establishments. Modern usage does not permit the use of barbarous weapons, as bar-shot, poisoned weapons, explosive bullets, or balls so shaped as to make death the result of a wound. So the assassination of commanders, poison-

There is a marked difference in the right of war, carried on by land and at sea. The object of a maritime war is the destruction of the enemy's commerce and navigation, in order to weaken and destroy the foundations of his naval power. The capture or destruction of private property is essential to that end, and it is allowed in maritime wars by the law and practice of nations. But there are great limitations imposed upon the operations of war by land, though depredations upon private property, and

ing of wells or of provisions are looked upon as odious crimes. In 1868, a compact was made at St. Petersburg, between all the European powers, absolutely forbidding the use of explosive balls; and by the Geneva Convention of 1864, ambulances and hospitals when used for the care of the sick or wounded, were to be acknowledged as neutral, and persons, including medical men and chaplains, employed in connection therewith, were also to have the benefit of such neutrality. So the enemy's soldiers, when taken prisoner, or disabled, are not to be maimed or put to death, when the preservation of their lives is consistent with safety and the enemy has not by cruelty justified retaliation. Prisoners are not to be sold into captivity, and the employment of savages, uncivilized Indians, and cannibals in war is also condemned. But the rules of war justify stratagems by land or sea, disguise of uniform, the use of spies, the ambush, mines, bombs, cheveaux de frieze, grape, and shell; also the false flag, but not a false signal of distress, at least after a naval battle is begun; the employment of privateers, if not forbidden by treaty; the wrecking or cutting off of the enemy's resources by the devastation, not merely wanton, of the adjacent territory, or the stopping of water supplies; or the confiscation of any property belonging to the individual inhabitants of the enemy's country and taken therein. See 3 Phillimore, Int. Law, (3d ed.) cc. 6, 7; Hosack's Law of Nations, 121; Maine's Int. Law, 136; Gallaudet's Manuel, p. 219; Halleck's Int. Law, p. 357; Glass, Marine Int. Law, p. 38; 3 Wharton's Int. Law, §§ 348 *a*, 384; Walker's Int. Law, c. 6; David Dudley Field's Memoir, 36 Alb. L. J. 284; 26 Revue Droit Int. 9, 586; 24 id. 406. As to divulging military secrets, see 21 Journ. du Droit Int. 265, 489.

Prisoners of war are no longer required to give information to their captors respecting their own army or country, and are not to be punished for giving false information; they are also permitted to retain their money and valuables, to a reasonable amount, and their extra clothing; and persons forced to serve as guides are not to be punished for so doing. Instructions for the U. S. Armies (1863), § 3, cl. 72, 80, 94.

The influence of the United States in promoting international arbitration is shown historically in 26 Am. Law Rev. 66, 85; 24 id. 897; 48 Alb. L. J. 291. As to disarmament by international agreement, see 19 Revue de Droit Int. 472, 479; 26 id. 573. Upon the international rights of railroads, owned by belligerents or by neutrals, in time of war, see 17 Revue de Droit Int. 332; 19 id. 164; 20 id. 362, 383; 21 Journal du Droit Int. 435, 641. As to the protection of marine telegraph cables, see 15 Revue de Droit Int. 17. By the Postal Treaty of Aug. 30, 1890, between Great Britain and France, postal packets are not liable to seizure or detention in case of war, until postal communication is ordered discontinued by either nation, and then they may return home.

despoiling and plundering the enemy's territory, are still too prevalent, especially when the war is assisted by irregulars. Such conduct has been condemned in all ages by the wise and virtuous, and it is usually severely punished by those commanders of disciplined troops who have studied war as a science, and are animated by a sense of duty or the love of fame. We may infer the opinion of Xenophon on this subject (and he was a warrior as well as a philosopher), when he states, in the Cyropædia, (*a*) that Cyrus of Persia gave orders to his army, when marching upon the enemy's borders, not to disturb the cultivators of the soil; and there have been such ordinances in modern times, for the protection of innocent and pacific pursuits. (*b*)[1]

(*a*) Lib. 5.

(*b*) 1 Emerigon, des Ass. 129, 130, 457, refers to ordinances of France and Holland, in favor of protection to fishermen; and to the like effect was the order of the British government in 1810, for abstaining from hostilities against the inhabitants of the Faroe Islands and Iceland. So it is the practice of all civilized nations to consider vessels employed only for the purpose of discovery and science, as excluded from the operations of war. The American Commissioners (John Adams, Benjamin Franklin, and Thomas Jefferson), in 1784, submitted to the Prussian Minister a proposition to

[1] Cotton was treated as a proper subject for capture under the peculiar circumstances of the rebellion, although private property and on land. Mrs. Alexander's Cotton, 2 Wall. 404; United States *v.* Padelford, 9 Wall. 531, 540 [Lamar *v.* Brown, 92 U. S. 187; Young *v.* United States, 97 U. S. 39]; *post*, 357, n. 1. See Mitchell *v.* Harmony, 13 How. 115; 1 Blatchf. 549. Both North and South also passed limited confiscation acts which applied to property on land, including credits; and the acts of Congress have been upheld by the Supreme Court as a legitimate exercise of the war powers of the government. Miller *v.* United States, 11 Wall. 268. See Wheat. Dana's notes 156, 157. The Confederate acts, to be sure, were treated as invalid in the United States courts. Texas *v.* White, 7 Wall. 700; Knox *v.* Lee, 12 Wall. 457, 554; Hickman *v.* Jones, 9 Wall. 197; *post*, 108, n. 1. Compare Shortidge *v.* Macon, 1 Phillips, N. C. 392, 2 Am. Law Rev. 95; Perdicaris *v.* Charleston Gaslight Co., 10 Int. Rev. Rec. 110, 2 Am. Law Times, 117, with United States *v.* Keehler, 9 Wall. 83. But it may be doubted in view of the practice of the United States and other nations in cases where expediency has dictated the taking of private property on land, whether the immunity of such property in general is so firmly established, that an argument can be drawn from it in favor of extending the exemption to private property at sea. The objections to the latter principle are forcibly stated by Professor J. N. Pomeroy, in the North American Review, cxiv. 376, for April, 1872, and the treaty between the United States and Prussia, mentioned in the note (*b*), the course of the United States with regard to the abolition of privateering by the Congress of Paris, *post*, 98, n. 1, and the adoption of the principle by Prussia in the war with France in 1870, are discussed and explained. See also Wheat. Dana's notes 158, 171, and the history in Wheat. Lawrence's note 192.

Vattel condemns *very strongly the spoliation of a country *92
without palpable necessity; and he speaks with a just indignation of the burning of the Palatinate by Turenne, under the cruel instructions of Luvois, the war minister of Louis XIV. (*a*) The general usage now is not to touch private property upon land, without making compensation, unless in special cases, dictated by the necessary operations of war, or when captured in places carried by storm, and which repelled all the overtures for a capitulation. Contributions are sometimes levied upon a conquered country, in lieu of confiscation of property, and as some indemnity for the expenses of maintaining order and affording protection. (*b*) If the conqueror goes beyond these limits wan-

improve the laws of war, by a mutual stipulation not to molest non-combatants, as cultivators of the earth, fishermen, merchants and traders in unarmed ships, and artists and mechanics inhabiting and working in open towns. These restrictions on the rights of war were inserted in a treaty between the United States and Prussia, in 1785. (See *post*, 98.) General Brune stated to the Duke of York, in October, 1799, when an armistice in Holland was negotiating, that if the latter should cause the dikes to be destroyed, and the country to be inundated, when not useful to his own army, or detrimental to the enemy's, it would be contrary to the laws of war, and must draw upon him the reprobation of all Europe and of his own nation. Nay, even the obstinate defence of a town, if it partake of the character of a mercantile place, rather than a fortress of strength, has been alleged to be contrary to the laws of war. (See the correspondence between General Laudohn and the Governor of Breslau, in 1760. Dodsley's Ann. Reg. 1760.) So, the destruction of the forts and warlike stores of the besieged in the post of Almeida, by the French commander, when he abandoned it with his garrison by night, in 1811, is declared by General Sarazin, in his history of the Peninsular War, to have been an act of wantonness which justly placed him without the pale of civilized warfare. When a Russian army, under the command of Count Diebitsch, had penetrated through the passes of the Balkan to the plains of Romelia, in the summer of 1829, the Russian commander gave a bright example of the mitigated rules of modern warfare, for he assured the Mussulmans that they should be entirely safe in their persons and property, and in the exercise of their religion; and that the Mussulman authorities in the cities, towns, and villages might continue in the exercise of their civil administration for the protection of person and property. The inhabitants were required to give up their arms, as a deposit, to be restored on the return of peace, and in every other respect they were to enjoy their property and pacific pursuits as formerly. This protection and full security to the persons and property of the peaceable inhabitants of conquered towns and provinces are according to the doctrine and declared practice of modern civilized nations. (See Dodsley's Ann. Reg. 1772, p. 37.

(*a*) Vattel, b. 3, c. 9, sec. 167.

(*b*) Vattel, b. 2, c. 8, sec. 147; c. 9, sec. 165; Scott's Life of Napoleon, iii. 58. Contributions exacted from the inhabitants by the armies of an invader, without payment, is contrary to the ordinary usages of modern warfare, though the practice is not consistent. The campaigns of revolutionary France, and of Napoleon, in modern Europe, were melancholy exceptions, of the severest character. Upon the invasion of

tonly, or when it is not clearly indispensable to the just
* 93 purposes of war, and seizes private * property of pacific persons for the sake of gain, and destroys private dwellings,

Mexico by the armies of the United States, in 1846, the American Secretary of War (Marcy) instructed General Taylor (September 22, 1846) to abstain from appropriating private property to the public uses, until purchased at a fair price, though he said that was in some respects going far beyond the common requirements of civilized warfare, and that an invading army had the unquestionable right to draw its supplies from the enemy without paying for them, and to require contributions for its support, and to make the enemy feel the weight of the war. He further observed, that upon the liberal principles of civilized warfare, either of three modes might be pursued in relation to obtaining supplies from the enemy: first, to purchase them on such terms as the inhabitants of the country might choose to exact; second, to pay a fair price without regard to the enhanced value resulting from the presence of a foreign army; and, third, to require them as contributions, without paying or engaging to pay therefor; that the last mode was the ordinary one, and General Taylor was instructed to adopt it, if in that way he was satisfied he could get abundant supplies for his forces. The previous instructions in that campaign had been to abstain from appropriating private property to the public use without purchase, at a fair price; but the instructions had now, in the progress of the campaign, risen to a severer character. The principle of kindness and liberality towards the enemy seems to be of a flexible character, and to be swayed by considerations of policy and circumstances. The President of the United States (James K. Polk), in his letter to the Secretary of the Treasury, of the 23d March, 1847, declared the right of the conqueror to levy contributions upon the enemy, in their seaports, towns, or provinces, which may be in his military possession by conquest, and to apply the same to defray the expenses of the war. He further declared, that the conqueror possessed the right to establish a temporary military government over such seaports, towns, or provinces, and to prescribe the terms of commerce with such places; that he might, in his discretion, exclude all trade, or impose terms upon it, — such, for instance, as a prescribed rate of duties on tonnage and imports. The President of the United States, therefore, with a view to impose a burden on the enemy, and deprive him of the revenue to be derived from trade, and secure it to the United States, ordered that all the ports and places in Mexico, in the actual possession of the land and naval forces of the United States, by conquest, should be opened, while the military occupation continued, to the commerce of all neutral nations, as well as of the United States, in articles not contraband of war, upon the payment of a prescribed tariff of duties and tonnage, prepared under the instructions of the President, and by him adopted, and to be enforced by the military and naval commanders. All these rights of war undoubtedly belong to the conqueror or nation who holds foreign places and countries by conquest; but the exercise of those rights and powers, except those that temporarily arise from necessity, belong to that power in the government to which the prerogative of war is constitutionally confided. The President of the United States, in his official letter to the Secretary of the Navy, of March 31, 1847, claimed and exercised, as being charged by the Constitution with the prosecution of the war, this belligerent right to levy military contributions upon the enemy, and to collect and apply the same towards defraying the expenses of the war, and to open the Mexican ports for that purpose, on a footing favorable to neutral commerce. The whole execution of the commercial regulations was placed under the control of the military and naval forces, and, with the policy of blockading some and opening other

or public edifices devoted to civil purposes only, or makes war upon monuments of art and models of taste, he violates the modern usages of war, and is sure to meet with indignant resentment, and to be held up to the general scorn and detestation of the world. (*a*)

2. Law of Retaliation. — Cruelty to prisoners, and barbarous destruction of private property, will provoke the enemy to severe retaliation upon the innocent. Retaliation is said by Ruther-

Mexican ports, to compel the whole commerce for the supply of Mexico to pass under the control of the American forces, subject to the contributions, exactions, and duties to be imposed. (See President Polk's Letter of March 31, 1847, to the Secretary of the Navy, and his letter of March 23, 1847, to the Secretary of the Treasury, and the letter of Mr. Walker, of the 30th March, 1847, to the President, containing a scale of duties to be collected, as a military contribution, in the ports of Mexico, and with a recommendation that the Mexican coastwise trade, and the interior trade, above ports of entry, be confined to American vessels, and that in all other respects the ports of Mexico in our possession be freely opened.) These fiscal and commercial regulations, issued and enforced at the mere pleasure of a President, would seem to press strongly upon the constitutional power of Congress to *raise and support armies*, to *lay and collect taxes, duties*, and *imports*, and to *regulate commerce with foreign nations*, and to *declare war*, and make *rules for the government and regulation of the land and naval forces*, and *concerning captures on land and water*, and *to define offences against the law of nations*. Though the Constitution vests the executive power in the President, and declares him to be commander-in-chief of the army and navy of the United States, these powers must necessarily be subordinate to the legislative power in Congress. It would appear to me to be the policy or true construction of this simple and general grant of executive power to the President, not to suffer it to interfere with those specific powers of Congress which are more safely deposited in the legislative department, and that the powers thus assumed by the President do not belong to him, but to Congress.

(*a*) Vattel, b. 3, c. 9, sec. 168. In the case of The Marquis de Somerueles (Stewart's Vice-Adm. Rep. 482), the enlightened judge of the vice-admiralty court at Halifax restored to the Academy of Arts in Philadelphia a case of Italian paintings and prints, captured by a British vessel in the war of 1812, on their passage to the United States; and he did it "in conformity to the law of nations, as practised by all civilized countries," and because "the arts and sciences are admitted to form an exception to the severe rights of warfare." Works of art and taste, as in painting and sculpture, have, by the modern law of nations, been held sacred in war, and not deemed lawful spoils of conquest. When Frederick II. of Prussia took possession of Dresden as conqueror, in 1756, he respected the valuable picture gallery, cabinets, and museums of that capital, as not falling within the rights of a conqueror. But Bonaparte, in 1796, compelled the Italian states and princes, including the Pope, to surrender their choicest pictures and works of art, to be transported to Paris. The *chefs d'œuvre* of art of the Dutch and Flemish schools, and in Prussia, were acquired by France in the same violent way. This proceeding is severely condemned by distinguished historians, as an abuse of the power of conquest, and a species of military contribution contrary to the usages of modern civilized warfare. Alison's History of Europe, iii. 42; Sir Walter Scott's Life of Napoleon, iii. 58–68.

forth (*b*) not to be a justifiable cause for putting innocent prisoners or hostages to death; for no individual is chargeable, by the law of nations, with the guilt of a personal crime, merely because the community of which he is a member is guilty. He is only responsible as a member of the state, in his property, for reparation in damages for the acts of others; and it is on this principle that, by the law of nations, private property may be taken and appropriated in war. Retaliation, to be just, ought to be confined to the guilty individuals, who may have committed some enormous violation of public law. On this subject of retaliation Professor Martens is not so strict. (*c*).[1] While he admits that the life of an innocent man cannot be taken, unless in extraordinary cases, he declares that cases will sometimes occur, when the established usages of war are violated, and there are no other means, except the influence of retaliation, of restraining the enemy from further excesses. Vattel speaks of retalia-
*94 tion as *a sad extremity, and it is frequently threatened without being put in execution, and probably without the intention to do it, and in hopes that fear will operate to restrain the enemy. Instances of resolutions to retaliate on innocent prisoners of war occurred in this country during the Revolutionary war, as well as during the war of 1812; but there was no instance in which retaliation, beyond the measure of severe confinement, took place in respect to prisoners of war. (*a*)

Although a state of war puts all the subjects of the one nation in a state of hostility with those of the other, yet, by the customary law of Europe, every individual is not allowed to fall upon the enemy.[1] If subjects confine themselves to simple defence, they are to be considered as acting under the presumed order of the state, and are entitled to be treated by the adversary as lawful enemies; and the captures which they make in such a case

(*b*) Inst. b. 2, c. 9.

(*c*) Summary of the Law of Nations, b. 8, c. 1, sec. 3, note.

(*a*) Journals of Congress under the Confederation, ii. 245; vii. 9 and 147; viii. 10; British Orders in Canada, of October 27 and December 12, 1813, and President's Message to Congress of December 7, 1813, and of October 28, 1814.

[1] But it is said that the above view does not appear in the last edition of Martens's work, and that the whole subject is discussed in a different spirit. Abdy's Kent, 245, citing Vergé's ed. 1858, t. ii. l. viii. c. 2, §§ 252, 262.

[1] *Post*, 96, n. 1.

are allowed to be lawful prize. But they cannot engage in offensive hostilities, without the express permission of their sovereign; and if they have not a regular commission, as evidence of that consent, they run the hazard of being treated by the enemy as lawless banditti, not entitled to the protection of the mitigated rules of modern warfare. (*b*)

It was the received opinion in ancient Rome, in the times of Cato and Cicero, (*c*) that one who was not regularly enrolled as a soldier could not lawfully kill an enemy. But the law of Solon, by which individuals were permitted to form associations for plunder, was afterwards introduced into the Roman law, and has been transmitted to us as * part of their sys- * 95 tem. (*a*) During the lawless confusion of the feudal ages, the right of making reprisals was claimed and exercised without a public commission. It was not until the fifteenth century that commissions were made necessary, and were issued to private subjects in time of war, and that subjects were forbidden to fit out vessels to cruise against enemies without license. There were ordinances in Germany, France, Spain, and England to that effect. (*b*) It is now the practice of maritime states to make use of the voluntary aid of individuals against their enemies as auxiliary to the public force; and Bynkershoek says that the Dutch formerly employed no vessels of war but such as were owned by private persons, and to whom the government allowed a proportion of the captured property, as well as indemnity from the public treasury. Vessels are now fitted out and equipped by private adventurers, at their own expense, to cruise against the commerce of the enemy. They are duly commissioned, and it is said not to be lawful to cruise without a regular commission. (*c*) Sir Matthew Hale held it to be depredation in a subject to attack the enemy's vessels, except in his own defence, without a commission. (*d*) The subject has been repeatedly

(*b*) Bynk. Q. J. Pub. b. 1, c. 20; Vattel, b. 3, c. 15, sec. 226; Journals of Congress, vii. 187; Martens, b. 8, c. 3, sec. 2.

(*c*) De Off. b. 1, c. 11.

(*a*) Dig. 47. 22. 4; Bynk. Q. J. Pub. b. 1, c. 18.

(*b*) Code des Prizes, i. 1; Martens on Privateers, 18; Robinson's Collectanea Maritima, 21.

(*c*) Bynk. *ubi supra;* Martens, b. 8, c. 3, sec. 2; Judge Croke, in the case of The Curlew, Stewart, Vice-Adm. 326.

(*d*) Harg. Law T. 245, 246, 247.

discussed in the Supreme Court of the United States, (*e*) and the doctrine of the law of nations is considered to be that private citizens cannot acquire a title to hostile property, unless seized under a commission, but they may still lawfully seize hostile property in their own defence. If they depredate *96 upon the enemy without *a commission, they act upon their peril, and are liable to be punished by their own sovereign; but the enemy is not warranted to consider them as criminals, and, as respects the enemy, they violate no rights by capture.

Such hostilities, without a commission, are, however, contrary to usage, and exceedingly irregular and dangerous, and they would probably expose the party to the unchecked severity of the enemy; but they are not acts of piracy unless committed in time of peace. Vattel, indeed, says, (*a*) that private ships of war, without a regular commission, are not entitled to be treated like captures made in a formal war. The observation is rather loose, and the weight of authority undoubtedly is, that non-commissioned vessels of a belligerent nation may at all times capture hostile ships, without being deemed, by the law of nations, pirates.[1] They are lawful combatants, but they have no interest in the prizes they may take, and the property will remain subject to condemnation in favor of the government of the captor, as *droits of the admiralty*. It is said, however, that in the United States the property is not strictly and technically condemned upon that principle, but *jure reipublicæ*; and it is the settled law of the United States that all captures made by non-commissioned captors are made for the government. (*b*)

(*e*) Brown *v.* United States, 8 Cranch, 132–135; The Nereide, 9 Cranch, 449; The Dos Hermanos, 2 Wheaton, 76, and 10 Wheaton, 306; The Amiable Isabella, 6 Wheaton, 1.

(*a*) B. 3, c. 15, sec. 226.

(*b*) Com. Dig. tit. Admiralty, E. 3; 2 Wood. Lect. 432; The Georgiana, 1 Dods.

[1] This passage has been criticised as inconsistent with p. 94, and it has been thought that although captures at sea by persons without regular commissions are lawful with respect to the government of the captors, such acts might be punished as piracy by the opposing belligerents. Halleck, c. 16, § 10. But see Abdy's Kent, 249 *et seq.* It is competent for any person to take possession of enemy's property coming within the hostile jurisdiction, unless it is protected by license, and to assist the sovereign to proceed against it to adjudication. The Johanna Emilie, Spinks, Prize C. 12, 14.

3. **Privateering.** — In order to encourage privateering, it is usual to allow the owners of private armed vessels to appropriate to themselves the property, or a large portion of the property, they may capture; and to afford them and the crews other facilities * and rewards for honorable and successful *97 efforts. This depends upon the municipal regulations of each particular power; and, as a necessary precaution against abuse, the owners of privateers are required, by the ordinances of the commercial states, to give adequate security that they will conduct the cruise according to the laws and usages of war and the instructions of the government, and that they will regard the rights of neutrals, and bring their prizes in for adjudication. These checks are essential to the character and safety of maritime nations. (*a*) Privateering, under all the restrictions which have been adopted, is very liable to abuse. The object is, not fame or chivalric warfare, but plunder and profit. The discipline of the crews is not apt to be of the highest order, and privateers are often guilty of enormous excesses, and become the scourge of neutral commerce. (*b*) They are sometimes manned and officered by foreigners having no permanent connection with the country, or interest in its cause. This was a complaint made by the United States, in 1819, in relation to irregularities and acts of atrocity committed by private armed vessels sailing under the flag of Buenos Ayres. (*c*) Under the best regulations, the business tends strongly to blunt the sense of private right, and to nourish a lawless and fierce spirit of rapacity. Efforts have

397; The Brig Joseph, 1 Gallison, 545; The Dos Hermanos, 10 Wheaton, 306; [The Siren, 13 Wall. 389. See Hall, Int. Law, pt. 3, c. 7, § 183.] The American Commissioners at the court of France, in 1778 (Benjamin Franklin, Arthur Lee, and John Adams), in a letter to the French government, laid down accurately and with precision the law in the text as to capture of enemy's property without a commission. Diplomatic Correspondence, by J. Sparks, i. 443.

(*a*) Bynk. Q. J. pub. b. 1, c. 19; Journals of Congress, 1776, ii. 102, 114; Acts of Congress of June 26, 1812, c. 107, and April 20, 1818, c. 83, sec. 10; President's instructions to private armed vessels, 2 Wheaton, App. p. 80; Danish instructions of March 10, 1810, Hall's L. J. iv. 263, and App. to 5 Wheaton, 91; Vattel, b. 3, c. 15, sec. 229; Martens, Summ. 289, 290, note; Ord. of Buenos Ayres, May, 1817, in App. to 4 Wheaton, 28; Digest of the Code of British Instructions, App. to 5 Wheaton, 129.

(*b*) Reports of the United States Secretary of State, March 2, 1794, and June 21, 1797.

(*c*) Mr. Adams's letter of 1st January, 1819, to Mr. De Forrest, and his official report of 28th January, 1819.

* 98 been made, from time to time, to abolish * the practice. In the treaty of amity and commerce between Prussia and the United States, in 1785, it was stipulated that, in case of war, neither party should grant commissions to any private armed vessels to attack the commerce of the other. But the spirit and policy of maritime warfare will not permit such generous provisions to prevail. That provision was not renewed with the renewal of the treaty. A similar attempt to put an end to the practice was made in the agreement between Sweden and Holland, in 1675, but the agreement was not performed. The French legislature, soon after the breaking out of the war with Austria, in 1792, passed a decree for the total suppression of privateering; but that was a transitory act, and it was soon swept away in the tempest of the revolution. The efforts to stop the practice have been very feeble and fruitless, notwithstanding that enlightened and enlarged considerations of national policy have shown it to be for the general benefit of mankind to surrender the licentious practice, and to obstruct as little as possible the freedom and security of commercial intercourse among the nations. (*a*) [1]

(*a*) 1 Emerigon, des Ass. 129–132, 457 ; Mably's Droit Public, c. 12, sec. 1 ; Edinburgh Review, viii. 13–15 ; North American Review, N. S. ii. 166. During the war between the United States and Great Britain, the legislature of New York went so far as to pass an act *to encourage privateering associations*, by authorizing any five or more persons, who should be desirous to form a company for the purpose of annoying the enemy and their commerce, by means of private armed vessels, to sign and file a certificate, stating the name of the company and its stock, &c., and that they and their successors should thereupon be a *body politic and corporate*, with the ordinary corporate powers. Laws, N. Y. 38 Sess. c. 12, Oct. 21, 1814.

[1] At the Congress of Paris of April 16, 1856, a declaration was signed by the representatives of Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey, of which the first principle was that "Privateering is and remains abolished." (*x*) The United States refused to accede to this unless it should be amended by adding that "the private property of the subjects or citizens of a belligerent on the high seas shall be exempted from seizure by public armed vessels of the

(*x*) The provision of the U. S. Constitution (Art. I, § 8) empowering Congress to grant letters of marque and reprisal, has been thought to deprive Congress of power to abrogate this constitutional prerogative by permanently joining in the Treaty of Paris or other like treaty. See 28 Am. L. Rev. 615; 24 id. 902; 19 Law Mag. & Rev. (4th Series), 35. A merchantman, armed for purely defensive purposes, though carrying a license, was subject to condemnation in the limited war with France, defined by the act of Congress of July 9, 1798. Cushing's Case, 22 Ct. Cl. 1; Hooper's Case, id. 408; see Gray's Case, 21 id. 340 ; Holbrook's Case, id. 434.

It has been a question, whether the owners and officers of private armed vessels were liable in damages for illegal conduct beyond the amount of the security given. Bynkershoek (*b*) has discussed this point quite at large, and he concludes that the owner, master, and sureties are jointly and severally liable, *in solido*, for the damages incurred; and that the master and owners are liable to the whole extent of the injury, though it may exceed the value of the privateer and her equipment, though the sureties are bound only to the amount of the sums for which they become bound. This rule is liable to the modifications of municipal regulations; *and though the French *99 law of prize was formerly the same as the rule laid down by Bynkershoek, yet the new commercial code of France (*a*) exempts the owners of private armed vessels in time of war from responsibility for trespasses at sea, beyond the amount of the security they may have given, unless they were accomplices in the tort. The English statute of 7 Geo. II. c. 15, is to the same effect, in respect to embezzlements in the merchants' service. It limits the responsibility to the amount of the vessel and freight, but it does not apply to privateers in time of war; and where there is no positive local law on the subject (and there is none with us), the general principle is, that the liability is commensurate with the injury. This was the rule as declared by the Supreme Court of the United States, in *Del Col* v. *Arnold*; (*b*) and though that case has since been shaken as to other points, (*c*) it has not been disturbed as to the point before us. We may, therefore, consider it to be a settled rule of law and equity, that the measure or [of] damages is the value of the property unlawfully injured or destroyed, and that each individual owner is responsible for the entire damages, and not ratably *pro tanto*. (*d*)

(*b*) Q. J. Pub. b. 1, c. 19.

(*b*) 3 Dallas, 333.

(*a*) Code de Commerce, art. 217.

(*c*) 1 Wheaton, 259; 1 Paine, 111, to the same point.

(*d*) The Karasan, 5 C. Rob. 291; The Anna Maria, 2 Wheaton, 327. But the owners of a privateer are not liable civilly beyond the security given by law, and the other belligerent, except it be contraband;" on the ground that this was necessary to prevent a nation which should maintain a powerful navy from having an undue advantage over one whose marine was wholly commercial. Ann. Reg. 1856, p. 221; Wheat. Lawrence's note 192; *ante*, 91, n. 1. See also the act of March 3, 1863, c. 85; 12 U. S. St. at L. 758; although the authority thereby given to the President for three years to commission privateers was not exercised during the rebellion.

Vattel admits (*e*) that an individual may, with a safe conscience, serve his country by fitting out privateers; but he holds it to be inexcusable and base to take a commission from a foreign prince to prey upon the subjects of a state in amity
* 100 with his native country. The laws of the United * States have made ample provision on this subject, and they may be considered as in affirmance of the law of nations, and as prescribing specific punishment for acts which were before unlawful. (*a*) An act of Congress prohibits citizens to accept, within the jurisdiction of the United States, a commission, or for any person not transiently within the United States, to consent to be retained or enlisted, to serve a foreign state in war, against a government in amity with us. It likewise prohibits American citizens from being concerned, without the limits of the United States, in fitting out, or otherwise assisting, any private vessel of war, to cruise against the subjects of friendly powers. (*b*) Similar prohibitions are contained in the laws of other countries: (*c*) and the French Ordinance of the Marine of 1681 treated such acts as piratical. The better opinion is, that a cruiser, furnished with commissions from two different powers, is liable to be treated as a pirate; for, though the two powers may be allies, yet one of them may be in amity with a state with whom the other is at war. (*d*)[1] In the various treaties

loss of a vessel, for *piratical* acts committed by the officers and crew of the privateer. They are only liable, by the maritime law, for the conduct of the officers and crew while in *the execution of the business of the cruise*. Dias *v.* Privateer Revenge, 3 Wash. 262. The New York scheme (see *supra*, 98, n. *a*) of making privateering companies actual corporations or bodies politic would seem to exempt the members from the personal responsibility ordinarily incident to the owners of privateers.

(*e*) B. 3, c. 15, sec. 229.

(*a*) Talbot *v.* Janson, 3 Dallas, 133; Brig Alerta *v.* Blas Moran, 9 Cranch, 359.

(*b*) Act of Congress of 20th April, 1818, c. 83.

(*c*) See the Austrian Ordinance of Neutrality of August 7, 1803, art. 2, 3. By the law of Plymouth Colony, in 1682, it was declared to be felony to commit hostilities on the high seas, under the flag of any foreign power, upon the subjects of another foreign power in amity with England. Bailie's Historical Memoir, ii. pt. 4, 35. The same acts were declared to be felony by a law of the colony of New York, in 1699. Smith's edition of the laws of the colony, i. 25.

(*d*) Valin's Comm. ii. 235, 236; Bynkershoek, b. 1, c. 17, and note by Duponceau to his translation, 129; Sir L. Jenkins's Works, 714. See *post*, 188, 191.

[1] 1 Phillimore, § ccclviii., "The better opinion seems to be that [sailing under two or more commissions granted by *allied powers* against a *common enemy*] is irregular and inexpedient, but does not carry with it the substance or name of Piracy."

between the powers of Europe in the two last centuries, and in the several treaties between the United States and France, Holland, Sweden, Prussia, Great Britain, Spain, Colombia, Chili, &c., it is declared that no subject or citizen of either nation shall accept a commission or letter of marque, to assist an enemy in hostilities against the other, under pain of being treated as a pirate.

4. **Prizes.** — The right to all captures vests primarily in the sovereign, and no individual can have any interest in a prize, whether made by a public or private armed vessel, but what he receives * under the grant of the state.[1] This is a gen- *101 eral principle of public jurisprudence, *bello parta cedunt reipublicæ*, and the distribution of the proceeds of prizes depends upon the regulations of each state; and unless the local laws have otherwise provided, the prizes vest in the sovereign. (*a*) But the general practice, under the laws and ordinances of the belligerent governments, is, to distribute the proceeds of captured property, when duly passed upon and condemned as prize (and whether captured by public or private commissioned vessels), among the captors, as a reward for bravery and a stimulus to exertion. (*b*)

When a prize is taken at sea, it must be brought, with due care, into some convenient port, for adjudication by a competent court; though, strictly speaking, as between the belligerent parties, the title passes, and is vested when the capture is complete; and that was formerly held to be complete and perfect when the battle was over, and the *spes recuperandi* was gone. Voet, in his Commentaries upon the Pandects, (*c*) and the authors he refers to, maintain with great strength, as Lord Mansfield observes in

(*a*) Grotius, b. 3, c. 6; Vattel, b. 3, c. 9, sec. 164; The Elsebe, 5 C. Rob. 173; Home *v.* Earl Camden, 2 H. Bl. 533. At common law, the goods taken from an enemy belong to the captor. Finch's Law, 28, 178; 12 Mod. 135; 1 Wils. 213. See *infra*, 357.

(*b*) Lord Loughborough, 1 H. Bl. 189–191; 2 Wheaton, App. 7, note c, and 71.

(*c*) ii. 1155.

[1] The Siren, 7 Wall. 152, 162, 163; 113. For a discussion as to who are entitled to share as joint captors at sea and on land, see The Cherokee, 2 Sprague, 235; The Selma, 1 Lowell, 30; Banda & Kirwee Booty, *supra*. The Banda & Kirwee Booty, L. R. 1 Ad. & Ec. 109, 134; Jecker *v.* Montgomery, 13 How. 498, 515; The Anglia, Blatchf. Pr. 566; The Aigburth, ib. 635; Stewart *v.* United States, 1 Ct. of Cl. (Nott & H.)

Goss v. *Withers*, (*d*) that occupation, of itself, transferred the title to the captor, *per solam occupationem dominium prædæ hostibus acquiri.* The question never arises but between the original owner and a neutral purchasing from the captor, and between the original owner and a recaptor. If a captured ship escapes from the captor, or is retaken, or if the owner ransoms her, his property is thereby revested. But if neither of these events happens, the question as to the change of title is open to dispute; and many arbitrary lines have been drawn, partly from policy, to prevent too easy dispositions of the property to * 102 neutrals, * and partly from equity, to extend the *jus postliminii* in favor of the owner. Grotius (*a*) and many other writers, and some marine ordinances, as those of Louis XIV. and of Congress during the American war, (*b*) made twenty-four hours' quiet possession by the enemy the test of title by capture. Bynkershoek (*c*) says that such a rule is repugnant to the laws and customs of Holland; and he insists that a firm possession, at any time, vests the property in the captor, and that ships and goods brought *infra præsidia* do most clearly change the property. But by the modern usage of nations, neither the twenty-four hours' possession, nor the bringing the prize *infra præsidia*, is sufficient to change the property in the case of a maritime capture. A judicial inquiry must pass upon the case, and the present enlightened practice of commercial nations has subjected all such captures to the scrutiny of judicial tribunals, as the only sure way to furnish due proof that the seizure was lawful. The property is not changed in favor of neutral vendee or recaptor, so as to bar the original owner, until a regular sentence of condemnation has been pronounced by some court of competent jurisdiction, belonging to the sovereign of the captor;[1] and the purchaser must be able to show documentary evidence of that

(*d*) 2 Burr. 683.

(*a*) B. 3, c. 6.

(*b*) Valin, lib. 3, tit. 9. art. 8; Journals of the Confederation Congress, March 27, 1781, vii. 59.

(*c*) Q. J. Pub. b. 1, c. 4 and 5; Martens, Summary, b. 8, c. 3, sec. 11, s. p.

[1] The Peterhoff, Blatchf. Pr. 620. A faith. Jecker *v.* Montgomery, 18 How. captor does not forfeit his rights as such, and render himself liable to be treated as a trespasser, by delay in sending home his prize for adjudication, if he thinks it necessary, and uses discretion and good 110; Fay *v.* Montgomery, 1 Curt. 266. See act of Congress, June 30, 1864; 13 U. S. St. at L., pp. 306, 314, c. 174, §§ 1, 28.

fact, to support his title. Until the capture becomes invested with the character of prize by a sentence of condemnation, the right of property is in abeyance, or in a state of legal sequestration. It cannot be alienated or disposed of, but the possession of it by the government of the captor is a trust for the benefit of those who may be ultimately entitled. (*x*) This salutary rule, and one so necessary to check irregular conduct and individual outrage, has been long established in the English admiralty, (*d*) *and it is now everywhere recognized as the *103 law and practice of nations. (*a*)

The condemnation must be pronounced by a prize court of the government of the captor sitting either in the country of the captor or of his ally. The prize court of an ally cannot condemn. Prize or no prize is a question belonging exclusively to the courts of the country of the captor. The reason of this rule is said to be, (*b*) that the sovereign of the captors has a right to inspect their behavior, for he is answerable to other states for the acts of the captor. The prize court of the captor may sit in the territory

(*d*) Carth. 423; 10 Mod. 79; 12 Mod. 143; 2 Burr. 694; 3 C. Rob. 97, *in notis*; 1 C. Rob. 139.

(*a*) The Flad Oyen, 1 C. Rob. 135; The Henrick and Maria, 4 C. Rob. 45; Vattel, b. 3, c. 14, sec. 216; Heineccii Opera, ed. Geneva, 1744, ii. 310, 360; 5 C. Rob. 249; Doug. 591; 8 Cranch, 226; 4 Wheaton, 298; 6 Taunt. 25; 2 Dallas, 1, 2, 4. Every court has the right to inquire into the competency of the jurisdiction of a foreign court to condemn captured property, and if it has none, the sentence is null. The consul of a belligerent in a neutral country has no power to condemn prizes. See cases, Abbott on Shipping, 5th Amer. ed., Boston, 1846, 30–32. But a prize carried into the country of an ally may be condemned there, and even by a consul belonging to the country of the captors; ib. 33.

(*b*) Rutherforth's Institutes, b. 2, c. 9.

(*x*) If there is probable cause for the seizure of a vessel which is not good prize, the captors may be awarded costs, though the vessel is not condemned. Hooper's Case, 22 Ct. Cl. 408. A captor, who unreasonably delays bringing suit for condemnation of a prize, is liable for demurrage if its restoration is decreed. The Neustra Senora De Regla, 108 U. S. 92. A belligerent who seizes a neutral vessel merely on suspicion is only excused for her loss when caused by unavoidable casualty. The Ship Tom, 29 Ct. Cl. 68. Captors are not liable for the loss, without their fault, of a vessel which they seize and hold as contraband of war. The Caroline Wilmans, 27 Ct. Cl. 215. As to the English Prize Courts under recent legislation, see 4 Law Quart. Rev. 107. The captured vessel has the burden of proof to clear herself of suspicion. Hooper's Case, 22 Ct. Cl. 408. A torpedo launch is a "ship" within the acts of Congress as to the distribution of prize money. United States *v.* Steever, 113 U. S. 747.

of the ally, but it is not lawful for such a court to act in a neutral territory. Neutral ports are not intended to be auxiliary to the operations of the power at war; and the law of nations has clearly ordained that a prize court of a belligerent captor cannot exercise jurisdiction in a neutral country. This prohibition rests not merely on the unfitness and danger of making neutral ports the theatre of hostile proceedings, but it stands on the ground of the usage of nations. (*c*)

It was for some time supposed that a prize court, though sitting in the country of its own sovereign, or of his ally, had no jurisdiction over prizes lying in a neutral port, because the court wanted that possession which was deemed essential to the exercise of a jurisdiction in a proceeding *in rem*. The principle was admitted to be correct by Sir William Scott, in the case of
* 104 the *Henrick and Maria*, (*d*) and he acted * upon it in a prior case. (*a*) But he considered that the English admiralty had gone too far, in supporting condemnations in England of prizes abroad in a neutral port, to permit him to recall the vicious practice of the court to the acknowledged principle; and the English rule is now definitively settled agreeably to the old usage and the practice of other nations. The Supreme Court of the United States has followed the English rule, and it has held valid the condemnations, by a belligerent court, of prizes carried into a neutral port, and remaining there. This was deemed the most convenient practice for neutrals, as well as for the parties at war; and though the prize was in fact within a neutral jurisdiction, it was still to be deemed under the control, or *sub potestate*, of the captor. (*b*) [1]

(*c*) Glass *v.* The Sloop Betsey, 3 Dallas, 6; The Flad Oyen, 1 C. Rob. 135; Havelock *v.* Rockwood, 8 T. R. 268; Oddy *v.* Bovill, 2 East, 475; Answer to the Prussian Memorial, 1753; L'Invincible, 1 Wheaton, 238; The Estrella, 4 Wheaton, 298; The Comet, 5 C. Rob. 285; The Victoria, Edw. Adm. 97.

(*d*) 4 C. Rob. 43.

(*a*) Note to the case of the Herstelder, 1 C. Rob. [119] 100, Philadelphia ed. 1810.

(*b*) 6 C. Rob. 138; note to the case of the Schooner Sophie; Smart *v.* Wolff, 3 T. R. 323; Bynk. by Duponceau, 38, note; Hudson *v.* Guestier, 4 Cranch, 293; Williams *v.* Armroyd, 7 Cranch, 423. In the treaty between the United States and the Re-

[1] The Polka, Spinks, Prize C. 57; 18 id. 110; (*x*) See act of June 30, 1864, The Zavalla, Blatchf. Pr. 173; Jecker *v.* Montgomery, 13 How. 498, 515; s. c. 13 U. S. St. at L. 306, 314, c. 174, § 28.

(*x*) The Gauntlet, L. R. 3 A. & E. 381; L. R. 4 P. C. 184.

5. Ransom Bills. — Sometimes circumstances will not permit property captured at sea to be sent into port; and the captor, in such cases, may either destroy it, or permit the original owner to ransom it. It was formerly the general custom to redeem property from the hands of the enemy by ransom; and the contract is undoubtedly valid, when municipal regulations do not intervene. It is now but little known in the commercial law of England, for several statutes in the reign of George III. absolutely prohibited to British subjects the privilege of ransom of property captured at sea, unless in a case of extreme necessity, to be judged of by the court of admiralty. (*c*) A ransom bill, when not locally prohibited, is a war contract, protected by good faith and the law of nations; and notwithstanding that the contract is considered in England as tending to relax the energy of war, and *deprive cruisers of the chance of recapture, it *105 is, in many views, highly reasonable and humane. Other maritime nations regard ransoms as binding, and to be classed among the few legitimate *commercia belli.* They have never been prohibited in this country; and the act of Congress of August 2, 1813, interdicting the use of British licenses or passes, did not apply to the contract of ransom. (*a*)

The effect of a ransom is equivalent to a safe-conduct granted by the authority of the state to which the captor belongs, and it binds the commanders of other cruisers to respect the safe-conduct thus given; and under the implied obligation of the treaty of alliance, it binds equally the cruisers of the allies of the captor's country. (*b*) From the very nature of the connection between allies, their compacts with the common enemy must bind each other, when they tend to accomplish the objects of the alliance. If they did not, the ally would reap all the fruits of the compact, without being subject to the terms and conditions of it; and the enemy with whom the agreement was made would be exposed, in regard to the ally, to all the disadvantages of it,

public of Colombia, in 1825, art. 21, and of Chili, in 1832, art. 21, it was agreed that the established courts for prize causes in the country to which the prize may be conducted should alone take cognizance of them.

(*c*) 1 Chitty, Comm. Law, 428.

(*a*) Azuni on Maritime Law, ii. c. 4, art. 6; 1 Emerigon, c. 12, sec. 21; 2 Valin, art. 66, p. 149; Le Guidon, c. 6, art. 2; Grotius, b. 3, c. 19; Goodrich *v.* Gordon, 15 Johns. 6.

(*b*) Miller *v.* The Resolution, 2 Dallas, 15.

without participating in the stipulated benefits. Such an inequality of obligation is contrary to every principle of reason and justice. (*c*)

The safe-conduct implied in a ransom bill requires that the vessel should be found within the course prescribed, and within the time limited by the contract, unless forced out of her course by stress of weather or unavoidable necessity. (*d*) If the vessel ransomed perishes by a peril of the sea, before arrival in port,

the ransom is, nevertheless, due, for the captor has not *106 insured the prize against the perils * of the sea, but only

against recapture by cruisers of his own nation, or of the allies of his country. If there should be a stipulation in the ransom contract, that the ransom should not be due if the vessel was lost by sea perils, the provision ought to be limited to total losses by shipwreck, and not to mere stranding, which might lead to frauds, in order to save the cargo at the expense of the ship. (*a*) (*x*)

If the vessel should be recaptured, out of the route prescribed by the contract for her return, or after the time allowed for her return, and be adjudged lawful prize, it has been made a question whether the debtors of the ransom are discharged from their contract. Valin (*b*) says, that, according to the constant practice, the debtors are discharged in such case, and the price of the ransom is deducted from the proceeds of the prize, and given to the first captor, and the residue goes to the second taker. So, if the captor himself should afterwards be taken by an enemy's cruiser, together with his ransom bill, the ransom becomes part of the lawful conquest of the enemy, and the debtors of the ransom are, consequently, discharged from the contract under the ransom bill. (*c*)

In the case of *Ricord* v. *Bettenham*, (*d*) an English vessel was captured by a French privateer, in the war of 1756, and ransomed

(*c*) Miller *v.* The Resolution, 2 Dallas, 15; Pothier, Traité du Droit de Propriété, No. 134.

(*d*) Pothier, Traité du Droit de Propriété, Nos. 134, 135.

(*a*) Pothier, Traité de Propriété, No. 138.

(*b*) Ord. des Prises, art. 19.

(*c*) Pothier, ib. Nos. 139, 140.

(*d*) 3 Burr. 1734.

(*x*) Generally there is no implied insurance in a ransom bill against loss by the perils of the sea. 2 Halleck's Int. Law (3d ed.), 331.

and a hostage given as a security for the payment of the ransom bill. The hostage died while in possession of the French, and it was made a question in the K. B., in a suit brought upon the ransom bill after the peace, whether the death of the hostage discharged the contract, and whether the alien could sue on the ransom bill in the English courts. It was shown that such a contract was valid among the other nations of Europe, and that the owner of the bill was entitled to sue upon it, and that it was not discharged by the death of the hostage, who was taken as a mere collateral *security, and the plaintiff was, accord- *107 ingly, allowed to recover. But it has been since decided, and it is now understood to be the law, that during war, and while the character of alien enemy continues, no suit will lie in the British courts by the enemy, in proper person, on a ransom bill, notwithstanding it is a contract arising *jure belli.* (*a*) The remedy to enforce payment of the ransom bill for the benefit of the enemy captor is by an action by the imprisoned hostage, in the courts of his own country, for the recovery of his freedom. This severe technical objection would seem to be peculiar to the British courts, for it was shown, in the case of *Ricord* v. *Bettenham*, to be the practice in France and Holland to sustain such actions by the owner of the ransomed contract. Lord Mansfield considered the contract as worthy to be sustained by sound morality and good policy, and as governed by the law of nations and the eternal rules of justice. (*b*) The practice in France (*c*) when a French vessel has been ransomed, and a hostage given to the enemy, is for the officers of the admiralty to seize the vessel and her cargo, on her return to port, in order to compel the owners to pay the ransom debt, and relieve the hostage; and this is a course dictated by a prompt and liberal sense of justice.

The recapture of the ransom bill, according to Valin, (*d*) puts an end to the claim of the captor. He may be deprived of the entire benefit of his prize, as well as of the ransom bill, either by recapture or rescue, and the questions arising on them lead to the consideration of postliminy and salvage. Upon recapture from pirates, the property is to be restored to the owner, on the

(*a*) Anthon *v.* Fisher, Doug. 649, note; The Hoop, 1 C. Rob. 196.
(*b*) Cornu *v.* Blackburne, Doug. 641.
(*c*) Pothier, Traité de Propriété, No. 144.
(*d*) ii. liv. 3, tit. 9, art. 19.

allowance of a reasonable compensation to the retaker in * 108 the nature of salvage; for it * is a principle of the law of nations that a capture by pirates does not, like a capture by an enemy in solemn war, change the title, or divest the original owner of his right to the property, and it does not require the doctrine of postliminy to restore it. (*a*)[1] In France, property may be reclaimed by the owner within a year and a day; (*b*) but in some other countries (and Grotius mentions Spain and Venice) the rule formerly was, that the whole property recaptured from pirates went to the retaker, and this rule was founded on the consideration of the desperate nature of the recovery.

6. Right of Postliminium. — The *jus postliminii* was a fiction of the Roman law, by which persons or things taken by the enemy were restored to their former state upon coming again under the power of the nation to which they formerly belonged. Postliminium fingit eum qui captus est in civitate semper fuisse. (*c*) It is a right recognized by the law of nations, and contributes essentially to mitigate the calamities of war. When, therefore, property taken by the enemy is either recaptured or rescued from him, by the fellow-subjects or allies of the original owner, it does not become the property of the recaptor or rescuer, as if it had been a new prize, but it is restored to the original owner, by right of postliminy, upon certain terms. Movables are not entitled, by the strict rules of the laws of nations, to the full benefit of postliminy, unless retaken from the enemy promptly after the capture, for then the original owner neither finds a difficulty in recognizing his effects, nor is presumed to have relinquished them. Real property is easily identified, and therefore more completely within the right of postliminy; and the reason for a stricter limitation of it in respect to personal property arises from its transitory nature, and the difficulty of identifying it, and the consequent presumption that the original owner had

(*a*) Grotius, b. 3, c. 9, sec. 16, 17; Bynk. Q. J. Pub. b. 1, c. 15 and 17.
(*b*) Valin, Comm. ii. 261.
(*c*) Inst. 1. 12. 5.

[1] A similar principle was applied where a vessel was recaptured which was alleged to have been condemned and sold by a Confederate prize court. The proceedings of such a court are of no validity in the courts of the United States. The Lilla, 2 Sprague, 177; s. c. 2 Cliff. 169; cf. *ante*, 91, n. 1.

abandoned the hope of recovery. (*d*) *This right does *109 not take effect in neutral countries, because the neutral nation is bound to consider the war on each side as equally just, so far as relates to its effects, and to look upon every acquisition made by either party as a lawful acquisition; with the exception of cases where the capture itself is an infringement of the jurisdiction or rights of the neutral power. (*a*) If one party was allowed, in a neutral territory, to enjoy the right of claiming goods taken by the other, it would be a departure from the duty of neutrality. The right of postliminy takes place, therefore, only within the territories of the nation of the captors, or of its ally; (*b*) and if a prize be brought into a neutral port by the captors, it does not return to the former owner by the law of postliminy, because neutrals are bound to take notice of the military right which possession gives, and which is the only evidence of right acquired by military force, as contradistinguished from civil rights and titles. They are bound to take the fact for the law. Strictly speaking, there is no such thing as a marine tort between belligerents. All captures are to be deemed lawful, and they have never been held within the cognizance of the prize tribunals of neutral nations. (*c*) With respect to persons, the right of postliminy takes place even in a neutral country; so that if a captor brings his prisoners into a neutral port, he may, perhaps, confine them on board his ship, as being, by fiction of law, part of the territory of his sovereign, but he has no control over them on shore. (*d*)

*In respect to real property, the acquisition by the *110 conqueror is not fully consummated until confirmed by the treaty of peace, or by the entire submission or destruction of the state to which it belonged. (*a*) If it be recovered by the original

(*d*) Vattel, b. 3, c. 14, sec. 209.

(*a*) M'Donough *v.* Dannery, 3 Dallas, 188, 198; The Josefa Segunda, 5 Wheaton, 338, 358. See also *post*, 121.

(*b*) Vattel, b. 3, c. 14, sec. 207, 208.

(*c*) La Amistad de Rues, 5 Wheaton, 390.

(*d*) Vattel, b. 3, c. 7, sec. 132; Bynk. by Duponceau, 116, 117, notes; Austrian Ord. of Neutrality, Aug. 7, 1803, art. 19. By one of the provisions of a commercial treaty between Carthage and Rome, in the earliest period of the Roman republic, soon after the expulsion of Tarquin, it was stipulated, that if either party should bring into the ports of the other prisoners taken from an ally, the prisoners might be reclaimed and set free. Polybius, b. 3, c. 3.

(*a*) Puff. Droit de la Nature par Barbeyrac, liv. 8, c. 6, sec. 20.

sovereign, it returns to the former proprietor, notwithstanding it may, in the mean time, have been transferred by purchase. The purchaser is understood to have taken the property at the hazard of a recovery or reconquest before the end of the war. But if the real property, as a town or portion of the territory, for instance, be ceded to the conqueror by the treaty of peace, the right of postliminy is gone for ever, and a previous alienation by the conqueror would be valid. (*b*)

In a land war, movable property, after it has been in complete possession of the enemy for twenty-four hours (and which goes by the name of booty and not prize), becomes absolutely his, without any right of postliminy in favor of the original owner; and much more ought this species of property to be protected from the operation of the rule of postliminy, when it has not only passed into the complete possession of the enemy, but been *bona fide* transferred to a neutral. By the ancient and strict doctrine of the law of nations, captures at sea fell under the same rule as other movable property taken on land; and goods so taken were not recoverable by the original owner from the rescuer or retaker. But the municipal regulations of most states have softened the rigor of the law of nations on this point by an equitable extension of the right of postliminy, as against a recaption by their own subjects. The ordinances of several of

the continental powers confined the right of restoration,
* 111 on recaption, to cases where the property * had not been
in possession of the enemy above twenty-four hours. This was the rule of the French ordinance of 1681; (*a*) but now the right is everywhere understood to continue until sentence of condemnation, and no longer.

It is also a rule on this subject, that if a treaty of peace makes no particular provisions relative to captured property, it remains in the same condition in which the treaty finds it, and it is tacitly conceded to the possessor. The right of postliminy no longer exists, after the conclusion of the peace. It is a right which belongs exclusively to a state of war, (*b*) and therefore a transfer to a neutral, before the peace, even without a judicial sentence of condemnation, is valid, if there has been no recovery or recaption before the peace. The intervention of peace cures

(*b*) Vattel, b. 3, c. 14, sec. 212; Martens, b. 8, c. 3, sec. 11, 12.
(*a*) Liv. 3, tit. 9, Des Prises, art. 8. (*b*) Vattel, b. 3, c. 14, sec. 216.

all defects of title, and vests a lawful possession in the neutral, equally as the title of the enemy captor himself is quieted by the intervention of peace. (*c*) The title, in the hands of such a neutral, could not be defeated in favor of the original owner, even by his subsequently becoming an enemy. It would only be liable, with his other property, to be seized as prize of war. (*d*)

Every power is obliged to conform to these rules of the law of nations relative to postliminy, where the interests of neutrals are concerned. But in cases arising between its own subjects, or between them and those of her allies, the principle may undergo such modifications as policy dictates. Thus, by several English statutes, the maritime rights of postliminy, as among English subjects, subsists to the end of the war; and, therefore, ships or goods captured at sea by an enemy, and retaken at any period during the war, and whether before or after sentence of condemnation, are to be restored to the original proprietor, on securing to the recaptors certain rates of salvage, as a compensation or reward *for the service they have performed. (*a*) The *112 maritime law of England gives the benefit of this liberal rule of restitution, with respect to the recaptured property of her own subjects, to her allies, unless it appears that they act on a less liberal principle, and then it treats them according to their own measure of justice. (*b*) Great Britain seems to have no fixed rule as to the quantum of salvage on a foreign vessel in cases of recapture, and the rate of salvage in other nations of Europe is different, as allowed by different nations. (*c*) The allotment of salvage on recapture or rescue is a question not of municipal law merely, except as to the particular rates of it. It is a question of the *jus gentium*, when the subjects of allies or neutral states claim the benefit of the reception. The restitution is a matter not of strict right after the property has been vested in the enemy, but one of favor and relaxation; and the belligerent recaptor has a right to annex a reasonable condition to his liberality. (*d*) Neu-

(*c*) Schooner Sophie, 6 Rob. 138.

(*d*) The Purissima Conception, 6 C. Rob. 45.

(*a*) 1 Chitty on Commercial Law, 435.

(*b*) The Santa Cruz, 1 C. Rob. 50.

(*c*) Wheaton on Captures, 245, 246, 297; Opinions of the Attorneys-General, i. 435.

(*d*) The Two Friends, 1 C. Rob. 271; Marshall on Ins. 474; Doug. 648.

tral property, retaken from the enemy, is usually restored, without the payment of any salvage, unless, from the nature of the case, or the usages of the enemy, there is a probability that the property would have been condemned, if carried into the enemy's ports, and in that case a reasonable salvage ought to be allowed, for a benefit has been conferred. (*e*)

The United States, by the act of Congress of 3d March, 1800, directed restoration of captured property, at sea, to the foreign and friendly owner, on the payment of reasonable salvage; but the act was not to apply when the property had been condemned as prize by a competent court, before recapture; nor when the foreign government would not restore the goods or vessels of the citizens of the United States, under the like circum-
*113 stances. The statute continued *the *jus postliminii*, until the property was devested by a sentence of condemnation, and no longer;[1] and this was the rule adopted in the English courts, before the extension of the right of postliminy, by statutes, in the reigns of George II. and George III. (*a*)

(*e*) The War Onskan, 2 C. Rob. 299; The Carlotta, 5 C. Rob. 54.

(*a*) Lord Mansfield, 2 Burr. 693, 1209; L'Actif, Edw. Adm. 186. [See, generally, Hall, Int. Law, pt. 3, c. 5.]

[1] See now the substituted act of June 30, 1864, c. 174, § 29; 13 U. S. St. at L. 314; which allows salvage according to the circumstances of the case, when any vessel or other property, captured by any force hostile to the United States, is recaptured before it has been condemned as prize by competent authority.

LECTURE VI.

OF THE GENERAL RIGHTS AND DUTIES OF NEUTRAL NATIONS.

THE rights and duties which belong to a state of neutrality form a very interesting title in the code of international law. They ought to be objects of particular study in this country, inasmuch as it is our true policy to cherish a spirit of peace, and to keep ourselves free from those political connections which would tend to draw us into the vortex of European contests. A nation that maintains a firm and scrupulously impartial neutrality, and commands the respect of all other nations by its prudence, justice, and good faith, has the best chance to preserve unimpaired the blessings of its commerce, the freedom of its institutions, and the prosperity of its resources. Belligerent nations are interested in the support of the just rights of neutrals, for the intercourse which is kept up by means of their commerce contributes greatly to mitigate the evils of war. The public law of Europe has established the principle, that, in time of war, countries not parties to the war, nor interposing in it, shall not be materially affected by its action; but they shall be permitted to carry on their accustomed trade, under the few necessary restrictions which we shall hereafter consider.

1. Neutrals must be impartial. — It belongs not to a common friend to judge between the belligerent parties, or to determine the question of right between them. (*a*) (*x*) The neutral is

(*a*) Bynk. l. 7, c. 9; Burlamaqui, ii. pt. 4, c. 5, sec. 16, 17.

(*x*) The United States may co-operate in explorations in barbarous countries with other commercial powers, foster and protect a friendly trade therein, and give personal protection to its travellers and missionaries there; but it is not its policy to impeach any foreign government or to enter into alliances even for enforcing neutrality in remote lands, such as Madagascar or the valley of the Congo. See 1 Wharton, Int. Law, §§ 51–54, 125. The privilege of protection and asylum in the legations of foreign diplomatic agents, though founded in humanity, is not a right allowed by the law of nations, but is frequently exercised by every civilized

* 116 not to favor one of them * to the detriment of the other;

and it is an essential character of neutrality, to furnish no aids to one party which the neutral is not equally ready to furnish to the other. (*a*) [1] A nation which would be admitted

(*a*) Mr. Manning, after referring to the practice of former times on the subject of foreign levies in neutral countries, and critically examining the reasoning of Vattel, justly concludes that foreign levies may not be allowed to one belligerent, while refused to his antagonist, consistently with the duties of neutrality, unless such an exclusive privilege was granted by treaty antecedent to the war. Manning's Commentaries, 180.

[1] Historicus, International Law, 147. See 117, n. 1.

State in barbarous or semi-barbarous lands. See 45 Albany L. J. 311; 17 Law Mag. & Rev. (4th Series), 93; 19 id. 38; 28 Am. Law Rev. 879. It is not conceded to exist in the civilized nations of Europe or their ships of war or in the Spanish-American States, and merchant vessels clearly have no right of asylum. See the authorities collected in Snow's Int. Law, 139–150; see also 7 Political Science Quarterly (1892), pp. 1, 197, 397. The right of asylum was, however, recently maintained by Portugal in support of the refuge accorded in 1894 at Rio Janeiro by her war-vessels to the fugitive Brazilian insurgents, and this action led to a rupture of diplomatic relations between the two governments. See 10 Law Quarterly Rev. 256.

"It is laid down by the publicists as an elementary principle that a man-of-war is permitted to enter a foreign port as a matter of courtesy, rather than of strict right. . . . On many occasions the government of the United States has in the most positive manner forbidden its diplomatic representatives to allow their protection to be made use of for the disturbance of the peace of the countries in which they reside. The duty of the government in respect to its men-of-war is yet more strict, since the extraterritoriality of a man-of-war is more nearly absolute than that of a minister's residence. Refugees may, if the local government deems it of sufficient importance, be taken by force from a minister's dwelling, if he refuses to surrender them. But writers generally deny that this may be done as to a man-of-war, and, in proportion as the power of the local government to act for its own protection is diminished, the duty of the foreign government to prevent its generosity to individuals from becoming an injury to a friendly nation is increased." John Bassett Moore, upon The Case of the Salvadorean Refugees, in 29 Am. L. Rev. 1, 6. This article (p. 19) refers to the change made in 1894 in Art. 287 of the U. S. Navy Regulations, by which the privilege of asylum is to be accorded only in countries where, on account of frequent insurrections, and constant instability of government, local usage sanctions it, but even in the waters of such countries it should be refused except when required by the interests of humanity in extreme cases, such as the pursuit of a refugee by a mob; and officers are never to invite refugees to accept asylum.

A person who here claims a right of asylum in a foreign country, with which the United States has a treaty, but who, having been there kidnapped, is tried and convicted in a State court, cannot invoke the protection of the U. S. Supreme Court on error, because of the violation of such right of asylum, or on the ground of a denial of due process of law. Ker *v.* Illinois, 119 U. S. 436.

to the privileges of neutrality, must perform the duties it enjoins. Even a loan of money to one of the belligerent parties is considered to be a violation of neutrality. (*b*) A fraudulent neutrality is no neutrality. But the neutral duty does not extend so far as to prohibit the fulfilment of antecedent engagements, which may be kept consistently with an exact neutrality, unless they go so far as to require the neutral nation to become an associate in the war. (*c*) If a nation be under a previous stipulation made in time of peace, to furnish a given number of ships or troops to one of the parties at war, the contract may be complied with, and the state of peace preserved, except so far as the auxiliary forces are concerned. The cantons of Switzerland have been accustomed to furnish such assistance to the other European powers. In 1788, Denmark furnished ships and troops to Russia, in her war with Sweden, in consequence of a previous treaty prescribing the amount; and this was declared by Denmark to be an act consistent with a spirit of amity and commercial intercourse with Sweden. It was answered by the latter in her counter declaration, that though she could not reconcile the practice with the law of nations, yet she embraced the Danish declaration, and confined her hostility, so far as Denmark was concerned, to the Danish auxiliaries furnished to Russia. (*d*) But, if a neutral power be under contract to furnish succors to one party, he is said not to be bound if his ally was the aggressor; and in this solitary instance the *neutral may *117 examine into the merits of the war, so far as to see whether the *casus fœderis* exists. (*a*) An inquiry of this kind, instituted by the party to the contract, for the purpose of determining on its binding obligation, holds out strong temptations to abuse; and, in the language of Mr. Jenkinson, (*b*) "when the execution

(*b*) Mr. Pickering's Letter to Messrs. Pinckney, Marshall, and Gerry, 2d of March, 1798. In Dewutz *v.* Hendricks, 9 Moore, C. B. 586, [s. c. 2 Bing. 314,] it was held to be contrary to the law of nations for persons residing in England to enter into engagements to raise money, by way of loan, for the purpose of supporting subjects of a foreign state in arms against a government in friendship with England, and no right of action attached upon any such contract.

(*c*) Vattel, b. 3, c. 6, sec. 99, 100, 101; ib. c. 7, sec. 104, 105; Martens, Summary, b. 8, c. 5, sec. 9; Mr. Jefferson's Letter to Mr. Pinckney, Sept. 17, 1793.

(*d*) New Ann. Reg. for 1788, tit. Public Papers, 99.

(*a*) Bynk. Q. J. Pub. b. 1, c. 9; Vattel, b. 2, c. 12, sec. 168.

(*b*) Discourse on the Conduct of the Government of Great Britain in Respect to Neutral Nations, 1757.

of guaranties depends on questions like these, it will never be difficult for an ally who has a mind to break his engagements, to find an evasion to escape."

2. Neutral Territory inviolable. — A neutral has a right to pursue his ordinary commerce, and he may become the carrier of the enemy's goods, without being subject to any confiscation of the ship, or of the neutral articles on board; though not without the risk of having the voyage interrupted by the seizure of the hostile property. As the neutral has a right to carry the property of enemies in his own vessel, so, on the other hand, his own property is inviolable, though it be found in the vessels of enemies. But the general inviolability of the neutral character goes further than merely the protection of neutral property. It protects the property of the belligerents when within the neutral jurisdiction. It is not lawful to make neutral territory the scene of hostility, or to attack an enemy while within it; and if the enemy be attacked, or any capture made, under neutral protection, the neutral is bound to redress the injury, and effect restitution. (*c*)[1] The books are full of cases recognizing this

(*c*) Grotius, b. 3, c. 4, sec. 8, note 2; Bynk. b. 1, c. 8; Vattel, b. 3, c. 7, sec. 132; Burlamaqui, ii. pt. 4, c. 5, sec. 19.

[1] *Ante*, 85, n. 1; *post*, 128, n. 1.

Historicus, in his paper on belligerent violation of neutral rights (Int. Law, 147 *et seq.*), lays it down that the right which is injured by the act of the offending belligerent is the right of the neutral government, and not that of the other belligerent; and that, therefore, it is the neutral, and not the belligerent, who is strictly entitled to claim or to enforce the remedy (p. 152). The belligerent, he concludes, cannot demand at the hands of the neutral, as of right, compensation for the injury he may have sustained, or impose upon the neutral the duty of obtaining for him any remedy beyond what may be had over persons and things within the neutral jurisdiction. If the offender has succeeded in evading the neutral jurisdiction, the belligerent cannot, as of right, call upon the neutral to pursue those further remedies to which the latter might be himself entitled (p. 162). In support of his positions he cites Kent, i. 116, 119, 121. But the text does not seem to bear out the conclusion just stated. In the well-known case of the General Armstrong, the United States made a claim against Portugal for not preventing the destruction of a United States privateer by British vessels, when lying in a Portuguese harbor during the war of 1812. The case was submitted to Louis Napoleon, then President of the French Republic, who held that Portugal was excused, even admitting the principle that a neutral might be liable under such circumstances, by the alleged facts that the garrison was feeble, and that the American commander had not applied in proper time to the local officers for protection, but had resisted the attack with arms, thus himself violating the neutrality of the territory. Wheat. Lawrence's

principle of neutrality. In the year 1793, the British ship *Grange* was captured in Delaware Bay by a French frigate, and upon due complaint the American government caused the British ship to be promptly restored. (*d*) So in the case of the *Anna* (*e*) the *sanctity of neutral territory was *118 fully asserted and vindicated, and restoration made of property captured by a British cruiser near the mouth of the Mississippi, and within the jurisdiction of the United States. It is a violation of neutral territory for a belligerent ship to take her station within it, in order to carry on hostile expeditions from thence, or to send her boats to capture vessels being beyond it. No use of neutral territory, for the purposes of war, can be permitted. This is the doctrine of the government of the United States. (*a*) It was declared judicially in England, in the case of the *Twee Gebroeders*; (*b*) and though it was not understood that the prohibition extended to remote objects and

(*d*) Mr. Jefferson's Letter to Mr. Ternant, of 15th May, 1793.

(*e*) 5 C. Rob. 373.

(*a*) Mr. Randolph's Circular to the Governors of the several States, April 16, 1795. The American Commissioners to the court of France (Benjamin Franklin, Silas Deane, and Arthur Lee), in their circular letter in 1777, to the commanders of American armed vessels, carried very far the extension of neutral protection, when they applied it indiscriminately to all captures "within sight of a neutral coast." Diplomatic Correspondence, by J. Sparks, ii. 110. *Vide supra*, Lecture II.

(*b*) 3 C. Rob. 162.

note 217; Wheat. Dana's note 208. In 1 Pistoye & Duverdy, Traité des Prises Maritimes, 107, a contrary doctrine to that of Historicus is laid down.

The right of the neutral government to reparation from the offending belligerent is not disputed. During the late war, in 1864, the rebel steamer Florida was taken out by night from the Brazilian port of Bahia, where she had sought refuge, by the Wachusett, a war vessel of the United States. The American government disavowed the act, and although unable to restore the Florida, which was accidentally sunk, gave other reparation satisfactory to Brazil. Wheat. Dana's note 208. The matter is related with some temper in the Annual Register, 1864, p. 281. See also Mr. Seward to Lord Lyons, June 10, 1863, 1 Dip. Corr. 1863, p. 581, for another admission of the same principle. [The Florida, 101 U. S. 37, was a case arising out of the transaction here mentioned. It was held that no title to the Florida vested in the United States, and that the vessel could not be libelled as prize. — B.]

It is undoubtedly true, that no private person can rest a claim for the restoration of prize in the courts of the captor on the ground that the capture was made in neutral waters, and that the neutral nation whose rights have been infringed alone can interpose. The Lilla, 2 Sprague, 177; The Sir William Peel, 5 Wall. 517; The Adela, 6 Wall. 266; The Anne, 3 Wheat. 435; Wheat. Dana's note 209.

uses, such as procuring provisions and other innocent articles, which the law of nations tolerated, yet it was explicitly declared, that no proximate acts of war were in any manner to be allowed to originate on neutral ground; and for a ship to station herself within the neutral line, and send out her boats on hostile enterprises, was an act of hostility much too immediate to be permitted. No act of hostility is to be commenced on neutral ground. No measure is to be taken that will lead to immediate violence. The neutral is to carry himself with perfect equality between both belligerents, giving neither the one nor the other any advantage; and if the respect due to neutral territory be violated by one party, without being promptly punished
* 119 by * just animadversion, it would soon provoke a similar treatment from the other party, and the neutral ground would become the theatre of war. (*a*)

If a belligerent cruiser inoffensively passes over a portion of water lying within neutral jurisdiction, that fact is not usually considered such a violation of the territory as to affect and invalidate an ulterior capture made beyond it. The passage of ships over territorial portions of the sea is a thing less guarded than the passage of armies on land, because less inconvenient, and permission to pass over them is not usually required or asked. To vitiate a subsequent capture, the passage must at least have been expressly refused, or the permission to pass obtained under false pretences. (*b*)

The right of a refusal of a pass over neutral territory to the troops of a belligerent power depends more upon the inconvenience falling on the neutral state, than on any injustice committed to the third party, who is to be affected by the permission or refusal. It is no ground of complaint against the intermediate neutral state if it grants a passage to belligerent troops, though inconvenience may thereby ensue to the adverse belligerent. It

(*a*) When Dom Miguel, 1828, ascended the throne of Portugal, by a vote of the Portuguese Cortes, in violation of the title by succession of his niece, Donna Maria, England declared herself neutral as between those claimants, in their domestic quarrel for the crown. Having declared her neutrality, England maintained it with fidelity and vigor. She would not allow any warlike equipments by either party in her ports; and when an armament had been fitted out in disguise, and sailed from Plymouth, in support of the claims of Donna Maria, England sent a naval force, and actually intercepted the Portuguese armament in its destination to the island of Terceira.

(*b*) The Twee Gebroeders, 3 C. Rob. 336.

is a matter resting in the sound discretion of the neutral power, who may grant or withhold the permission, without any breach of neutrality. (*c*)[1] No belligerent power can claim the right of passage through a neutral territory, unless founded upon a previous treaty; and it cannot be granted by a neutral, where there is no antecedent treaty, unless an equality of privilege be allowed to both belligerents. (*x*) This is the reasonable and just rule to be deduced from the opinions of jurists and the conventional law of modern nations. (*d*)

* Bynkershoek (*a*) makes one exception to the general * 120 inviolability of neutral territory, and supposes that if an enemy be attacked on hostile ground, or in the open sea, and flee within the jurisdiction of a neutral state, the victor may pursue him *dum fervet opus*, and seize his prize within the neutral state. He rests his opinion entirely on the authority and practice of the Dutch, and admits that he had never seen the distinction taken by the publicists, or in the practice of nations. It appears, however, that Casaregis, and several other foreign jurists mentioned by Azuni, (*b*) held a similar doctrine. But D'Abreu, Valin, Emerigon, Vattel, Azuni, and others maintain the sounder doctrine, that when the flying enemy has entered neutral territory,

(*c*) Grotius, b. 2, c. 2, sec. 13, n. 4; Vattel, b. 3, c. 7, sec. 119, 123, 127; Sir William Scott, 3 C. Rob. 353.

(*d*) Grotius, b. 3, c. 7, sec. 2, 3; Vattel, b. 3, c. 7, sec. 126; Manning's Commentaries, 182–186. Within a few years after the expulsion of the Tarquins, the Romans, under the auspices of the consul Spurius Cassius, concluded a league with the thirty cities or states of Latium; and one article was, that neither party should give to each other's enemies a passage through their lands. Dionysius, b. 6, sec. 95; Niebuhr's History of Rome, ii. 28.

(*a*) Q. J. Pub. b. 1, c. 8. (*b*) Maritime Law, ii. 223, ed. N. Y.

[1] *Ante*, 117, n. 1; Historicus, Int. Law, 153, 159.

(*x*) The assent of the neutral State now appears to be necessary for the passage of belligerent troops or vessels over its territory. See Cobbett's Int. Law Cases (2d ed.), 237. The approved opinion is that neutrality requires a refusal when permission is asked by one belligerent for its troops to pass over a neutral's territory, and that the privilege should be equally granted to both belligerents or to neither. See 21 Revue de Droit Int., 117, 130, 139. If a belligerent, when attacked on neutral territory, elects to defend himself, the neutral is no longer responsible for violation of territory. The General Armstrong, 2 Ortolon, Dip. de la Mer, 300; Cobbett's Int. Law Cases (2d ed.), 239. A rule as to land seizures laid down by a belligerent cannot change neutral territory into high seas or make it subject to maritime law. Field *v.* United States, 27 Ct. Cl. 224.

he is placed immediately under the protection of the neutral power. The same broad principle that would tolerate a forcible entrance upon neutral ground or waters, in pursuit of the foe, would lead the pursuer into the heart of a commercial port. There is no exception to the rule that every voluntary entrance into neutral territory, with hostile purposes, is absolutely unlawful. (*c*). The neutral border must not be used as a shelter for making preparations to renew the attack; and though the neutral is not obliged to refuse a passage and safety to the pursuing party, he ought to cause him to depart as soon as possible, and not permit him to lie by and watch his opportunity for further contest. This would be making the neutral country directly auxiliary to the war, and to the comfort and support of one party. In the case of the *Anna*, (*d*) Sir William Scott was inclined to agree with Bynkershoek to this extent, that if a vessel refused to submit to visitation and search, and fled within neutral territory, to places which were uninhabited, like the
*121 little mud islands before the *mouth of the Mississippi,
and the cruiser, without injury or annoyance to any person, should quietly take possession of his prey, he would not stretch the point so far, on that account only, as to hold the capture illegal. But in this, as well as in every other case of the like kind, there is, *in stricto jure*, a violation of neutral jurisdiction, and the neutral power would have a right to insist on a restoration of the property. It was observed by the same high authority, in another case, depending on a claim of territory, (*a*) "that when the fact is established, it overrules every other consideration. The capture is done away; the property must be restored, notwithstanding it may actually belong to the enemy."

A neutral has no right to inquire into the validity of a capture, except in cases in which the rights of neutral jurisdiction were violated; and, in such cases, the neutral power will restore

(*c*) Vattel, b. 3, c. 7, sec. 133; 1 Emerigon, Traité des Ass. 449; Azuni, ii. 223. It was observed by the American Secretary of State (Mr. Webster), in the diplomatic correspondence between him and the British minister (Lord Ashburton), relative to the case of the steamboat Caroline, on the Canadian border, and seemingly admitted by Lord Ashburton, that, to justify a hostile entrance upon neutral territory, there must exist a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.

(*d*) 5 C. Rob. 373, 385, *d*.

(*a*) The Vrow Anna Catharina, 5 C. Rob. 15.

the property, if found in the hands of the offender, and within its jurisdiction, regardless of any sentence of condemnation by a court of a belligerent captor. (*b*) It belongs solely to the neutral government to raise the objection to a capture and title, founded on the violation of neutral rights. The adverse belligerent has no right to complain when the prize is duly libelled before a competent court. (*c*) If any complaint is to be made on the part of the captured, it must be by his government to the neutral government, for a fraudulent, or unworthy, or unnecessary submission to a violation of its territory, and such submission will naturally provoke retaliation.[1] In the case of prizes brought within a neutral port, the neutral sovereign exercises jurisdiction so far as to restore the property of its *own subjects, illegally captured; and this is done, says *122 Valin, (*a*) by way of compensation for the asylum granted to the captor and his prize. It has been held, in this country, that foreign ships, offending against our laws, within our jurisdiction, may be pursued and seized upon the ocean, and rightfully brought into our ports for adjudication. (*b*)[2]

(*b*) The Arrogante Barcelones, 7 Wheaton, 496; The Austrian Ordinance of Neutrality, August 7, 1808, art. 18; La Amistad de Rues, 5 Wheaton, 390.

(*c*) Case of the Etrusco, 3 C. Rob. 162, note; [*ante*, 117, n. 1.]

(*a*) Comm. ii. 274.

(*b*) The Marianna Flora, 11 Wheaton, 42.

[1] *Ante*, 117, n. 1; Historicus, Int. Law, 159.

[2] In June, 1857, the Cagliari, a Sardinian mail steamer, plying between Genoa and Tunis, was seized by armed men and directed to a small island where were confined some Neapolitan prisoners. These were released and taken on board, and the vessel was directed to the coast of Naples. There the armed men and the released prisoners landed, with the intent to promote an insurrection, and abandoned the vessel. The master at once set sail for Naples under the Sardinian flag, but was captured by a Neapolitan cruiser on the high seas. The prize court at Naples condemned the vessel, and the government held the master and crew, including two Englishmen, as prisoners of war. Dr. Twiss and Dr. Phillimore both gave opinions that the seizure, as it was not belligerent, and as the vessel was not under the suspicion of a piratical condition, was illegal, and that the privilege of the flag was the privilege of the state. June 8, 1858, the Cagliari and crew were given up to the British government, upon their earnest remonstrances, and by them restored to Sardinia. The Neapolitan appellate court afterward pronounced the seizure rightful, on the ground that the vessel had been engaged in mixed acts of war and piracy, with the fault of the master and crew. Ann. Reg. 1858, pp. 63, 181; Wheat. Dana's note 240; Wheat. Lawrence's note 84; Dr. Abdy (Kent, 331, 332) thinks this qualifies the case of the Marianna Flora.

The government of the United States was warranted by the law and practice of nations, in the declarations made in 1793, of the rules of neutrality, which were particularly recognized as necessary to be observed by the belligerent powers, in their intercourse with this country. (*c*) These rules were, that the original arming or equipping of vessels in our ports, by any of the powers at war, for military service, was unlawful; and no such vessel was entitled to an asylum in our ports. The equipment by them of government vessels of war, in matters which, if done to other vessels, would be applicable equally to commerce or war, was lawful. The equipment by them of vessels fitted for merchandise and war, and applicable to either, was lawful; but if it were of a nature solely applicable to war, it was unlawful. And if the armed vessel of one nation should depart from our jurisdiction, no armed vessel, being within the same, and belonging to an adverse belligerent power, should depart until twenty-four hours after the former, without being deemed to have violated the law of nations. (*d*) Congress have repeatedly, by statute, made suitable provision for the support and due observance of similar rules of neutrality, and given sanction to the principle of them, * 123 as being * founded in the universal law of nations. (*x*) It

(*c*) Vattel, b. 3, sec. 104; Wolfius, sec. 1174; Austrian Ordinance of Neutrality, August 7, 1803; Cours de Droit Public, par M. Pinheiro-Ferreira, ii. 44–47.

(*d*) Instructions to the Collectors of the Customs, August 4, 1793. Mr. Jefferson's Letters to M. Genet, of 5th and 17th June, 1793; his Letter to Mr. Morris, of 16th August, 1793; Mr. Pickering's Letter to Mr. Pinckney, January 16, 1797; his Letter to M. Adet, January 20, 1796. [*Post*, 124, n. 1.]

(*x*) The present neutrality laws are now embraced in U. S. Rev. Stat. §§ 5281–5291. Sect. 5283, prohibiting the fitting out and arming of vessels with intent to be employed against a State or people with which this country is at peace, presupposes, it seems, two or more foreign belligerent powers, and not factions unrecognized by this government. The Conserva, 38 Fed. Rep. 431; The Itata, 56 id. 505; 49 id. 646; but see 13 A. G. Op. 179; The Salvador, L. R. 3 C. P. 218. A cargo, which is contraband of war, may be landed on the territory of one belligerent at a point not blockaded. The Florida, 4 Ben. 452. Sects. 5283, 5286 do not apply to arms and munitions of war purchased here and carried to insurgents in a foreign country but not forming a part of the vessel's furnishings. The Itata, *supra;* The Carondelet, 37 Fed. Rep. 799; United States *v.* Trumbull, 48 Fed. Rep. 99; see United States *v.* Rand, 17 id. 142; United States *v.* The Resolute, 40 id. 543. Or to a vessel merely employed to transport them to a vessel which is so fitting out. United States *v.* The Robert and Minnie, 47 Fed. Rep. 84; United States *v.* Skinner, 2 Wheeler

is declared to be a misdemeanor for any citizen of the United States, within the territory or jurisdiction thereof, to accept and exercise a commission to serve a foreign prince, state, colony, district, or people, in war, by land or by sea, against any prince, state, colony, district, or people, with whom the United States are at peace; or for any person, except a subject or citizen of any foreign prince, state, colony, district, or people, transiently within the United States, on board of any foreign armed vessel, within the territory or jurisdiction of the United States to enlist or enter himself, or hire or retain another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States, with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people, as a soldier, or mariner, or seaman; or to fit out and arm, or to increase or augment the force of any armed vessel, with intent that such vessel be employed in the service of any foreign power at war with another power with whom we are at peace; or to begin, or set on foot, or provide, or prepare the means for any military expedition or enterprise, to be carried on *from thence* against the territory or dominions of any foreign prince or state, or of any colony, district, or people with whom we are at peace; or to hire or enlist

Cr. Cas. 232. Or to money contributed to aid a foreign insurrection. Bailey *v.* O'Mahoney, 33 N. Y. Supr. Ct. 239.

The intent is material, and is alone sufficient to constitute the statutory offence, the actual arming of the vessel here not being necessary. The City of Mexico, 28 Fed. Rep. 148; The Conserva, 38 id. 431; United States *v.* 214 Boxes of Arms, 20 id. 50. The plan and intent must be formed here and not after the vessel reaches a foreign port. The City of Mexico, 24 Fed. Rep. 33; see 25 id. 924; 32 id. 105. Sect. 5286 does not require that the expedition should have actually set out, or any particular number of men, the crime being completed by the organization only. United States *v.* Ybanez, 53 Fed. Rep. 536. The organization is illegal, though formed and despatched in separate parts. United States *v.* Hogan, 18 Fed. Rep. 529; see United States *v.* 214 Boxes, 20 id. 50. As to informers under these statutes, see The City of Mexico, 32 Fed. Rep. 105; United States *v.* The Resolute, 40 id. 543; The Chapman, 4 Sawyer, 501.

Military expeditions or enterprises originating within the United States, and to be carried on from this country, are clearly prohibited by the Rev. Stats. § 5286. But the sending of a ship from a foreign country to the United States, to take on board arms and ammunition purchased here, and carry them to the foreign state, is not the preparing or setting on foot of such an expedition or enterprise within the meaning of the statute. United States *v.* Trumbull, 48 Fed. Rep. 99; The Itata, 49 id. 646; The City of Mexico, 24 id. 33; Hendricks *v.* Gonzalez, 67 id. 351. See Glenn's Int. Law ch. 21, p. 286.

A neutral government is not bound to prevent neutral ships from supplying materials to a belligerent. The Madagascar Expedition, 29 Am. L. Rev. 539.

troops or seamen for foreign military or naval service; or to be concerned in fitting out any vessel to cruise or commit hostilities in foreign service against a nation at peace with us; and the vessel, in this latter case, is made subject to forfeiture. The President of the United States is also authorized to employ force to compel any foreign vessel to depart, which, by the law of nations, or by treaty, ought not to remain within the United States, and to employ the public force generally in enforcing the observance of the duties of neutrality prescribed by law. (*a*)[1] In

(*a*) Acts of Congress of 5th June, 1794, and 20th April, 1818, c. 83. By an act of Congress of March 10, 1838, c. 31, the provisions of the act of 1818 were enlarged and applied to any military expedition or enterprise against the territory of any foreign prince or state, or of any colony, district, or people, conterminous with the United States, and with whom they are at peace. Great Britain, by act of Parliament of 59 Geo. III., called the Foreign Enlistment Act, in like manner prohibited enlistments and equipments within the king's dominions, for warlike purposes in foreign states.

[1] United States *v.* Kazinski, 2 Sprague, 7; 18 Law Rep. 254; 7 Op. Att.-Gen. 367; *ante*, 117, n. 1. The act of 1838, mentioned in note (*a*), expired by limitation at the end of two years.

The result of the controversy between the United States and England as to rebel privateers built and fitted out in English ports, has been to establish principles of dealing, at least between the two countries in question, which England had previously insisted did not belong to international law, but depended on municipal regulations, like the act referred to in the text. The principles are embodied in the following rules which were agreed to be taken as applicable to the case before the board of arbitration on the Alabama claims; but the protestation of England as to the principles in force at the time the claims arose should be noticed.

"A neutral government is bound —

"First, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

"Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

"Thirdly, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

"Her Britannic Majesty has commanded her High Commissioners and Plenipotentiaries to declare that Her Majesty's Government cannot assent to the foregoing rules as a statement of principles of international law which were in force at the time when the claims mentioned in Article I. arose, but that Her Majesty's Government, in order to evince its desire of strengthening the friendly relations between the two countries and of making satisfactory provision for the

case of the *Santissima Trinidad*, (*b*) it was decided, that captures made by a vessel so illegally fitted out, whether a public or private armed ship, were torts, and that the original owner was entitled to restitution, if the property was brought within our jurisdiction; but that an illegal outfit did not affect a capture made after the cruise, to which the outfit had been applied, had terminated. The offence was deposited with the voyage, and the *delictum* ended with the termination of the cruise. (*c*)

Though a belligerent vessel may not enter within neutral jurisdiction for hostile purposes, she may, consistently with a state of neutrality, until prohibited by the neutral power, bring her prize into a neutral port, and sell it. (*d*) The neutral power is, however, at liberty *to refuse this privilege, *124 provided the refusal be made, as the privilege ought to be granted, to both parties, or to neither. The United States, while a neutral power, frequently asserted the right to prohibit, at discretion, the sale within their ports of prizes brought in by the belligerents; and the sale of French prizes was allowed as an indulgence merely, until it interfered with the treaty of England of 1794, in respect to prizes made by privateers. (*a*) In the

(*b*) 7 Wheaton, 283.

(*c*) The seamen of a neutral nation may serve on board of a *commercial* vessel of a belligerent power, or be employed in a contraband trade on board of a neutral vessel, without being liable to punishment personally, by the municipal laws of his own country, or by the law of nations. Opinions of the Attorneys-General of the United States, i. 35.

(*d*) Bynk. b. 1, c. 15; Vattel, b. 3, c. 7, sec. 132; Martens, b. 8, c. 6, sec. 6; Hopner *v.* Appleby, 5 Mason, 77.

(*a*) Instructions to the American Ministers to France, July 15, 1797. Mr. Pickfuture, agrees that, in deciding the questions between the two countries arising out of those claims, the arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in these rules.

"And the High Contracting Parties agree to observe these rules as between themselves in future, and to bring them to the knowledge of other maritime powers, and to invite them to accede to them."

For discussions of the question, see Wheat. Dana's note 215; Bemis on American Neutrality, Boston: Little, Brown, & Co., 1866; Mountague Bernard on Neutrality of Great Britain during the American Civil War, London: Longmans, 1870, Historicus, Int. Law, 151; [Hall, Int. Law, pt. 4, c. 3; 6 Revue de Droit International, 453 and *passim*.] See also the great case under the British act, The Alexandra, Attorney-General *v.* Sillem, London: Eyre & Spottiswoode, 1863, and letter of Earl Russell to the Lords of the Treasury, ib. vol. 2, app. i.; s. c. 2 Hurlst. & C. 431; and a very important case under the American act, The Meteor, Boston: Little, Brown, & Co., 1869, stated briefly, 3 Am. Law Rev. 234; 1 id. 401.

opinion of some jurists, it is more consistent with a state of neutrality and the dictates of true policy to refuse this favor; for it must be very convenient to permit the privateers of contending nations to assemble, together with their prizes, in a neutral port. The edict of the States General of 1656 forbade foreign cruisers to sell their prizes in their neutral ports, or cause them to be unladen; and the French Ordinance of the Marine of 1681 contained the same prohibition, and that such vessels should not continue in port longer than twenty-four hours, unless detained by stress of weather. (*b*) The admission into neutral ports of the public ships of the belligerent parties, without prizes, and under due regulations, is considered to be a favor, required on the principle of hostility among friendly powers, and it has been uniformly conceded on the part of the United States. (*c*) [1]

3. Enemy's Property in Neutral Vessels. — But neutral ships do not afford protection to enemy's property, and it may be seized if found on board of a neutral vessel, beyond the limits of the neutral jurisdiction. This is a clear and well-settled principle of the law of nations. (*d*) [2] It was formerly a question whether

ering's Letters to M. Adet, May 24, and November 15, 1796. His Letter to Mr. Pinckney, January 16, 1797. It is deemed proper and safe for a neutral power to permit a prize, brought into port in distress, *to be repaired*, for the purpose of further navigation. Opinions of the Attorneys-General, i. 603.

(*b*) Valin, Comm. ii. 272.

(*c*) Mr. Jefferson's Letter to Mr. Hammond, September 9, 1793; Instructions to the American Commissioners to France, July 15, 1797; Cours de Droit Public, par M. Pinheiro-Ferreira, ii. 47. Such public vessels are exempt from the jurisdiction of the local authorities, but this exemption does not extend to private vessels. *Vide infra*, 156, note.

(*d*) Grotius, l. 3, c. 6, sec. 6; Heinec. de Nav. ob Vect. c. 2, sec. 9; Bynk. Q. J. Pub. c. 14; Loccenius, de Jure Mar. et Nav. b. 2, c. 4, sec. 2; Molloy, de Jure Maritimo, b. 1, c. 1, sec. 18; Lampredi, du Commerce des Neutres, sec. 10, 11; Vattel, b. 3, c. 7, sec. 115; Answer, in 1753, to the Prussian Memorial; Consulat de la Mer, par Boucher, ii. c. 273, 276, sec. 1004.

[1] Mr. Cushing's opinion in the case of The Sitka, 7 Op. Att.-Gen. 122, contains much learning on this subject, and confirms the text and note (*c*).

The twenty-four hours rule seems to have become part of international law. Pistoye & Duverdy, i. 108; M. Bernard, Neutrality of Great Britain, c. 11, p. 273; Moore's Rebellion Record, iii. 454; Hautefeuille, i. 366.

[2] *Post*, 128, n. 1; [Hall, Int. Law, pt. 4, c. 7 and 9. In the Institut de Droit International, held at La Haye in 1875, resolutions were adopted, though not without dissent, to the effect that — 1. The rule that enemy's property on board neutral vessels is inviolable unless contraband is a part of the positive law of nations. 2. That merchant ships and cargoes should not be captured unless they carry contra-

the neutral *ship, conveying enemy's property, was not *125 liable to confiscation for that cause. (x) This was the old law of France, (a) in cases in which the master of the vessel knowingly took on board enemy's property; but Bynkershoek truly observes, that the master's knowledge is immaterial in this case, and that the rule in the Roman law, making the vessel liable for the fraudulent act of the master, was a mere fiscal regulation, and did not apply; and for the neutral to carry enemy's goods is not unlawful, like smuggling, and does not affect the neutral ship. (b) If there be nothing unfair in the conduct of the neutral master, he will even be entitled to his reasonable demurrage, and his freight for the carriage of the goods, though he has not carried them to the place of destination. They are said to be seized and condemned, not *ex delicto*, but only *ex re*. The capture of them by the enemy is a delivery to the person who, by the rights of war, was substituted for the owner. (c) Bynkershoek (d) thinks the master is not entitled to freight, because the goods were not carried to the port of destination, though he admits that the Dutch lawyers and the *Consolato* give freight. But the allowance of freight in that case has been the uniform practice of the English admiralty for near two centuries past, except when there was some circumstance of *mala fides*, or a departure from a strictly proper neutral conduct. (e) The freight is paid, not *pro*

(a) Ord. de la Marine, liv. 3, tit. 9, des Prises, art. 7.
(b) Bynk. Q. J. Pub. lib. 1, c. 14.
(c) Vattel, b. 3, c. 7, sec. 115. (d) B. 1, c. 14.
(e) Jenkinson's Discourse in 1757, p. 13; The Atlas, 3 C. Rob. 304, note; Answer to the Prussian Memorial, 1753.

band or attempt to violate a duly declared blockade. 3. The above rules not to apply to any vessels taking part, or destined to take part, in the hostilities. See 7 Revue de Droit International, 288. — B.]

(x) As between the parties to the Declaration of Paris, hostile goods in neutral ships go free. Cobbett's Int. Law Cases (2d ed.), 293, 298. A neutral vessel in the direct employ of a belligerent is, upon capture, as well as her enemy's cargo, liable to condemnation. The City of Mexico, 24 Fed. Rep. 33, 40; see 11 Law Mag. & Rev. (4th Series), 56; 50 Albany L. J. 389. A neutral vessel laden with neutral cargo is liable if captured when actually and voluntarily under an enemy's protection. The Nancy, 27 Ct. Cl. 99. At the close of the eighteenth century an enemy's cargo captured on such a vessel was subject to confiscation, but the vessel itself would have been freed with freight money and compensation for loss directly caused by the seizure. The Joanna, 24 Ct. Cl. 198; The William, 23 id. 201.

rata, but *in toto*, because capture is considered as delivery, and the captor pays the whole freight, because he represents his
* 126 enemy, by possessing himself of the enemy's goods **jure belli*, and he interrupts the actual delivery to the consignee. (*a*)

The right to take enemy's property on board a neutral ship has been much contested by particular nations, whose interests it strongly opposed. This was the case with Prussia in the case of the Silesia loan, and with the Dutch in the war of 1756; and Mr. Jenkinson (afterwards Earl of Liverpool) published, in 1757, a discourse, very full and satisfactory, on the ground of authority and usage, in favor of the legality of the right, when no treaty intervened to control it. The rule has been steadily maintained by Great Britain. In France it has been fluctuating. The ordinance of the marine of 1681 asserted the ancient and severe rule, that the neutral ship, having on board enemy's property, was subject to confiscation. The same rule was enforced by the arrêts of 1692 and 1704, and relaxed by those of 1744 and 1778. (*b*) In 1780 the Empress of Russia proclaimed the principles of the Baltic code of neutrality, and declared she would maintain them by force of arms. One of the articles of that code was, that "all effects belonging to the subjects of belligerent powers should be looked upon as free on board of neutral ships, except only such goods as were contraband." The principal powers of Europe, as Sweden, Denmark, Prussia, Germany, Holland, France, Spain, Portugal, and Naples, and also these United States, acceded to the Russian principles of neutrality. (*c*) But the want of the consent of a power of such decided maritime superiority as that of Great Britain was an insuperable obstacle to the success of the Baltic conventional law of neutrality; and it was abandoned in 1793 by the naval powers of Europe, as not sanctioned by the existing law of nations, in every case in which the doc-
* 127 trines of that code * did not rest upon positive compact.

During the whole course of the wars growing out of the French revolution, the government of the United States admitted the English rule to be valid, as the true and settled doctrine of

(*a*) The Copenhagen, 1 C. Rob. 289.

(*b*) Valin, Comm. l. 3, tit. 9, des Prises, art. 7.

(*c*) New Ann. Reg. 1780, tit. Public Papers, 118–120; Martens, Summary, 327, ed. Phil.; Journals of Congress, vii. 68, 185.

international law; and that enemy's property was liable to seizure on board of neutral ships, and to be confiscated as prize of war. (*a*) It has, however, been very usual, in commercial treaties, to stipulate that free ships should make free goods, contraband of war always excepted; but such stipulations are to be considered as resting on conventional law merely, and as exceptions to the operation of the general rule, which every nation not a party to the stipulation is at perfect liberty to exact or surrender. The Ottoman Porte was the first power to abandon the ancient rule, and she stipulated, in her treaty with France, in 1604, that free ships should make free goods, and she afterwards consented to the same provision in her treaty with Holland, in 1612; and according to Azuni, (*b*) Turkey has, at all times, on international questions, given an example of moderation to the more civilized powers of Europe.

The effort made by the Baltic powers, in 1801, to recall and enforce the doctrines of the armed neutrality, in 1780, was met, and promptly overpowered, and the confederacy dissolved by the naval power of England. Russia gave up the point, and by her convention with England of the 17th June, 1801, expressly agreed that enemy's property was not to be protected on board of neutral ships. The rule has since been very generally acquiesced in; and it was expressly recognized in the Austrian ordinance of neutrality, published at Vienna the 7th of August, 1803. Its reasons * and authority have been ably *128 vindicated by English statesmen and jurists, and particularly by Mr. Ward, in his treatise *of the relative rights and duties of belligerent and neutral powers in maritime affairs*, published in 1801, and which exhausted all the law and learning applicable to the question. (*a*)[1]

(*a*) Mr. Jefferson's Letter to M. Genet, July 24, 1793; Mr. Pickering's Letter to Mr. Pinckney, January 16, 1797; Letter of Messrs. Pinckney, Marshall, and Gerry, to the French government, January 27, 1798.

(*b*) Maritime Law of Europe, ii. 163. Flasson, in his Histoire de la Diplomatie Française, ii. 226, says, that it was not the object of the Ottoman Porte, in the instance mentioned in the text, to abandon the ancient rule, and that it was not a treaty, but a concession to France of privileges and exemption, from pure liberality.

(*a*) Mr. Manning, in his Commentaries on the Law of Nations, 203–244, has discussed the question, whether "free ships make free goods," quite at large, and with

[1] On the breaking out of the war with Russia in 1854, as the combined effect of the English principle that enemy's goods on neutral vessels are good prize, and the

4. Neutral Property in an Enemy's Vessel. — It is also a principle of the law of nations relative to neutral rights that the effects of neutrals, found on board of enemy's vessels, shall be free; and it is a right as fully and firmly settled as the other, though, like that, it is often changed by positive agreement. (*b*) The principle is to be met with in the *Consolato del Mare*, and the property of the neutral is to be restored without any compensation for detention, and the other necessary inconveniences incident to the capture. The former ordinances of France, of 1543, 1585, and 1681, declared such goods to be lawful prize; and

great strength of reasoning. He vindicates the belligerent right against the doctrine of the Baltic powers, upon solid principles, and upon the authority of the Consolato del Mare, and of the most eminent European jurists who have written on the law of nations within the last two centuries. The principal authorities have been already referred to, at pages 124, 125, n. [*et seq.*]. Mr. Manning also examines the question, on the authority of the customary and conventional law of nations, by a review of a succession of treaties between European powers, from the year 1351 to the present times. The result is, that there is nothing like system or consistency of principle in the conventional law of Europe. The belligerent rule has been alternately adopted and rejected, and qualified with infinite vicissitude, and so as to leave the rule, as a general and settled principle of international law, when not disturbed by positive stipulations, in full force. Comm. 244–280.

(*b*) Grotius, b. 3, c. 6 and 16; Bynk. c. 13; Vattel, b. 3, c. 7, sec. 116; Answer to the Prussian Memorial, 1753; Mr. Jefferson's Letter to M. Genet, July 24, 1793; Mr. Pickering's Letter to Mr. Pinckney, January 10, 1797.

French doctrine that neutral goods on enemy's vessels are so, would have been to almost put an end to neutral commerce, the English and French governments declared that although they could not forego the right of seizing articles contraband of war, and of preventing neutrals from bearing the enemy's despatches, or from breaking effective blockades, they would "waive the right of seizing enemy's property laden on board a neutral vessel, unless it be contraband of war." Neither was it intended "to claim the confiscation of neutral property, not being contraband of war, found on board enemy's ships." Spinks, Ec. & Ad. R. app. i. No. 1, and Order in Council of April 15, 1854, ib. ix. No. 8; Ann. Reg. 1854, p. 210; Wheat. Lawrence's note 228; Wheat. Dana's note 223; 1 Pistoye & Duverdy, 316 *et seq.* (tit vi. c. 1); Edinburgh Review, July, 1854. By the declaration of principles of the Congress of Paris, April 16, 1856, "The neutral flag covers enemy's goods, with the exception of contraband of war. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag." Ann. Reg. 1856, p. 221; Pistoye & Duverdy, ii. 507; ib. i. 337 (tit. vi. c. 2); Wheat. Lawrence's note 192. See Treaty of United States with Russia, July 22, 1854, 10 St. at L. 215; and the treaties 11 St. at L. 607; 695; 12 id. 1003, 1012; 15 id. 473, 481, &c. These principles were applied as embodying the traditional policy of the United States during the war of the rebellion. Dip. Corr. 1861, pp. 44, 143, 191, 251.

Valin (*c*) justifies the ordinances, on the ground that the neutral, by putting his property on board of an enemy's vessel, favors the enemy's commerce, and agrees to abide the fate of the vessel. But it is fully and satisfactorily shown, by the whole current of modern authority, that the neutral has a perfect right to avail himself of the vessel of his friend, to transport his property; and Bynkershoek has devoted an entire chapter to the vindication of the justice and equity of the right. (*d*)

The two distinct propositions, that enemy's goods found on board a neutral ship may lawfully be seized as prize of war, and that the goods of a neutral found on board of an *enemy's vessel were to be restored, have been explicitly *129 incorporated into the jurisprudence of the United States, and declared by the Supreme Court (*a*) to be founded in the law of nations. The rule, as it was observed by the court, rested on the simple and intelligible principle, that war gave a full right to capture the goods of an enemy, but gave no right to capture the goods of a friend. The neutral flag constituted no protection to enemy's property, and the belligerent flag communicated no hostile character to neutral property. The character of the property depended upon the fact of ownership, and not upon the character of the vehicle in which it was found. After vindicating the simplicity and justice of the original rule of the law of nations against the speculations of modern theorists, and the *ultima ratio* of the armed neutrality, which attempted to effect by force a revolution in the law of nations, the court stated that nations have changed this simple and natural principle of public law, by conventions between themselves, in whole or in part, as they believed it to be for their interest; but the one proposition, that free ships should make free goods, did not necessarily imply the converse proposition, that enemy's ships should make enemy's goods. If a treaty establish the one proposition, and was silent as to the other, the other stood precisely as if there had been no stipulation, and upon the ancient rule. The stipulation that neutral bottoms should make neutral goods was a concession

(*c*) Comm. b. 3, tit. 9, des Prises, art. 7.

(*d*) Consulat de la Mer, par Boucher, ii. c. 276, sec. 1012, 1013; Heineccius, de Nav. ob. Vect. c. 2, sec. 9; Opera, ii. pt. 1, 349–355; Vattel, b. 3, c. 7, sec. 116; Bynk. c. 13.

(*a*) The Nereide, 9 Cranch, 388.

made by the belligerent to the neutral, and it gave to the neutral flag a capacity not given to it by the law of nations. On the other hand, the stipulation subjecting neutral property found in the vessel of an enemy to condemnation as prize of war was a concession made by the neutral to the belligerent, and took from the neutral a privilege he possessed under the law of na-
* 130 tions; but neither reason nor practice * rendered the two concessions so indissoluble, that the one could not exist without the other. It rested entirely in the discretion of the contracting parties, whether either or both should be granted. The two propositions are distinct and independent of each other, and they have frequently been kept distinct by treaties, which stipulated for the one and not for the other. (*a*)

The government of the United States, in their negotiations with the republics in South America, have pressed very earnestly for the introduction and establishment of the principle of the Baltic code of 1780, that the friendly flag should cover the cargo; and this principle was incorporated into the treaty between the United States and Colombia, in 1825, and into the treaty of navigation and commerce between the United States and the Republic of Chili, in 1832. (*b*) The introduction of those new republics into the great community of civilized nations has justly been deemed a very favorable opportunity to inculcate and establish, under their sanction, more enlarged and liberal doctrines on the subject of national rights. It has been the desire of our government to obtain the recognition of the fundamental principles, consecrated by the treaty with Prussia, in 1785, relative to the perfect equality and reciprocity of commercial rights between nations; the abolition of private war upon the ocean; and the enlargement of the privileges of neu-

(*a*) The Cygnet, 2 Dods. 299, s. p.

(*b*) It was stipulated in those American treaties that, as between the parties, free ships should give freedom to goods, — that the flag should cover the cargo even of enemies, contraband goods excepted, and should also cover the persons, though enemies, unless they were officers or soldiers in actual service. But the provision was only to apply to those powers who recognized the principle; and neutral property found on board enemy's vessels were [was], under the above stipulation, liable to capture. If, however, the neutral flag did not protect enemy's property, then the goods of a neutral on board of an enemy's vessel were to be free. Treaty with Colombia, art. 12, 13; Treaty with Chili, art. 12, 13; Treaty with Venezuela, art. 15; Treaty with the Peru-Bolivian Confederation, art. 11, 12; Treaty with Ecuador, in 1839, art. 15.

tral commerce. The rule of public law, that the property of an enemy is liable to capture in the vessel of a friend, is now declared, on the part of our government, to have no foundation in natural right; and that the usage rests entirely on force. Though the high seas are a general jurisdiction, common to all, yet each nation has a special jurisdiction over its own vessels; and all the maritime nations of modern Europe have, at times, acceded to the principle, that the property of an enemy should be protected in the vessel of a friend. No neutral nation, it is said, is bound to submit to the usage; and the neutral may have *yielded at one time to the usage, without *131 sacrificing the right to vindicate, by force, the security of the neutral flag at another. The neutral right to cover enemy's property is conceded to be subject to this qualification: that a belligerent nation may justly refuse to neutrals the benefit of this principle, unless it be conceded also by the enemy of the belligerent to the same neutral flag. (*a*)

But whatever may be the utility or reasonableness of the neutral claim, under such a qualification, I should apprehend the belligerent right to be no longer an open question; and that the authority and usage on which that right rests in Europe, and the long, explicit, and authoritative admission of it by this country, have concluded us from making it a subject of controversy; and that we are bound, in truth and justice, to submit to its regular exercise, in every case, and with every belligerent power who does not freely renounce it.

It has been a matter of discussion, whether the captor of the enemy's vessel be entitled to freight from the owner of the neutral goods found on board, and restored. Under certain circumstances, the captor has been considered to be entitled to freight, even though the goods were carried to the claimant's own country, and restored: and he clearly is entitled to freight, if he performs the voyage, and carries the goods to the port of original destination. In no other case is freight due to the captor; and the doctrine of *pro rata* freight is entirely rejected, because it would involve a prize court in a labyrinth of minute inquiries and considerations, in the endeavor to ascertain, in every case, the

(*a*) Letter of Mr. Adams, Secretary of State, to Mr. Anderson, 27th May, 1823; President's Message to the Senate, of 26th December, 1825, and to the House of Representatives, March 15, 1826.

balance of advantage or disadvantage which an interruption and loss of the original voyage, by capture, might have produced to the owner of the goods. (*b*)

* 132 * In the case of the *Nereide*, (*a*) the Supreme Court of the United States carried the principle of immunity of neutral property on board an enemy's vessel to the extent of allowing it to be laden on board an *armed* belligerent cruiser; and it was held that the goods did not lose their neutral character, not even in consequence of resistance made by the armed vessel, provided the neutral did not aid in such armament or resistance, notwithstanding he had chartered the whole vessel, and was on board at the time of the resistance. The act of arming was the act of the belligerent party, and the neutral goods did not contribute to the armament, further than the freight, which would be paid if the vessel was unarmed; and neither the goods nor the neutral owner were chargeable for the hostile acts of the belligerent vessel, if the neutral took no part in the resistance. A contemporary decision of an opposite character, on the same point, was made by the English High Court of Admiralty in the case of the *Fanny*; (*b*) and it was there observed that a neutral subject was at liberty to put his goods on board the merchant vessel of a belligerent; but if he placed them on board an armed belligerent ship, he showed an intention to resist visitation and search, by means of the association, and, so far as he does this, he was presumed to adhere to the enemy, and to withdraw himself from his protection of neutrality. If a neutral chooses to take the protection of a hostile force, instead of his own neutral character, he must take (it was observed) the inconvenience with the convenience, and his property would, upon just and sound principles, be liable to condemnation along with the belligerent vessel.

The question decided in the case of the *Nereide* is a very important one in prize law, and of infinite importance in its practical results; and it is to be regretted that the decisions of two courts of the highest character, on such a point, * 133 * should have been in direct contradiction to each other. The same point afterwards arose, and was again argued,

(*b*) Bynk. Q. J. Pub. b. 1, c. 13; The Fortuna, 4 C. Rob. 278; The Diana, 5 C. Rob. 67; Vrow Anna Catharina, 6 C. Rob. 269.

(*a*) 9 Cranch, 388. (*b*) 1 Dods. 443.

and the former decision repeated in the case of the *Atalanta*. (*a*) It was observed, in this latter case, that the rule with us was correct in principle, and the most liberal and honorable to the jurisprudence of this country. The question may, therefore, be considered here as at rest, and as having received the most authoritative decision that can be rendered by any judicial tribunal on this side of the Atlantic.

(*a*) 3 Wheaton, 409.

LECTURE VII.

OF RESTRICTIONS UPON NEUTRAL TRADE.

THE principal restriction which the law of nations imposes on the trade of neutrals is the prohibition to furnish the belligerent parties with warlike stores and other articles which are directly auxiliary to warlike purposes. Such goods are denominated contraband of war; but in the attempt to define them the authorities vary, or are deficient in precision, and the subject has long been a fruitful source of dispute between neutral and belligerent nations. (*x*)

1. Contraband of War. — In the time of Grotius, some persons contended for the rigor of war, and others for the freedom of

(*x*) England's position has been that all implements of war, including articles suited for naval construction, are contraband. Elsewhere it has been maintained to the extent of including coal, human beings, money, and written despatches, while France, in 1885, attempted, in coercing China, to include rice as a prime necessity of the Chinaman. The meaning of the term in the Declaration of Paris has not been as yet defined. According to Mr. Field's definition goods become contraband when "actually destined for the use of the hostile nation in war, but not otherwise." See 2 Jur. Rev. 95, 346, 351; Boyd's Wheaton's Elements of Int. Law (3d ed.), 651, 794; 3 Wharton's Digest, §§ 368, 390; 25 Revue de Droit Int. 7, 124, 239, 389; 26 id. 116, 214, 401; 27 id. 58. The British Admiralty Manual of Prize Law (1888) states that it is part of the Crown's prerogative to extend or reduce the list of contraband articles in time of war; and, subject to this rule, enumerates contraband articles as follows: — (1) As absolutely contraband, — Arms of all kinds and machinery for manufacturing arms; ammunition and materials for ammunition, including lead, potash, nitrate of soda, gunpowder, saltpetre, brimstone, and gun-cotton; military equipments and clothing; military stores; naval stores, including masts, spars, rudders, ship-timber, hemp, cordage, sail-cloth, pitch and tar, copper fit for sheathing, marine engines and all the component parts and materials used in the manufacture thereof; iron in any of the forms in which it is used for naval shipbuilding or repair. (2) As conditionally contraband, — Provisions and liquors fit for consumption in the army or navy; money; telegraphic materials, such as wire, porous caps, platinum, sulphuric acid and zinc; materials for railway construction; coal, hay, horses, resin, tallow, and timber.

commerce. As neutral nations are willing to seize the opportunity which war presents of becoming carriers for the belligerent powers, it is natural that they should desire to diminish the list of contraband as much as possible. Grotius distinguishes (*a*) between things which are useful only in war, as arms and ammunition, and things which serve merely for pleasure, and things which are of a mixed nature, and useful both in peace and war. He agrees with other writers in prohibiting neutrals from carrying articles of the first kind to the enemy, as well as in permitting the second kind to be carried. As to articles of the third class, which are of indiscriminate use in peace and war, as money, provisions, ships, and naval stores, he says that they are sometimes lawful articles of neutral commerce, and sometimes not; and the question will depend upon circumstances existing *at the time.[1] They would be contraband if carried to a *136 besieged town, camp, or port. In a naval war, it is admitted that ships and materials for ships become contraband, and horses and saddles may be included. (*a*) Vattel speaks with some want of precision, and only says, in general terms, (*b*) that commodities particularly used in war are contraband, such as arms, military and naval stores, timber, horses, and even provisions, in certain junctures, when there are hopes of reducing the enemy by famine. Loccenius, (*c*) and some other authorities referred to by Valin, consider provisions as generally contraband; but Valin and Pothier insist that they are not so, either by the law of France or the common law of nations, unless carried to besieged or blockaded places. (*d*) The marine ordinance of Louis XIV. (*e*) included horses and their equipage, transported for military service, within the list of contraband, because they were necessary to war equipments; and that is, doubtless, the general rule. They are included in the restricted list of contraband articles mentioned in the treaty between the United States and Colombia, in 1825. Valin says that naval stores have been regarded as contraband from the beginning of the last

(*a*) B. 3, c. 1, sec. 5.
(*b*) B. 3, c. 7, sec. 112.
(*d*) Valin, Comm. ii. 264; Pothier de Propriété, No. 104.
(*e*) Des Prises, art. 11.

(*a*) Rutherforth's Inst. b. 1, c. 9.
(*c*) De Jure Maritimo, lib. 1, c. 4, note 9.

[1] The Peterhoff, 5 Wall. 28, 58; s. c. Blatchf. Pr. 463; Pistoye & Duverdy, t. i. tit. vi. c. 2, § 3, p. 392. [See, generally, Hall, Int. Law, pt. 4, c. 5 and 6.]

century, and the English prize law is very explicit on this point. Naval stores, and materials for ship-building, and even corn, grain, and victuals of all sorts, going to the dominions of the enemy, were declared contraband by an ordinance of Charles I. in 1626. (*f*) Sail-cloth is now held to be universally contraband, even on a destination to ports of mere mercantile naval equipment; (*g*) and in the case of the *Maria* (*h*) it was held * 137 that * tar, pitch, and hemp, and whatever other materials went to the construction and equipment of vessels of war, were contraband by the modern law of nations; though formerly, when the hostilities of Europe were less naval than at the present day, they were of a disputable nature. The executive government of this country has frequently conceded that the materials for the building, equipment, and armament of ships of war, as timber and naval stores, were contraband. (*a*) But it does not seem that ship timber is, *in se*, in all cases, to be considered a contraband article, though destined to an enemy's port. In the case of the Austrian vessel, *Il Volante*, captured by the French privateer, *L'Etoile de Bonaparte*, and which was carrying ship timber to Messina, an enemy's port, it was held, by the Council of Prizes at Paris, in 1807, upon the opinion of the advocate-general, M. Collet Descotils, that the ship timber in that case was not contraband of war, it being ship timber of an ordinary character, and not exclusively applicable to the building of ships of war. (*b*)

Questions of contraband were much discussed during the continuance of our neutral character in the furious war between England and France, commencing in 1793, and we professed to be governed by the modern usage of nations on this point. (*c*) The national convention of France, on the 9th of May, 1793, decreed that neutral vessels laden with provisions, destined to

(*f*) Robinson's Collec. Mar. 63. (*g*) The Neptunus, 3 C. Rob. 108.
(*h*) 1 C. Rob. 287, Phil. ed.
(*a*) Mr. Randolph's Letter to M. Adet, July 6, 1795; Mr. Pickering's Letter to Mr. Pinckney, January 16, 1797; Letter of Messrs. Pinckney, Marshall, and Gerry, to the French Minister, January 27, 1798.
(*b*) Répertoire universel et raisonné de Jurisprudence, par M. Merlin, ix. tit. Prise Maritime, sec. 3, art. 3. [s. c. Pistoye & Duvérdy, i. 409.] [Money, bullion, &c., are contraband when destined for hostile use or to procure hostile supplies. United States *v.* Dickelman, 92 U. S. 520. — B.]
(*c*) President's Proclamation of Neutrality, April 22, 1793.

an enemy's port, should be arrested and carried into France; and one of the earliest acts of England, in that war, (*d*) was to detain all neutral *vessels going to France, and *138 laden with corn, meal, or flour. It was insisted, on the part of England, (*a*) that, by the law of nations, all provisions were to be considered as contraband, in the case where the depriving of an enemy of those supplies was one of the means employed to reduce him to reasonable terms of peace; and that the actual situation of France was such as to lead to that mode of distressing her, inasmuch as she had armed almost the whole laboring class of her people, for the purpose of commencing and supporting hostilities against all the governments of Europe. This claim on the part of England was promptly and perseveringly resisted by the United States; and they contended that corn, flour, and meal, being the produce of the soil and labor of the country, were not contraband of war, unless carried to a place actually invested. (*b*) The treaty of commerce with England, in 1794, in the list of contraband, stated, that whatever materials served directly to the building and equipment of vessels, with the exception of unwrought iron and fir planks, should be considered contraband, and liable to confiscation; but the treaty left the question of provisions open and unsettled, and neither power was understood to have relinquished the construction of the law of nations which it had assumed. The treaty admitted that provisions were not generally contraband, but might become so according to the existing law of nations, in certain cases, and those cases were not defined.

It was only stipulated, by way of relaxation of the penalty of the law, that whenever provisions were contraband, the captors, or their government, should pay to the owner the full value of the articles, together with the freight and a reasonable profit. Our government has repeatedly admitted that, as far as that treaty enumerated contraband articles, *it was declar- *139 atory of the law of nations, and that the treaty conceded nothing on the subject of contraband. (*a*)

(*d*) Instructions of 8th June, 1793.

(*a*) Mr. Hammond's Letter to Mr. Jefferson, September 12, 1793, and his Letter to Mr. Randolph, April 11, 1794.

(*b*) Mr. Jefferson's Letter to Mr. Pinckney, September 7, 1793, and Mr. Randolph's Letter to Mr. Hammond, May 1, 1794.

(*a*) Mr. Pickering's Letter to Mr. Monroe, September 12, 1795; his Letter to

The doctrine of the English admiralty, on the subject of provisions being considered contraband, was laid down very fully and clearly in the case of the *Jonge Margaretha*. (*b*) It was there observed, that the catalogue of contraband had varied much, and, sometimes, in such a manner as to make it difficult to assign the reasons of the variations, owing to particular circumstances, the history of which had not accompanied the history of the decisions. In 1673, certain articles of provision, as corn, wine, and oil, were deemed contraband, according to the judgment of a person of great knowledge and experience in the practice of the admiralty; and, in much later times, many other sorts of provisions have been condemned as contraband. In 1747 and 1748, butter and salted fish and rice were condemned as contraband; and those cases show that articles of human food have been considered as contraband, when it was probable they were intended for naval or military use. The modern established rule is, that provisions are not generally contraband, but may become so, under circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it. Among the circumstances which tend to preserve provisions from being liable to be treated as contraband, one is, that they are of the growth of the country which produces them. Another circumstance to which some indulgence is shown by the practice of nations, is when the articles are in their native and unmanufactured state. Thus, iron is treated with indulgence, though anchors and other instruments fabricated out of it are directly contraband. Hemp is more
* 140 favorably considered than cordage; * and wheat is not considered as so objectionable a commodity, when going to an enemy's country, as any of the final preparations of it for human use. The most important distinction is, whether the articles were intended for the ordinary use of life, or even for mercantile ships' use, or whether they were going with a highly probable destination to military use. The nature and quality of the port to which the articles are going is not an irrational test. If the port be a general commercial one, it is presumed the articles are going for civil use, though occasionally a ship of war may be constructed in that port. But if the great predominant character of that

Mr. Pinckney, January 16, 1797; Instructions from the Secretary of State to the American Minister to France, July 15, 1797.

(*b*) 1 C. Rob. [189], 159, ed. Phil.

port, like Brest in France, or Portsmouth in England, be that of a port of naval military equipment, it will be presumed that the articles were going for military use, although it is possible that the articles might have been applied to civil consumption. As it is impossible to ascertain positively the final use of an article *ancipitis usus*, it is not an injurious rule which deduces the final use from the immediate destination; and the presumption of a hostile use, founded on its destination to a military port, is very much inflamed, if, at the time when the articles were going, a considerable armament was notoriously preparing, to which a supply of those articles would be eminently useful. (*x*)

These doctrines of the English prize law were essentially the same with that adopted by the American Congress in 1775, for they declared that all vessels, to whomsoever belonging, carrying provisions or other necessaries to the British army or navy within the colonies, should be liable to seizure and confiscation. (*a*) They were likewise fully adopted by the Supreme Court of the United States, when we came to know and feel the value of belligerent rights, by becoming a party to a maritime war. In the case of the *Commercen*, (*b*) a neutral vessel, captured by one of our cruisers in the act of carrying provisions for the use of the British armies in Spain, the court held, that provisions, being * neutral property, but the growth of the enemy's * 141 country, and destined for the supply of the enemy's military or naval force, were contraband. The court observed, that, by the modern law of nations, provisions were not generally contraband, but they might become so on account of the particular situation of the war, or on account of their destination. If destined for the ordinary use of life in the enemy's country, they were not contraband; but it was otherwise if destined for the army or navy of the enemy, or for his ports of military or naval equipment. And if the provisions were the growth of the enemy's country, and destined for the enemy's use, they were to be treated as contraband, and liable to forfeiture, even though the

(*a*) Journals of the Confederation Congress, i. 241. (*b*) 1 Wheaton, 382.

(*x*) See 3 Phillimore's Int. Law, (4th ed.) 422, 441; 78 L. T. 403. A submarine cable, and also a ship employed in laying it by a belligerent nation, may, it seems, be of a commercial or belligerent character according to the circumstances under which they are chiefly used. The International, L. R. 3 Adm. & Ecc. 321, 327; see The Gauntlet, id. 381; L. R. 4 P. C. 184.

army or navy were in a neutral port, for it would be a direct interposition in the war.

This case followed the decisions of Sir William Scott, and carried the doctrine of contraband, as applied to provisions, to as great an extent. It held the voyage of the Swedish neutral so illegal as to deserve the infliction of the penalty of loss of freight.

It is the *usus bellici* which determined an article to be contraband; and as articles come into use as implements of war which were before innocent, there is truth in the remark, that as the means of war vary and shift from time to time, the law of nations shifts with them; not, indeed, by the change of principles, but by a change in the application of them to new cases, and in order to meet the varying inventions of war. When goods are once clearly shown to be contraband, confiscation to the captor is the natural consequence. This is the practice in all cases, as to the article itself, excepting provisions; and as to them, when they become contraband, the ancient and strict right of forfeiture is softened down to a right of pre-emption on reasonable terms. (*a*) * 142 But, generally, to stop contraband goods, would, * as Vattel observes, (*a*) prove an ineffectual relief, especially at sea. The penalty of confiscation is applied, in order that the fear of loss might operate as a check on the avidity for gain, and deter the neutral merchant from supplying the enemy with contraband articles. The ancient practice was, to seize the contraband goods, and keep them, on paying the value. But the modern practice of confiscation is far more agreeable to the mutual duties of nations, and more adapted to the preservation of their rights. It is a general understanding, grounded on true principles, that the powers at war may seize and confiscate all contraband goods, without any complaint on the part of the neutral merchant, and without any imputation of a breach of neutrality in the neutral sovereign himself. (*b*) It was contended, on the part of the French nation, in 1796, that neutral governments were bound to restrain their subjects from selling or exporting articles contraband of war to the belligerent powers. But it was successfully shown, on the part of the United States, that neutrals may lawfully sell, at home, to a belligerent purchaser, or carry, themselves, to the

(*a*) Case of the Haabet, 2 C. Rob. 182.
(*b*) Vattel, b. 3, c. 7, sec. 113.

(*a*) B. 3, c. 7, sec. 113.

belligerent powers, contraband articles subject to the right of seizure, *in transitu.* (*c*) This right has since been explicitly declared by the judicial authorities of this country. (*d*) The right of the neutral to transport, and of the hostile power to seize, are conflicting rights, and neither party can charge the other with a criminal act.[1]

Contraband articles are said to be of an infectious nature, and they contaminate the whole cargo belonging to the *same owners. The innocence of any particular article is *143 not usually admitted to exempt it from the general confiscation. By the ancient law of Europe, the ship, also, was liable to condemnation; and such a penalty was deemed just, and supported by the general analogies of law; for the owner of the ship had engaged it in an unlawful commerce, and contraband goods are seized and condemned *ex delicto.* But the modern practice of the courts of admiralty, since the age of Grotius, is milder; and the act of carrying contraband articles is attended only with the loss of freight and expenses, unless the ship belongs to the owner of the contraband articles, or the carrying of them has been connected with malignant and aggravating circumstances; and among those circumstances, a false destination and false papers are considered as the most heinous. In those cases, and in all cases of fraud in the owner of the ship, or in his agent, the penalty is car-

(*c*) M. Adet's Letter to Mr. Pickering, March 11, 1796; Mr. Pickering's Letters to M. Adet, January 20 and May 25, 1796; Circular Letter of the Secretary of the Navy to the Collectors, August 4, 1793.

(*d*) Richardson *v.* Maine Ins. Company, 6 Mass. 113; The Santissima Trinidad, 7 Wheaton, 283.

[1] This passage is cited and approved by Lord Westbury in *Ex parte* Chavasse, *re* Grazebrook, 11 Jur. N. S. 400, 34 L. J. N. S. By. 17; Historicus, Int. Law, 119, 129 (on neutral trade in contraband of war); Hobbs *v.* Henning, 17 C. B. N. S. 791, 810; 11 Op. Att.-Gen. 408, 410; ib. 451; The Helen, L. R. 1 Ad. & Ec. 1. The above cases show that similar principles apply to blockade-running. See also an article in 5 Am. Law Rev. 247.

The next passage, as to the infectious nature of contraband, is sustained by The Peterhoff, 5 Wall. 28, 59; s. c. Blatchf. Pr. 463; The Springbok, 5 Wall. 1, 26; Blatchf. Pr. 434. Vessels were condemned in the cases of The Bermuda, 3 Wall. 514, 555; Hart, ib. 559; s. c. Blatchf. Pr. 387. See also Hobbs *v.* Henning, 17 C. B. N. S. 791, 814.

Other treaties besides those mentioned in note (*b*) of the next page are to be found 11 U. S. St. at L. 642 (with King of Two Sicilies); 15 id. 473, 480, 481 (with Dominican Republic); 10 id. 880, 881; ib. 937, &c.

ried beyond the refusal of freight and expenses, and is extended to the confiscation of the ship, and the innocent parts of the cargo. (*a*) This is now the established doctrine; but it is sometimes varied by treaty, in like manner as all the settled principles and usages of nations are subject to conventional modification. (*b*) [1]

2. Blockades. — A neutral may also forfeit the immunities of his national character by violations of blockade; and among the rights of belligerents there is none more clear and incontrovertible, or more just and necessary in the application, than that which gives rise to the law of blockade. Bynker-
* 144 shoek (*c*) says, * it is founded on the principles of natural reason, as well as on the usage of nations; and Grotius (*a*) considers the carrying of supplies to a besieged town, or a blockaded port, as an offence exceedingly aggravated and injurious. They both agree that a neutral may be dealt with severely; and Vattel says he may be treated as an enemy. (*b*) The law of blockade is, however, so harsh and severe in its operation, that, in order to apply it, the fact of the actual blockade must be established by clear and unequivocal evidence; and the neutral must have had due previous notice of its existence; and the squadron allotted for the purposes of its execution must be competent to cut off all communication with the interdicted place or port; and the neutral must have been guilty of some act of violation, either by going in, or attempting to enter, or by coming out with a

(*a*) Bynk. Q. J. Pub. b. 1, c. 12 and 14; Heinec. de Nav. ob Vect. Merc. Vetit. Com. c. 2, sec. 6; Opera, ii. 348; The Staadt Embden, 1 C. Rob. 26; The Jonge Tobias, 1 C. Rob. 329; The Franklin, 3 C. Rob. 217; The Neutralitet, 3 C. Rob. 295; The Edward, 4 C. Rob. 68; The Ranger, 6 Rob. 125. *Vide infra*, 151, note.

(*b*) In the treaty between the United States and the Republic of Colombia, and in that with the republics of Chili, of Venezuela, and of the Peru-Bolivian Confederation and Ecuador, it is provided, that contraband articles shall not affect the rest of the cargo, or the vessel, for it is declared that they shall be left free to the owner. In these treaties, the articles of contraband are enumerated, and they consist of munitions of war, and other things made up in a military form and for a military use, and cavalry horses, with their furniture, and all materials, manufactured, prepared, and formed expressly for the purposes of war, either by sea or land. All other mechandises and things are declared to be subjects of lawful commerce.

(*c*) Q. J. Pub. b. 1, c. 4, sec. 11. [See Hall, Int. Law, pt. 4, c. 8.]

(*a*) B. 3, c. 1, sec. 5. (*b*) B. 3, c. 7, sec. 117.

[1] *Ante*, 142, n. 1. On the next passage in the text, compare Historicus's letters on the law of blockade, International Law, 87, 97.

cargo laden after the commencement of the blockade. The failure of either of the points requisite to establish the existence of a legal blockade amounts to an entire defeasance of the measure, even though the notification of the blockade had issued from the authority of the government itself. (*c*)

A blockade must be existing in point of fact; and, in order to constitute that existence, there must be a power present to enforce it. (*x*) All decrees and orders, declaring extensive coasts and whole countries in a state of blockade, without the presence

(*c*) The Betsey, 1 C. Rob. 93; 1 Chitty on Commercial Law, 450; Letter from Mr. Clay, the Secretary of State, to Mr. Tudor, dated October 23, 1827.

(*x*) The maritime blockage of a fort requires the actual presence of a force sufficiently strong to prevent, or render dangerous, attempts to pass it. 2 Halleck's Int. Law, c. 25, p. 186. So when a port is blockaded, it is the duty of the blockaders to maintain a force sufficient of itself to enforce the blockade, and a vessel which innocently enters and departs is not liable to seizure later in its voyage. The Nancy, 1 Acton, 57. War vessels which have been commissioned by, and thrown off their allegiance to, their country, the government of which is still in possession on the land, as happened recently in the Republic of Chili, are, it seems, simply pirates, if they have not been commissioned afresh by any State or recognized belligerent, and foreign powers cannot allow to a blockade by such vessels any validity in International Law. See 16 Law Mag. & Rev. (4th Series) 164, 174; *infra*, p. 184, n. Unrecognized insurgents are clearly pirates so far as they commit depredations upon the citizens or ships of neutral states. The Magellan Pirates, 1 Spinks, 81; The Huascar, 3 Wharton's Digest, 474; Snow's Int. Law, 205–208. At Rio Janeiro, in 1894, the United States, with the assent of the French and Austrian naval commanders, refused to recognize belligerent rights over neutral commerce in favor of the purely naval insurgents, and its war vessels intervened, by a show of force, to prevent the insurgent ships from firing on neutral vessels seeking to enter the port. See 19 Law Mag. & Rev. (4th Series), 32; 10 Law Quarterly Rev. 256.

Forfeitures for violating the government's interdict of commercial intercourse may be enforced after hostilities have ceased. Duvall *v.* United States, 154 U. S. 548; see United States *v.* Hallock, id. 537.

Besides the right of blockade in time of war, a blockade in time of peace, known as the "pacific blockade," first used as a mode of international coercion in 1827, has been since often employed by the European powers. It is not, however, recognized as a legitimate form of constraint according to the rules of International Law. The Ambrose Light, 25 Fed. Rep. 408, 446. In every recorded case, while detrimental to neutrals, such proceedings have amounted to no more than an armed coercion of a feeble State into some course demanded by a much stronger one, and the object has been, either to obtain satisfaction by means falling short of war for some damage caused by the other State, or to influence its conduct by direct intervention in its affairs. See Mr. J. M. Grover's article in 14 Law Mag. & Rev. (4th Series), 127; 18 id. 313; Cobbett's Int. Law Cases (2d ed.), 150.

of an adequate naval force to support it, are manifestly illegal and void, and have no sanction in public law. The ancient authorities all referred to a strict and actual siege or blockade. The language of Grotius (*d*) is *oppidum obsessum vel portus clausus*,

and the investing power must be able to apply its force * 145 to every point of the * blockaded place, so as to render it dangerous to attempt to enter, and there is no blockade of that part where its power cannot be brought to bear. (*a*) The definition of a blockade given by the convention of the Baltic powers, in 1780, and again in 1801, and by the ordinance of Congress, in 1781, required that there should be actually a number of vessels stationed near enough to the port to make the entry apparently dangerous. The government of the United States has uniformly insisted that the blockade should be effective by the presence of a competent force, stationed and present at or near the entrance of the port; and they have protested with great energy against the application of the right of seizure and confiscation to ineffectual or fictitious blockades. (*b*) [1]

(*d*) B. 3, c. 1, sec. 5.

(*a*) The Mercurius, 1 C. Rob. 80; The Betsey, 1 C. Rob. 93; The Stert, 4 C. Rob. 65; Letter of the Secretary of the Navy to Commodore Preble, February 4, 1804.

(*b*) Mr. King's Letter to Lord Grenville, May 23, 1799; Mr. Marshall's Letter to Mr. King, Sept. 20, 1799; Mr. Madison's Letter to Mr. Pinckney, October 25, 1801; Letter of the Secretary of the Navy to Commodore Preble, February 4, 1804; Mr. Pinckney's Letter to Lord Wellesley, January 14, 1811. In the convention between Great Britain and Russia, on the 17th of June, 1801, a blockaded port was declared to be, "that where there is, by the disposition of the power which attacks it with ships stationary, or sufficiently near, an evident danger in entering." The definition in the treaty of commerce between the United States and Chili, in May, 1832, art. 15, and the Peru-Bolivian Confederation, in May, 1838, art. 14, of a besieged or blockaded place is, "one actually attacked by a belligerent force, capable of preventing the entry of the neutral."

[1] *Post*, 147, n. 1; The Peterhoff, 5 Wall. 28: s. c. Blatchf. Pr. 463; The Sarah Starr, Blatchf. Pr. 69; The Douro, ib. 362; Historicus, Int. Law, 89. A public blockade once established and duly notified, must be presumed to continue until notice of discontinuance, in the absence of positive proof of discontinuance by other evidence; and it is not enough that the master and mate of the captured vessel swear that they saw no blockading ships off the port. The Baigorry, 2 Wall. 474; The Circassian, ib. 135. The occupation of New Orleans by the Northern forces in 1862 did not immediately put an end to the blockade of the port. The Circassian, 2 Wall. 135; The Baigorry, ib. 474. See The Venice, ib. 258; The Josephine, 3 Wall. 83.

The occasional absence of the blockading squadron, produced by accident, as in the case of a storm, and when the station is resumed with due diligence, does not suspend the blockade, provided the suspension, and the reason of it, be known; and the law considers an attempt to take advantage of such an accidental removal as an attempt to break the blockade, and as a mere fraud. (*c*) The American government seemed disposed to admit the continuance of the blockade in such a case; (*d*) and the language of the judicial authorities in New York has been in favor of the solidity and justness of the English doctrine of blockade on this * point. (*a*) But if the blockade * 146 be raised by the enemy, or by applying the naval force, or part of it, though only for a time, to other objects, or by the mere remissness of the cruisers, the commerce of neutrals to the place ought to be free. The presence of a sufficient force is the natural criterion by which the neutral is enabled to ascertain the existence of the blockade. He looks only to the matter of fact; and if the blockading squadron is removed when he arrives before the port, and he is ignorant of the cause of the removal, or if he be not ignorant, and the cause be not an accidental one, but voluntary, or produced by an enemy, he may enter, without being answerable for a breach of the blockade. When a blockade is raised voluntarily, or by a superior force, it puts an end to it absolutely; and if it be resumed, neutrals must be charged with notice *de novo*, and without reference to the former state of things, before they can be involved in the guilt of a violation of the blockade. (*b*)

The object of a blockade is not merely to prevent the importation of supplies, but to prevent export as well as import, and to cut off all communication of commerce with the blockaded port. The act of egress is as culpable as the act of ingress, if it be done fraudulently; and a ship coming out of a blockaded port is, in the first instance, liable to seizure, and, to obtain a release, the party must give satisfactory proof of the innocence of his

(*c*) The Frederick Molke, 1 C. Rob. 66; The Columbia, 1 C. Rob. 154; The Juffrow Maria Schroeder, 3 C. Rob. 155; The Hoffnung, 6 C. Rob. 116, 117.

(*d*) Mr. Marshall's Letter to Mr. King, September 20, 1799.

(*a*) Radcliff, J., 2 Johns. Cas. 187; Radcliff *v.* U. Ins. Co., 7 Johns. 38.

(*b*) Williams *v.* Smith, 2 Caines, 1; Letter of the Secretary of State to Mr. King, September 20, 1799; The Hoffnung, 6 C. Rob. 112.

intention. (*c*) But according to modern usage, a blockade does not rightfully extend to a neutral vessel found in port when the blockade was instituted, nor prevent her coming out with the cargo *bona fide* purchased, and laden on board before * 147 the * commencement of the blockade. (*a*) [1] The modern practice does not require that the place should be invested by land, as well as by sea, in order to constitute a legal blockade; and if a place be blockaded by sea only, it is no violation of belligerent rights for the neutral to carry on commerce with it by inland communications. (*b*)

It is absolutely necessary that the neutral should have had due notice of the blockade, in order to affect him with the penal consequences of a violation of it. This information may be communicated to him in two ways: either actually, by a formal notice from the blockading power; or constructively, by notice to his government, or by the notoriety of the fact. It is immaterial in what way the neutral comes to the knowledge of the blockade. If the blockade actually exists, and he has knowledge of it, he is bound not to violate it. A notice to a foreign government is a notice to all the individuals of that nation; and they are not permitted to aver ignorance of it, because it is a duty of the neutral government to communicate the notice to their people. (*c*) [2] In the case of a blockade without regular notice, notice in fact is generally requisite; and there is this difference between a blockade regularly notified and one without such notice; that, in a former case, the act of sailing for the blockaded place, with an intent to evade it, or to enter contingently, amounts, from the very commencement of the voyage, to a breach of the blockade; for the port is to be considered as closed up,

(*c*) Bynk. Q. J. Pub. b. 1, c. 4; The Frederick Molke, 1 C. Rob. 86; The Neptunus, 1 C. Rob. 170; The Vrouw Judith, 1 C. Rob. 150.

(*a*) The Betsey, 1 C. Rob. 93; The Vrouw Judith, 1 C. Rob. 150; The Comet, Edw. Adm. 32; Olivera *v.* Union Ins. Co., 3 Wheaton, 183.

(*b*) The Ocean, 3 C. Rob. 297; The Stert, ib. 299, note; Letter of the Secretary of State to Mr. King, September 20, 1799.

(*c*) The Neptunus, 2 C. Rob. 110; The Adelaide, 2 C. Rob. 111, note.

[1] The Hiawatha, Blatchf. Pr. 1; s. c. Prize Cases, 2 Black, 635; The Gerasimo, 11 Moore, P. C. 88, 116. During the late war the mouth of the Rio Grande, between Texas and the neutral territory of Mexico, was not blockaded, and, it seems, it could not have been. The Peterhoff, 5 Wall. 28; s. c. Blatchf. Pr. 463.

[2] The Hiawatha, Blatchf. Pr. 1. See the treaties referred to, *ante*, 142, n. 1.

until the blockade be formally revoked or actually raised; whereas, in the latter case of a blockade *de facto*, the ignorance of the party as to its continuance may be received as an excuse for sailing to the * blockaded place, on a doubtful and provisional destination. (*a*) The question of notice is a *148 question of evidence, to be determined by the facts applicable to the case. The notoriety of a blockade is of itself sufficient notice of it to vessels lying within the blockaded port.[1] In the case of the *Adelaide*, (*b*) it was the doctrine of the English admiralty that a notification given to one state must be presumed, after a reasonable time, to have reached the subjects of neighboring states, and it affects them with the knowledge of the fact, on just grounds of evidence. And after the blockade is once established, and due notice received, either actually or constructively, the neutral is not permitted to go to the very station of the blockading force, under pretence of inquiring whether the blockade had terminated, because this would lead to fraudulent attempts to evade it, and would amount in practice to a universal license to attempt to enter, and on being prevented, to claim the liberty of going elsewhere. Some relaxation was very reasonably given to this rule, in its application to distant voyages from America; and ships sailing for Europe, before knowledge of the blockade reached them, were entitled to notice, even at the blockaded port. If they sailed after notice, they might sail on a contingent destination for the blockaded port, with the purpose of calling for information at some European port, and be allowed the benefit of such a contingent destination, to be rendered definite by the information. But in no case is the information as to the existence of the blockade to be sought at the mouth of the port. (*c*)[2]

A neutral cannot be permitted to place himself in the vicinity of a blockaded port, if his situation be so near that he may, with impunity, break the blockade whenever *he *149 pleases, and slip in without obstruction. If that were to

(*a*) The Columbia, 1 C. Rob. 154; The Neptunus, 2 C. Rob. 119.

(*b*) 2 C. Rob. 111, *in notis.*

(*c*) The Spes and Irene, 5 C. Rob. 76.

[1] Prize Cases, 2 Black, 635, 677.

Notice of a blockade must not be more extensive than the blockade itself. The Franciska, 10 Moore, P. C. 37.

[2] The Josephine, 3 Wall. 83; The Cheshire, ib. 231; The Admiral, ib. 603; The Empress, Blatchf. Pr. 175, 659; The Union, Spinks, Prize C. 164.

be permitted, it would be impossible that any blockade could be maintained. It is a presumption, almost *de jure*, that the neutral, if found on the interdicted waters, goes there with an intention to break the blockade; and it would require very clear and satisfactory evidence to repel the presumption of a criminal intent. (*a*) [1]

The judicial decisions in England and in this country have given great precision to the law of blockade, by the application of it to particular cases, and by the extent, and clearness, and equity of their illustrations. They are distinguished, likewise, for general coincidence and harmony in their principles. All the cases admit that the neutral must be chargeable with knowledge, either actual or constructive, of the existence of the blockade, and with an intent, and with some attempt, to break it, before he is to suffer the penalty of a violation of it. The evidence of that intent, and of the overt act, will greatly vary, according to circumstances; and the conclusion to be drawn from those circumstances will depend, in some degree, upon the character and judgment of the prize courts; but the true principles which ought to govern have rarely been a matter of dispute. The fact of clearing out or sailing for a blockaded port is, in itself, innocent, unless it be accompanied with knowledge of the blockade. Such a vessel not possessed of such previous knowledge is to be first warned of the fact, and a subsequent attempt to enter constitutes the breach. This was the provision in the treaty with England, in 1794, and it has been declared in other cases, and is considered to be a correct exposition of the law of nations. (*b*)

(*a*) The Neutralitet, 6 C. Rob. 30; The Charlotte Christine, 6 C. Rob. 101; The Gute Erwartung, 6 C. Rob. 182; Bynk. Q. J. Pub. b. 1, c. 11; The Arthur, Edw. Adm. 202; Radcliff *v.* United Ins. Co., 7 Johns. 47; Fitzsimmons *v.* Newport Ins. Co., 4 Cranch, 185.

(*b*) Fitzsimmons *v.* Newport Ins. Co., 4 Cranch, 185; British Instructions to their fleets on the West India station, 5th of January, 1804; Letter of the Secretary of the Navy to Commodore Preble, February 4, 1804; Treaty between the United States and the Republic of Chili, May, 1832, art. 17, and between the United States and Venezuela, May, 1836, art. 20.

[1] The Cornelius, 3 Wall. 214. See The Sea Witch, 6 Wall. 242. Nothing less than uncontrollable necessity will justify a neutral in attempting to enter a blockaded port. The Diana, 7 Wall. 354. Questions of evidence of an intent to violate a blockade are very numerous in Blatchford's Prize Cases. See also 2 Sprague, 2, 3, and 5 Wallace.

*It has been a question in the courts of this country, *150 whether they ought to admit the law of the English prize courts, that sailing for a blockaded port, knowing it to be blockaded, was, in itself, an attempt, and an act sufficient to charge the party with a breach of the blockade, without reference to the distance between the port of departure and the port invested, or to the extent of the voyage performed when the vessel was arrested. (*a*). But in *Yeaton* v. *Fry* (*b*) the Supreme Court of the United States coincided essentially with the doctrine of the English prize courts; for they held, that sailing from Tobago for Curaçoa, knowing the latter to be blockaded, was a breach of the blockade; and, according to the opinion of Mr. Justice Story, in the case of the *Nereide*, (*c*) the act of sailing with an intent to break a blockade is a sufficient breach to authorize confiscation.[1] The offence continues, although at the moment of capture the vessel be, by stress of weather, driven in a direction from the port, for the hostile intention still remains unchanged. The distance or proximity of the two ports would certainly have an effect upon the equity of the application of the rule. A Dutch ordinance, in 1630, declared that vessels bound to the blockaded ports of Flanders were liable to confiscation, though found at a distance from them, unless they had voluntarily altered the voyage before coming in sight of the port; and Bynkershoek contends for the reasonableness of the order. (*d*) What that distance must be is not defined; and if the ports be not very wide apart, the act of sailing for the blockaded port may reasonably be deemed evidence of a breach of it, and an overt act of fraud upon the belligerent rights. But a relaxation of the rule has been required and granted in the case of distant voyages, *such as those *151 across the Atlantic; and the vessel is allowed to sail on a contingent destination for a blockaded port, subject to the duty of subsequent inquiry at suitable places. (*a*) The ordinance of Congress, of 1781, seems to have conceded this point to the

(*a*) Fitzsimmons *v.* Newport Ins. Co., 4 Cranch, 185; Vos & Graves *v.* U. Ins. Co., 2 Johns. Cas. 180, 469.

(*b*) 5 Cranch, 335. (*c*) 9 Cranch, 440, 446.

(*d*) Q. J. Pub. b. 1, c. 11; 3 C. Rob. 326, *in notis.*

(*a*) 5 C. Rob. 76; 6 Cranch, 29; Sperry *v.* The Delaware Ins. Co., 2 Wash. 243; Naylor *v.* Taylor, 9 Barn. and Cress. 718.

[1] The Circassian, 2 Wall. 135; The Admiral, 3 Wall. 603; *ante*, 85, n. 1.

extent of the English rule, for they made it lawful to take and condemn all vessels of all nations, "destined to any such port," without saying anything of notice or proximity. (*b*)

The consequence of a breach of blockade is the confiscation of the ship; and the cargo is always, *prima facie*, implicated in the guilt of the owner or master of the ship; and it lays with them to remove the presumption that the vessel was going in for the benefit of the cargo, and with the direction of the owner. (*c*)[1] The old doctrine was much more severe, and often inflicted, not merely a forfeiture of the property taken, but imprisonment, and other personal punishment; (*d*) but the modern and milder usage has confined the penalty to the confiscation of the ship and goods. If a ship has contracted guilt by a breach of blockade, the offence is not discharged until the end of the voyage. The penalty never travels on with the vessel further than to the end of the return voyage;[2] and if she is taken in any part of that voyage, she is taken *in delicto*. This is deemed reasonable, because no other opportunity is afforded to the belligerent force to vindicate
* 152 the law. (*e*) The penalty for a * breach of blockade is also held to be remitted, if the blockade has been raised before the capture. The *delictum* is completely done away when the blockade ceases. (*a*)

There are other acts of illegal assistance afforded to a belliger-

(*b*) Journals of Congress, vii. 186. The mere act of sailing to a blockaded port is not an offence, if there was no premeditated design of breaking the blockade, though it should be found to continue when the vessel arrives off the port. See the opinion of Sir Wm. Scott, in the case of the Shepherdess, 5 C. Rob. 264; and of Lord Tenterden, in Naylor *v.* Taylor, 9 Barn. & Cress. 718; and of Tindal, Ch. J., in Medeiros *v.* Hill, 8 Bing. 231.

(*c*) The Mercurius, 1 C. Rob. 80; The Columbia, 1 C. Rob. 154; The Neptunus, 3 C. Rob. 173; The Alexander, 4 C. Rob. 93; The Exchange, Edw. Adm. 39.

(*d*) Bynk. Q. J. Pub. b. 1, c. 11.

(*e*) The Welvaart Van Pillaw, 2 C. Rob. 128; The Juffrow Maria Schroeder, 3 C. Rob. 147. In cases of contraband, the return voyage has not usually been deemed connected with the outward, and the offence was deposited with the offending subject; but in distant voyages, with contraband and false papers, the rule is different; the fraud contaminates the return cargo, and subjects it to condemnation, as being one entire transaction. The Rosalie and Betty, 2 C. Rob. 343; The Nancy, 3 C. Rob. 122; Carrington *v.* The Merchants' Ins. Co., 8 Peters, 495.

(*a*) The Lisette, 6 C. Rob. 387.

[1] The Panaghia Rhomba, 12 Moore, P. C. 168; The William Bagaley, 5 Wall. 377, 411. See also The United States *v.* Guillem, 11 How. 47, 62; The Sally Magee, 3 Wall. 451.

[2] The Wren, 6 Wall. 582.

ent besides supplying him with contraband goods and relieving his distress, under a blockade. Among these acts the conveyance of hostile despatches is the most injurious, and deemed to be of the most hostile and noxious character. The carrying of two or three cargoes of stores is necessarily an assistance of a limited nature; but in the transmission of despatches may be conveyed the entire plan of a campaign, and it may lead to a defeat of all the projects of the other belligerent in that theatre of the war. The appropriate remedy for this offence is the confiscation of the ship; and in doing so, the courts make no innovation on the ancient law, but they only apply established principles to new combinations of circumstances. There would be no penalty in the mere confiscation of the despatches. The proper and efficient remedy is the confiscation of the vehicle employed to carry them; and if any privity subsists between the owners of the cargo and the master, they are involved by implication in his delinquency. If the cargo be the property of the proprietor of the ship, then, by the general rule, *ob continentiam delicti*, the cargo shares the same fate, and especially if there was an active interposition in the service of the enemy, concerted and continued in fraud. (*b*)

A distinction has been made between carrying despatches of the enemy between different parts of his dominions and carrying despatches of an ambassador from a neutral * country *153 to his own sovereign. The effect of the former despatches is presumed to be hostile; but the neutral country has a right to preserve its relations with the enemy, and it does not necessarily follow that the communications are of a hostile nature.[1] Ambas-

(*b*) The Atalanta, 6 C. Rob. 440.

[1] *The Trent Affair.* (*x*) — In November, 1861, Captain Wilkes, of the United States war-steamer San Jacinto, after firing a round shot and a shell, boarded the English mail-packet Trent, in Old Bahama Channel, on its passage from Havana to Southampton, and by force carried off Messrs. Mason and Slidell, two rebel ministers from the Confederate States, so called, who had been taken on board as passengers bound for England. Mason and Slidell were conveyed to the United States, and committed to prison; but after a formal requisition by Great Britain, declaring the capture to be illegal, they were surrendered by the federal government. Mr. Seward took the ground that the Southern emissaries and their despatches

(*x*) See Francis Wharton's comments on this affair in 16 Cent. L. J. 384, 386. See 29 Am. L. Rev. 274.

sadors resident in a neutral country are favorite objects of the protection of the law of nations, and their object is to preserve the relations of amity between the governments; and the pre-

were contraband of war, and that the Trent might properly have been carried into port and condemned as prize. If such a condemnation had taken place, it was intimated that, as there was no direct process in prize courts against contraband persons, the adjudication against the ship would have carried the right to detain the persons for carrying whom she was condemned, as an indirect consequence. But as the ship was released by Captain Wilkes without necessity, and partly out of consideration for her innocent passengers, the capture was waived while incomplete, and the prisoners must therefore be released also. The principle was thought to be similar to the denial of the right of belligerents to search neutral vessels which the American government had always made. Mr. Seward to Lord Lyons, Dec. 26, 1861.

The British government did not acquiesce in these propositions, but denied that the conveyance of public agents of this character from Havana to St. Thomas on their way to Great Britain and France, and of their credentials or despatches (if any) on board the Trent, was or could be a violation of the duties of neutrality on the part of that vessel; and both for that reason, and also because the destination of these persons and despatches was *bona fide* neutral, it was thought certain that they were not contraband. The government further declared that they would not acquiesce in the capture of any British merchant ship in circumstances similar to those of the Trent, even though it was brought before a prize court. Earl Russell to Lord Lyons, Jan. 23, 1862.

Mr. Lawrence thinks that the same principle of the *jus belli* which subjects a neutral to confiscation for carrying military officers applies to the carriage of important persons in the civil service. The British claim to take their sailors out of American ships stood on wholly different grounds. Lawrence's Wheaton, App. 3, pp. 955, 956, and n. 72, pp. 217, 218.

Mr. Dana thinks that this case can be considered as having settled but one principle, and that one no longer disputed: that a public ship, though of a nation at war, cannot take persons out of a neutral vessel at sea, whatever may be the claim of her government on those persons. Wheat. Dana's note 228.

Professor Mountague Bernard, after stating the case and giving the despatches, comes to the conclusion that a neutral ship conveying persons in the enemy's employment, whether military or civil, is not liable to condemnation unless she is serving the enemy as a transport, and so as to assist, substantially, though not perhaps directly, his military operations. If the enemy has not the actual control and disposal of the ship by any contract, he thinks that it must be proved that the service performed was in its nature such as is rendered by a transport, and that there should be evidence of intention or knowledge from which intention may be reasonably inferred, on the part of the owner or his agent, the master. He thinks the rules of contraband inapplicable, and that the fact that the voyage is to end at a neutral port, though not conclusive, is a strong argument against condemnation, especially if coupled with proof that the ship was pursuing her ordinary employment. Neutrality of Great Britain during the Am. Civil War, c. 9, pp. 224, 225.

For further discussion of the subject, see Mr. Sumner's speech in the United States Senate, Jan. 9, 1862; M. Thouvenel's despatch to M. Mercier, of Dec. 3, 1861; Ann. Reg. 1861, p. 252, and Pub. Doc. 288; pamphlets by Professor

sumption is, that the neutral state preserves its integrity, and is not concerned in any hostile design. (*a*)

3. **Right of Search.** — In order to enforce the rights of belligerent nations against the delinquencies of neutrals, and to ascertain the real as well as assumed character of all vessels on the high seas, the law of nations arms them with the practical power of visitation and search. The duty of self-preservation gives to belligerent nations this right. It is founded upon necessity, and is strictly and exclusively a war right, and does not rightfully exist in time of peace, unless conceded by treaty. (*b*)[2] (*x*) All writers

(*a*) The Caroline, 6 C. Rob. 461; Martens, Summary, b. 7, c. 13.

(*b*) Le Louis, 2 Dods. 248; The Antelope, 10 Wheaton, 119. Yet the British Parliament, by statute, in August, 1839, in order more effectually to suppress the slave trade, and especially as against Portugal, a power that had grossly violated her treaty with England on that subject, authorized the power of visitation and search in time of peace. The British government disclaim the right *of search* in time of peace, but they claim at all times the right *of visit*, in order to know whether a vessel, pretending, for instance, to be American, and hoisting the American flag, be really what she seems to be. Lord Aberdeen's Despatch of December, 1841, to the American Minister, Mr. Stevenson. But the government of the United States do not admit the distinction between the right of visitation and the right of search. They consider the difference to be one rather of definition than principle, and that it is not known to the law of nations. They will not admit the exercise of the claim of visit to be a *right*; while the British government concedes that if, in the *exercise of the right of visit* to ascertain the genuineness of the flag which a suspected vessel bears, any injury ensues, prompt reparation would be made. *The mutual right of visitation and search* in reference to the slave trade has ever been conceded by the European governments of Austria, France, Great Britain, Prussia, and Russia, who were parties to the Quintuple Treaty at London, of December, 1841. See Mr. Webster's Despatch, as American Secretary of State, to Mr. Everett, the American Minister at London, of March 28, 1843. This treaty was subsequently ratified by all the contracting parties except France, who remained bound only to a restrictive right of search under the conventions of 1831 and 1833. The inter-visitation of ships at sea is a branch of the law of self-defence, and is, in point of fact, practised by the public vessels of all nations, including those of the United States, when the piratical character of a vessel is suspected. The right of visit is conceded for the sole purpose of ascertaining the

Parker (Cambridge, 1862), M. Hautefeuille, and Professor Mountague Bernard (Oxford, 1862); Woolsey, Int. Law, § 184; Historicus, Int. Law, 185; Lord Mackenzie, Roman Law, 60.

[2] The British government have abandoned the claim of a right of visitation in time of peace for the purpose of verifying the flag, except so far as allowed by treaty. Historicus, Int. Law, 173, where the whole subject is discussed. Hansard, cli. 1307, 2082; Ann. Reg. 1858, p. 188. Treaty with Great Britain of May 25, 1862, 12 U. S. St. at L. 279.

(*x*) Visitation and search are no longer permissible in time of peace, and if vessels of the United States are in time of peace searched by foreign cruisers, reparation will be required. 3 Wharton's Digest, § 327; see 16 Cent. L. J. 385.

upon the law of nations, and the highest authorities, acknowledge the right in time of war as resting on sound principles of public jurisprudence, and upon the institutes and practice of all great maritime powers. (*c*) And if, upon making the search, the vessel be found employed in contraband trade, or in carrying enemy's property, or troops, or despatches, she is liable to be taken and brought in for adjudication, before a prize court.

Neutral nations have frequently been disposed to question and resist the exercise of this right. This was particularly the case with the Baltic confederacy during the American war, and with the convention of the Baltic powers, in 1801. The right of search was denied, and the flag of the state was declared to be a substitute for all documentary and other proof, and to exclude all right of search. Those powers armed for the purpose of defending * 154 their neutral * pretensions; and England did not hesitate to consider it as an attempt to introduce, by force, a new code of maritime law inconsistent with her belligerent rights, and hostile to her interests, and one which would go to extinguish the right of maritime capture. The attempt was speedily frustrated and abandoned, and the right of search has, since that time, been considered incontrovertible. (*a*)

The whole doctrine was ably discussed in the English High Court of Admiralty, in the case of the *Maria*, (*b*) and it was adjudged that the right was incontestable, and that a neutral sovereign could not, by the interposition of force, vary that right. Two powers may agree among themselves that the presence of one of their armed ships, along with their merchant ships, shall be mutually understood to imply that nothing is to be found in that convoy of merchant ships inconsistent with amity or neu-

real national character of the vessel sailing under suspicious circumstances, and is wholly distinct from the right of search. It has been termed, by the Supreme Court of the United States, the *right of approach* for that purpose (The Marianna Flora, 11 Wheaton, 1, 43); and it is considered to be well warranted by the principles of public law and the usages of nations. Bynk. Q. J. Pub. lib. 1, c. 114, s. p.

(*c*) Vattel, b. 3, c. 7, sec. 114; Ord. de la Marine, of 1681, art. 12; Hübner, de la Saisie des Bâtimens Neutres; The Maria, 1 C. Rob. 340; Le Louis, 2 Dods. 245; The Marianna Flora, 11 Wheaton, 42.

(*a*) In the convention between England and Russia, on the 17th of June, 1801, Russia admitted the belligerent right of search, even of merchant vessels navigating under convoy of a ship of war, provided it was exercised by a ship of war belonging to government.

(*b*) 1 C. Rob. 340.

trality. (*c*) But no belligerent power can legally be compelled, by mere force, to accept of such a pledge; and every belligerent power who is no party to the agreement has a right to insist on the only security known to the law of nations on this subject, independent of any special covenant, and that is the right of personal visitation and search, to be exercised by those who have an interest in making it. The penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation; and the infliction of this penalty is conformable to the settled practice of nations, as well as to the principles of the municipal jurisprudence of most countries in Europe. There may be cases in which the master of a neutral ship may be authorized, by the natural right of self-preservation, to defend himself against extreme violence threatened by a cruiser, grossly abusing his commission; but, except in extreme cases, a merchant vessel has no right to say for itself, and an armed vessel has no right to say for it, that it will not submit to visitation or search, or be carried into a proximate port for judicial inquiry. Upon * these principles, a fleet of Swedish mer- * 155 chant ships, sailing under convoy of a Swedish ship of war, and under instructions from the Swedish government to resist, by force, the right of search claimed by British lawfully commissioned cruisers, was condemned. The resistance of the convoying ship was a resistance of the whole convoy, and justly subjected the whole to confiscation. (*a*)

The doctrine of the English admiralty on the right of visitation and search, and on the limitation of the right, has been recognized, in its fullest extent, by the courts of justice in this country. (*b*) The very act of sailing under the protection of a

(*c*) In the treaty of commerce between the United States and the Republic of Chili, in 1832, it was agreed that the right of visitation and search should not apply to vessels sailing under convoy. So, also, in the convention between the United States and the Peru-Bolivian Confederacy, of 1838, art. 19.

(*a*) The Maria, 1 C. Rob. 340; The Elsabe, 4 C. Rob. 408.

(*b*) The Nereide, 9 Cranch, 427, 438, 443, 445, 453; The Marianna Flora, 11 Wheaton, 42. The government of the United States admits the right of visitation and search by belligerent government vessels of their private merchant vessels, for enemy's property, articles contraband of war, or men in the land or naval service of the enemy. But it does not understand the law of nations to authorize, and does not admit, the right of search for subjects or seamen. England, on the other hand, asserts the right to look for her subjects on the high seas, into whatever service they might wander, and will not renounce it. The objections to the British claim, on the ground of public

belligerent or neutral convoy, for the purpose of resisting search, is a violation of neutrality. The Danish government asserted the same principle in its correspondence with the government of the United States, and in the royal instructions of the 10th of March, 1810;(*c*) and none of the powers of Europe have called in question the justice of the doctrine. (*d*)[1] Confiscation is applied, by way of penalty for resistance of search, to all vessels, without any discrimination as to the national character of the vessel or cargo, and without separating the fate of the cargo from that of the ship.

This right of search is confined to private merchant vessels, and does not apply to public ships of war. Their immunity from the exercise of any civil or criminal jurisdiction but that of the sovereign power to which they belong is uniformly asserted,

claimed, and conceded. A contrary doctrine is not to be * 156 found in any jurist or writer on the law of nations, or * admitted in any treaty; and every act to the contrary has been promptly met and condemned. (*a*)

law and policy, were stated with great force and clearness, in 1818, by the American Minister in London to Lord Castlereagh. Rush's Memoranda, 181–193, 279–283. The claim of Great Britain to the right of search, on the high seas, of neutral vessels, for deserters and other persons liable to military and naval service, has been a question of animated discussion between that government and the United States. It was one principal cause of the war of 1812, and remains unsettled to this day. In the discussions in 1842, between Lord Ashburton and Mr. Webster, relative to the boundary line of the State of Maine, the American Minister incidentally discussed the subject, and intimated that the rule hereafter to be insisted on would be, that every regularly documented American merchant vessel was evidence that the seamen on board were American, and would find protection under the American flag.

(*c*) 4 Hall's Law Journal, 263; Letters of Count Rosenkrantz to Mr. Erving, 28th and 30th June, and 9th July, 1811.

(*d*) The Austrian ordinance of neutrality of August 7, 1803, enjoined it upon all their vessels to submit to visitation on the high seas, and not to make any difficulty as to the production of the documentary proofs of property.

(*a*) Thurlow's State Papers, ii. 503; Casaregis's Discourses, 136; Mr. Canning's Letter to Mr. Monroe, August 3, 1807; Edinburgh Review for October, 1807, art. 1.

[1] Historicus, Int. Law, 173, 181; Wheat. Dana's note 242. The captain of a merchant steamer is not privileged from search by the fact that he has a government mail on board. The Peterhoff, 5 Wall. 28; s. c. Blatchf. Pr. 463. [As to the right to search the mail itself the law is not settled, but the right, if it exists, is not likely to be exercised except under suspicious circumstances. Hall, Int. Law, pt. 4, c. 6, § 252. — B.]

As to public ships, see 7 Op. Att.-Gen. 122, *ante*, 124, n. 1.

See the treaties referred to, *ante*, 142, n. 1, for regulations of visitation and search.

The exercise of the right of visitation and search must be conducted with due care and regard to the rights and safety of the

'In the case of Prins Frederik, 2 Dods. 451, the question was raised, and learnedly discussed, whether a public armed ship, belonging to the King of the Netherlands, was liable to civil or criminal process in a British port. She was brought in by assistance, in distress, and salvage was claimed, and the ship was arrested upon that claim, and a plea to the jurisdiction interposed. The question went off by arrangement, and was not decided, though the immunity of such vessels from all private claims was forcibly urged, on grounds of general policy and the usage of nations. And in this country, in the case of The Schooner Exchange *v.* M'Faddon, 7 Cranch, 116, it was decided, after great discussion, that a public vessel of war of a foreign sovereign, at peace with the United States, coming into their ports, and demeaning herself in a friendly manner, was exempt from the jurisdiction of the country. L'Invincible, 1 Wheaton, 238, 252, s. p. In that interesting case, The Schooner Exchange, it was shown that the exemption of a public ship in port from the local jurisdiction was not founded on the absolute right of another sovereign to such an exemption, but upon principles of public comity and convenience, and arose from the presumed consent of nations : that consent might be withdrawn, upon notice, without just offence ; and if a foreign ship, after such notice, comes into the port, she becomes amenable to the local laws in the same manner as other vessels ; and though a public ship and her armament might be excepted, the prize property which she brings into port is subject to the local jurisdiction, for the purpose of examination and inquiry, and, in a proper case, for restitution. It has been asserted, on the part of the executive authority of the United States, that a writ of *habeas corpus* may be lawfully awarded to bring up a subject illegally detained on board a foreign ship of war in our waters. Opinion of the Attorney-General of the United States, June 24, 1794. (Opinions of the Attorneys-General, i. 47.) So, also, it was the official opinion of the Attorney-General of the United States, in 1799, that it was lawful to serve civil or criminal process upon a person on board a foreign ship of war lying within a harbor of the United States. Ib. i. 55–57. These opinions do not apply, of course, to any process against the ship itself. Mr. Webster, the American Secretary of State, in his diplomatic letter to Lord Ashburton, the British Minister at Washington, of the date of August 1, 1842, contended, that if a vessel be driven by stress of weather or other necessity, or carried by unlawful force into a British port, even if it be a prohibited or blockaded port, that necessity exempted the vessel from all penalty and all hazard ; that a vessel on the high seas is regarded as part of the territory of the nation to which she belongs, and subject to its exclusive jurisdiction ; and if it be forced by such necessity into a foreign port, her immunities continue by the comity and practice of nations ; that the jurisdiction continues, though the vessel be *at anchor* in the foreign port ; so that if a murder be committed on board a vessel in a foreign port by one of the crew, or a passenger, on another of the crew, or a passenger, the offence is cognizable by the courts of the nation to which the vessel belongs ; that the vessel, while water-borne in foreign places, was, for the general *purpose of governing and regulating the rights, duties, and obligations of those on board,* considered as part of the territory to which she belonged, and that local laws did not affect existing relations between persons on board. He further stated that, by the comity and practice of nations, *merchant vessels* going voluntarily into a foreign port for trade, retain on board, for their protection and government, the jurisdiction and laws of their own country. These immunities were presumed to exist as a part of civilization, and to be allowed until expressly retracted. This presumption is deemed

vessels. (*b*) If the neutral has acted with candor and good faith, and the inquiry has been wrongfully pursued, the belligerent

to be part of the voluntary and adopted law of nations. The case of a vessel forced by necessity into a foreign port, placed the claim for exemption from interference on higher principles and stronger courtesy. If the vessel has slaves on board, the foreign government has no right to enter on board and interfere with that relation. It was admitted, however, that the exemption from the local jurisdiction could not be claimed for unlawful acts done, and contracts made, on board the vessel so placed. *Vide supra*, 109, 124, n., and *infra*, 362. The act of Congress giving jurisdiction in cases of felony committed in a foreign port, as in the case stated by Mr. Webster, assumes, and impliedly admits, a concurrent jurisdiction in the courts of the territory where the vessel was at the time. Lord Ashburton, in his reply of the 6th of August, declined the discussion of the question of immunity in harbor, on general principles, and said that Mr. Webster had advanced some propositions which rather surprised and startled him, though he did not pretend to judge of them. He admitted, that in the case of American vessels, driven by necessity into a British port, there ought not to be any officious interference with them, nor any further inquisition into the state of persons or things on board than might be indispensable to enforce the observance of the municipal laws of the country, and the proper regulation of its harbors and waters. The principles of national law, stated in the diplomatic correspondence above referred to, were judicially recognized by the Supreme Court of Louisiana, in the case of McCargo *v.* New Orleans Ins. Co., 10 Rob. La. 202, 316. It was there declared to be a true exposition of the law of nations, that a vessel on the high seas, in time of peace, engaged in a lawful voyage, was under the exclusive jurisdiction of the state to which her flag belongs; (*x*) and that if forced by necessity into a port of a friendly power, she loses

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(*b*) The Anna Maria, 2 Wheaton, 327. The right of visitation and search is sometimes laid under special restrictions, by convention between maritime states. See, for instance, art. 17 of the convention of navigation and commerce between the United States and the Peru-Bolivian Confederation, May, 1838.

(*x*) In The Annapolis, The Johanna Stoll, Lush. 295, 306, Dr. Lushington said: "The Parliament of Great Britain has not, according to the principles of public law, any authority to legislate for foreign vessels on the high seas, or for foreigners out of the limits of British jurisdiction, though, if Parliament thought fit so to do, this Court, in its instance jurisdiction at least, would be bound to obey. In cases admitting of doubt, the presumption would be that Parliament intended to legislate without violating any rule of international law, and the construction accordingly." See United States *v.* Diekelman, 92 U. S. 520.

A packet owned by a foreign sovereign, and commanded by officers commissioned by him, if she conveys mails and carries on commerce, is exempt from the admiralty jurisdiction in England. The Parlement Belge, 5 P. D. 197; 4 P. D. 129; see The Constitution, 4 P. D. 39. But a foreign sovereign, whose public vessels cannot be arrested, may, if he sues as plaintiff to recover damages for a collision, be required to give security for costs to a defendant who brings a counter-claim. The Newbattle, 10 P. D. 33; Mighell *v.* Sultan of Johore, [1894] 1 Q. B. 149.

A merchant vessel of a neutral nation, which is acting as a transport of one belligerent in carrying munitions of war and troops, is liable to condemnation as a prize, but cannot, it seems, if readily capable of capture, be properly fired upon

cruiser is responsible to the neutral in costs and damages, to be assessed by the prize court which sustains the judicial examina-

none of the rights appertaining to her on the high seas, but herself and cargo, and the persons on board, with their property, and all the rights incident to their personal relations, as established by the laws of the state to which they belong, were placed under the protection which the laws of nations extend to the unfortunate under such circumstances. Although the jurisdiction of the nation over the vessel belonging to it be not wholly exclusive, and though, for any unlawful acts committed, while in such a situation, by the master, crew, or owners, she or they may be responsible to the laws of the place, yet the local laws do not supersede the laws of the country to which the vessel belongs, so far as relates to the rights, duties, and obligations of those on board; and that whatever might be the state of the foreign law in relation to slavery, it did not operate on board the vessel so forced by necessity into the foreign port, and before a voluntary landing of the slaves on board, to dissolve the relation of master and slave.

Two cases, in which this interesting subject was discussed, are cited from Ortolan, Règles Internationales de la Mer, i. in Wheaton's Elements, 3d ed. 152-154, in which it was decided by the Council of State, in 1806, in the French courts, that foreign private vessels in French ports, for the purpose of trade, were exempted from the local jurisdiction, as to acts of mere international discipline of the vessel, and even as to crimes and offences committed by a person forming a part of its officers and crew, against another person belonging to the same, when the peace of the port is not disturbed. But the local jurisdiction is properly asserted as to crimes committed on board the vessel against persons not forming part of its officers and crew, or by any other than a person belonging to the same, or those committed by the officers and crew upon each other, if the peace of the port be thereby disturbed; and the jurisdiction, also, is exercised as to civil contracts made to persons not belonging to the vessel.(*y*) These were the cases of the Newton at Antwerp, and of the Sally, at

and sunk by a war-vessel of the other belligerent, as was recently done in the case of the British transport, Kow Shing, destroyed by the Japanese man of war Naniwa. 19 Law Mag. & Rev. (4th Series), 315.

(*y*) When a vessel is in a foreign port, "disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished by the proper authorities of the local jurisdiction." Waite, C. J., in Wildenhus's Case, 120 U. S. 1, 18; 28 Fed. Rep. 924; see United States *v.* Diekelman, 92 U. S. 520; The Newton, and The Sally, 1 Ortolan, Dip. de la Mer, 450; The Tempest, id. 455; L'Anémone, 3 Journal de Droit. Int. Privé, 413. The law of the port is binding on foreign merchant vessels in all matters concerning the peace of the port. Pelletier *v.* Hayti, 35 Albany L. J. 144. Mr. A. P. Morse, in an article in 42 Albany L. J. 345, 353, concludes that:—(1) By modern international law, the law of the flag in respect to merchant vessels is exclusive of the law of the port; (2) There are circumstances and conditions under which the law of the flag and the law of the port may exercise concurrent jurisdiction; (3) There are cases in which the law of the port is exclusive of the law of the flag.

The exemption of a public vessel from the local sovereignty in foreign waters is not an absolute but a qualified right which should be recognized and respected in accordance with the reciprocal rights

tion. The mere exercise of the right of search involves the cruiser in no trespass, for it is strictly lawful; but if he proceeds to capture the vessels [vessel] as prize, and sends her in for adjudication, and there be no probable cause, he is responsible. (*z*) It is not the search, but the subsequent capture, which is treated in such a case as a tortious act. (*c*) If the capture be justifiable, the subsequent detention for adjudication is never punished with damages; and in all cases of marine torts, courts of admiralty exercise a large discretion in giving or withholding damages. (*d*) [1]

* 157 * A rescue effected by the crew after capture, and when the captors are in actual possession, is unlawful, and considered to be a resistance within the application of the penalty of confiscation; for it is delivery by force from force. (*a*) And where the penalty attaches at all, it attaches as completely to

Marseilles. These cases show a liberal relaxation of the strict rights of the local jurisdiction, and so they are regarded by Mr. Wheaton. Another important principle of international jurisprudence was declared by the French Court of Cassation, in 1832, in the case of the Carlo Alberto (Sirey, Recueil Général de Jurisprudence, xxxii. 578, cited from Wheaton's Elements, 3d ed. 154), viz. that by the law of nations, a foreign vessel, allied or neutral, is considered as part of the territory of the nation to which it belongs, and entitled to the privilege of the inviolability of the territory; but that privilege ceases to protect her when having committed acts of hostility in the French territory inconsistent with its character of ally or neutral, and that even the pretext of putting into port in distress will not exclude the jurisdiction of the local tribunals of a charge of high treason against the persons found on board.

(*c*) 2 Mason, 439.

(*d*) Story, J., 11 Wheaton, 54–56.

(*a*) The Despatch, 3 C. Rob. 278; Brown *v.* Union Ins. Co., 5 Day, 1.

[1] The Ostsee, 9 Moore, P. C. 150, Spinks, Pr. 174, 33 Eng. L. & Eq. 28; The Leucade, Spinks, Pr. 217; The Aline and Fanny, 10 Moore, P. C. 491, 500; The Maria, 11 Moore, P. C. 271, 287; The Thompson, 3 Wall. 155; La Manche, 2 Sprague, 207; The Jane Campbell, Blatchf. Pr. 101; The Dashing Wave, 5 Wall. 170. In the first of these cases the Privy Council reversed Dr. Lushington's decision, and laid down more liberal principles as to allowing costs and damages to claimants of a vessel captured without probable cause, than had formerly prevailed in the English practice. See Katchenovsky's Prize Law, by Pratt, London, 157 *et seq.*

and duties of the sovereign of the State and the sovereign of the ship; and a distinction is to be drawn between acts which have no effect externally to the vessel and those done on her which have an external operation. See Mr. A. P. Morse's article in 50 Alb. L. J. 204.

(*z*) See *supra*, p. 153, note (*x*). This right, when lawful, must be exercised in a lawful manner; if resisted, the penalty is the confiscation of the property withheld from visitation and search. 2 Halleck's Int. Law (Baker's 3d ed.), 258, 259.

the cargo as to the ship; for the master acted as agent of the owner of the cargo, and his resistance was a fraudulent attempt to withdraw it from the rights of war. (*b*)

A neutral is bound not only to submit to search, but to have his vessel duly furnished with the genuine documents requisite to support her neutral character. (*c*) The most material of these documents are the register, passport, or sea-letter, muster-roll, log-book, charter-party, invoice, and bill of lading. (*x*) The want of some of these papers is strong presumptive evidence against the ship's neutrality; yet the want of any one of them is not absolutely conclusive. (*d*) Si aliquid ex solemnibus deficiat, cum æquitas poscit subveniendum est. The concealment of papers material for the preservation of the neutral character justifies a capture, and carrying into port for adjudication, though it does not absolutely require a condemnation. It is good ground to refuse costs and damages on restitution, or to refuse further proof to relieve the obscurity of the case, where the cause labored under heavy doubts, and there was *prima facie* ground for condemnation independent of the concealment. (*e*) The spoliation of papers is a still more aggravated and inflamed circumstance of suspicion. That fact may exclude further * proof, * 158 and be sufficient to infer guilt; but it does not, in England, as it does by the maritime law of other countries, create an absolute presumption *juris et de jure;* and yet a case that escapes with such a brand upon it is saved so as by fire. (*a*) The Supreme Court of the United States has followed the less rigorous English rule, and held that the spoliation of papers was not,

(*b*) The Catharina Elizabeth, 5 C. Rob. 232.

(*c*) Answer to the Prussian Memorial, 1753; Hübner, de la Saisie des Bâtimens Neutres.

(*d*) Danish Instructions, 10th March, 1810. The register of a vessel is the only document which need be on board a vessel in time of universal peace, to prove national character. Catlett *v.* Pacific Ins. Co., 1 Paine, 594. By the convention of navigation and commerce between the United States and the Peru-Bolivian Confederation, May, 1838, art. 18, the vessels of each power are to be furnished in time of war with sea-letters or passports, describing the name, property, and burden of the ship, and name and residence of the commander. So they must also be provided with certificates, containing the particulars of the cargo, and the place whence the ship sailed, signed by the officers of the port.

(*e*) Livingston *v.* Maryland Ins. Co., 7 Cranch, 544.

(*a*) The Hunter, 1 Dods. 480.

(*x*) Hall, Int. Law, Appen. III.

of itself, sufficient ground for condemnation, and that it was a circumstance open for explanation; for it may have arisen from accident, necessity, or superior force. (*b*) If the explanation be not prompt and frank, or be weak and futile; if the cause labors under heavy suspicions, or there be a vehement presumption of bad faith, or gross prevarication, — it is good cause for the denial of further proof; and the condemnation ensues from defects in the evidence, which the party is not permitted to supply. The observation of Lord Mansfield, in *Bernardi* v. *Motteux*, (*c*) was to the same effect. By the maritime law of all countries, he said, throwing papers overboard was considered as a strong presumption of enemy's property; but, in all his experience, he had never known a condemnation on that circumstance only.[1] (*x*)

(*b*) The Pizarro, 2 Wheaton, 227.

(*c*) Doug. 581.

[1] The Johanna Emilie, Spinks, Prize C. 12; The Ella Warley, Blatchf. Pr. 288, 648; The Stephen Hart, ib. 387; The Peterhoff, ib. 463; The Mersey, ib. 187; The Zavalla, ib. 173, and other cases in the same volume.

(*x*) An American vessel on the high seas, which has no passport or manifest, though thereby deprived of freedom from search under the treaty of amity and commerce of 1788 (8 U. S. Stat. at Large, 12, 26, arts. 25, 27) is still entitled to the protection of international law, and is not subject to condemnation. The Venus, 27 Ct. Cl. 116.

LECTURE VIII.

OF TRUCES, PASSPORTS, AND TREATIES OF PEACE.

HAVING considered the rights and duties appertaining to a state of war, I proceed to examine the law of nations relative to negotiations, conventions, and treaties, which either partially interrupt the war, or terminate in peace.

1. **Of Truces.** — A truce or suspension of arms does not terminate the war, but it is one of the *commercia belli* which suspends its operations. These conventions rest upon the obligation of good faith; and as they lead to pacific negotiations, and are necessary to control hostilities, and promote the cause of humanity, they are sacredly observed by civilized nations.

A particular truce is only a partial cessation of hostilities, as between a town and an army besieging it. But a general truce applies to the operations of the war; and if it be for a long or indefinite period of time, it amounts to a temporary peace, which leaves the state of the contending parties, and the questions between them, remaining in the same situation as it found them. A partial truce may be made by a subordinate commander, and it is a power necessarily implied in the nature of his trust; but it is requisite to a general truce, or suspension of hostilities throughout the nation, or for a great length of time, that it may be made by the sovereign of the country, or by his special authority. (*a*) The general principle on the subject *is, *160 that if a commander makes a compact with the enemy, and it be of such a nature that the power to make it could be reasonably implied from the nature of the trust, it will be valid and binding though he abuse his trust. The obligation he is under not to abuse his trust regards his own state, and not the enemy. (*a*)

A truce binds the contracting parties from the time it is concluded, but it does not bind the individuals of the nation so as to

(*a*) Vattel, b. 3, c. 16, sec. 233–238; Grotius, b. 8, c. 21.
(*a*) Rutherforth, b. 2, c. 9; Vattel, b. 3, c. 16, sec. 261; Grotius, b. 3, c. 22, sec. 4.

render them personally responsible for a breach of it, until they have had actual or constructive notice of it. Though an individual may not be held to make pecuniary compensation for a capture made, or destruction of property, after the suspension of hostilities, and before notice of it had reached him, yet the sovereign of the country is bound to cause restoration to be made of all prizes made after the date of a general truce. To prevent the danger and damage that might arise from acts committed in ignorance of the truce, it is common and proper to fix a prospective period for the cessation of hostilities, with a due reference to the distance and situation of places. (*b*)

A truce only temporarily stays hostilities; and each party to it may, within his own territories, do whatever he would have a right to do in time of peace. He may continue active preparations for war, by repairing fortifications, levying and disciplining troops, and collecting provisions and articles of war. He may do whatever, under all the circumstances, would be deemed compatible with good faith and the spirit of the agreement; but he is justly restrained from doing what would be directly injurious to the enemy, and could not safely be done in the midst of hostilities. Thus, in the case of a truce between the governor of a fortified town and the army besieging it, neither party is at liberty to continue works, constructed either for attack or defence, and which could not safely be done if hostilities had

*161 *continued; for this would be to make a mischievous and fraudulent use of the cessation of arms. So, it would be a fraud upon the rights of the besieging army, and an abuse of the armistice, for the garrison to avail themselves of the truce to introduce provision and succors into the town, in a way or through passages which the besieging army would have been competent to prevent. (*a*) The meaning of every such compact is, that all things should remain as they were in the places contested, and of which the possession was disputed, at the moment of the conclusion of the truce. (*b*)

At the expiration of the truce, hostilities may recommence without any fresh declaration of war; but if it be for an indefinite time, justice and good faith require due notice of an intention to terminate it. (*c*)

(*b*) Vattel, b. 3, c. 15, sec. 239, 244.
(*b*) Ib. sec. 250.

(*a*) Vattel, b. 3, c. 16, sec. 247, 248.
(*c*) Vattel, b. 3, c. 16, sec. 260.

Grotius and Vattel, (*d*) as well as other writers on national law, have agitated the question, whether a truce for a given period, as, for instance, from the first of January to the first of February, will include or exclude the first day of each of these months. Grotius says, that the day from whence a truce is to be computed is not one of the days of the truce, but that it will include the whole of the first day of February as being the day of its termination. Puffendorf, Heineccius, and Vattel, on the other hand, are of opinion, that the day of the commencement of the truce would be included; and as the time ought to be taken largely and liberally, for the sake of humanity, the last day mentioned would also be included. Every ambiguity of this kind ought always to be prevented, by positive and precise stipulations, as, from such a day to such a day, both inclusive.(*e*)

2. Passports. — * A passport or safe-conduct is a privilege *162 granted in war, and exempting the party from the effects of its operation, during the time and to the extent prescribed in the permission. It flows from the sovereign authority; but the power of granting a passport may be delegated by the sovereign to persons in subordinate command, and they are invested with that power either by an express commission, or by the nature of their trust. (*a*) The general of an army, from the very nature of his power, can grant safe-conducts; but the permission is not transferable by the person named in the passport, for it may be that the government had special reasons for granting the privilege to the very individual named, and it is presumed to be personal. If the safe-conduct be granted, not for persons, but for effects, those effects may be removed by others besides the owner, provided no person be selected as the agent against whom there may exist a personal objection, sufficient to render him an object of suspicion or danger, within the territories of the power granting the permission.

He who promises security, by a passport, is morally bound to afford it against any of his subjects or forces, and to make good

(*d*) Grotius, b. 3, c. 21, sec. 4; Vattel, b. 3, c. 16, sec. 244; Puff. 8. 7. 8; Heinecc. Jur. Nat. et Gent. 2. 9. 208.

(*e*) The rule proposed by the English commissioners, in their report on the practice of the English courts, in July, 1831, is recommended by its simplicity and certainty. They propose to compute the first day exclusively, and the last day inclusively, in *all cases*. See iv. 95.

(*a*) Vattel, b. 3, c. 17.

any damage the party might sustain by a violation of the passport. The privilege being so far a dispensation from the legal effects of war, it is always to be taken strictly, and must be confined to the purpose, and place, and time, for which it was granted. A safe-conduct generally includes the necessary baggage and servants of the person to whom it is granted; and, to save doubt and difficulty, it is usual to enumerate, with precision, every particular branch and extent of the indulgence. If a safe-conduct be given for a stated term of time, the person in whose favor it was granted must leave the enemy's country before the time expires, unless detained by sickness, or some unavoidable
* 163 circumstance, * and then he remains under the same protection. The case is different with an enemy who comes into the country of his adversary during a truce. He, at his own peril, takes advantage of a general liberty allowed by the suspension of hostilities, and, at the expiration of the truce, the war may freely take its course, without being impeded by any claims of such a party for protection. (*a*)

It is stated that a safe-conduct may even be revoked by him who granted it, for some good reason; for it is a general principle in the law of nations, that every privilege may be revoked when it becomes detrimental to the state. If it be a gratuitous privilege, it may be revoked purely and simply; but if it be a purchased privilege, the party interested in it is entitled to indemnity against all injurious consequences, and every party affected by the revocation is to be allowed time and liberty to depart in safety. (*b*)

The effect of a license given by the enemy to the subjects of the adverse party, to carry on a specified trade, has already been considered, (*c*) in respect to the light in which it is viewed by the government of the citizens accepting it. A very different effect is given to these licenses by the government which grants them, and they are regarded and respected as lawful relaxations or suspensions of the rules of war. It is the assumption of a state of peace to the extent of the license, and the act rests in the discretion of the sovereign authority of the state, which alone is competent to decide how far considerations of commercial and political expediency may, in particular cases, control the ordinary

(*a*) Vattel, b. 3, c. 17, sec. 273, 274.
(*b*) Ib. sec. 276.
(*c*) *Supra*, [81,] 85.

consequences of war. In the country which grants them, licenses to carry on a pacific commerce are *stricti juris*, as being exceptions to a general rule; though they are not to be construed with pedantic accuracy, nor will every *small *164 deviation be held to vitiate the fair effect of them. (*a*) An excess in the quantity of goods permitted to be imported might not be considered as noxious to any extent; but a variation in the quality or substance of the goods might be more significant. Whenever any part of the trade assumed under the license is denuded of any authority under it, such part is subject to condemnation.

Another material circumstance in all licenses is the limitation of time in which they are to be carried into effect, for what is proper at one time may be very unfit and mischievous at another time. Where a license was limited to be in force until the 29th of September, and the ship did not sail from the foreign port until the 4th of October, yet, as the goods were laden on board by the 12th of September, and there was an entire *bona fides* on the part of the person holding the license, this was held to be legal. (*b*) But where a license was to bring away a cargo from Bordeaux, and the party thought proper to change the license, and accommodate it to another port in France, it was held by the English admiralty, in the case of the *Twee Gebroeders*, (*c*) that the license was vitiated, and the vessel and cargo were condemned. It has also been held that the license must be limited to the use of the precise persons for whose benefit it was obtained. The great principle in these cases is, that subjects are not to trade with the enemy without the special permission of the government; and a material object of the control which the government exercises over such a trade is that it may judge of the particular persons who are fit to *be intrusted *165

(*a*) The Cosmopolite, 4 C. Rob. 8; Grotius, b. 3, c. 21, sec. 14, lays down the general rule, that a safe-conduct, of which these licenses are a species, are [is] to be liberally construed; *laxa magis quam stricta interpretatio admittenda est.* And licenses were eventually construed with great liberality in the British courts of admiralty. Judge Croke, in the case of The Abigail, Stewart, Vice-Adm. 360; Duer on Insurance, i. 595–619. The English admiralty and common-law decisions on this subject of licenses are collected and examined by Mr. Duer, with his usual diligence and sagacity.

(*b*) Schroeder *v.* Vaux, 15 East, 52; 3 Camp. 83.

(*c*) Edw. Adm. 95.

with an exemption from the ordinary restrictions of a state of war. (*a*)

3. Treaties of Peace. — The object of war is peace; and it is the duty of every belligerent power to make war fulfil its end with the least possible mischief, and to accelerate, by all fair and reasonable means, a just and honorable peace. The same power which has the right to declare and carry on war, would seem naturally to be the proper power to make and conclude a treaty of peace; but the disposition of this power will depend upon the local constitution of every nation; and it sometimes happens that the power of making peace is committed to a body of men who have not the power to make war. In Sweden, after the death of Charles XII., the king could declare war without the consent of the national diet, but he made peace in conjunction with the senate. (*b*) So, by the Constitution of the United States, the President, by and with the advice and consent of two thirds of the Senate, may make peace, but it is reserved to Congress to declare war. This provision in our Constitution is well adapted (as will be shown more fully hereafter) to unite, in the negotiation and conclusion of treaties, the advantage of talents, experience, stability, and a comprehensive knowledge of national interest, with the requisite secrecy and despatch.

Treaties of peace, when made by the competent power, are obligatory upon the whole nation. If the treaty requires the payment of money to carry it into effect, and the money cannot be raised but by an act of the legislature, the treaty is morally obligatory upon the legislature to pass the law, and to refuse it would be a breach of public faith.[1] The department of the government that is intrusted by the Constitution with the
* 166 treaty-making power is competent to * bind the national faith in its discretion; for the power to make treaties of peace must be coextensive with all the exigencies of the nation, and necessarily involves in it that portion of the national sovereignty which has the exclusive direction of diplomatic negotiations and contracts with foreign powers. All treaties made by

(*a*) The Jonge Johannes, 4 C. Rob. 263. See the law as to licenses, collected in 1 Holt, 129, note. Mr. Holt says, that Sir William Scott was, in fact, the author of the whole learning of the law relating to the system of licenses.

(*b*) Vattel, b. 4, c. 2, sec. 10.

[1] But see 286, n. 1.

that power become of absolute efficacy, because they are the supreme law of the land.

There can be no doubt that the power competent to bind the nation by treaty may alienate the public domain and property by treaty. If a nation has conferred upon its executive department, without reserve, the right of treating and contracting with other states, it is considered as having invested it with all the power necessary to make a valid contract. That department is the organ of the nation, and the alienations by it are valid, because they are done by the reputed will of the nation. The fundamental laws of a state may withhold from the executive department the power of transferring what belongs to the state; but if there be no express provision of that kind, the inference is, that it has confided to the department charged with the power of making treaties a discretion commensurate with all the great interests and wants and necessities of the nations. A power to make treaties of peace necessarily implies a power to decide the terms on which they shall be made, and foreign states could not deal safely with the government upon any other presumption. The power that is intrusted generally and largely with authority to make valid treaties of peace can, of course, bind the nation by alienation of part of its territory; and this is equally the case whether that territory be already in the occupation of the enemy or remains in the possession of the nation, and whether the property be public or private. (*a*) (*x*) In the case of the *Schooner Peggy*, (*b*) the *Supreme Court of the United *167 States admitted that individual rights, acquired by war, and vested rights of the citizens, might be sacrificed by treaty for

(*a*) Vattel, b. 1, c. 20, sec. 244; ib. c. 21, sec. 262; b. 4, c. 2, sec. 11, 12. Vattel admits that the fundamental laws of a nation may withhold the power of alienation by treaty; and it would seem, by necessary inference, to be a violation of fundamental law for the treaty-making power, acting under such an instrument as the Constitution of the United States, to agree by treaty for the abolition or alteration of any part of the Constitution. The stipulation would go to destroy the very authority for making the treaty.

(*b*) 1 Cranch, 103.

(*x*) The Clayton-Bulwer Treaty of 1850, between Great Britain and the United States, as to a canal across the Isthmus of Panama, is strictly no longer binding, as it contemplated a canal that was never actually constructed, and appears not to have applied to Honduras. See Cobbett's Int. Law Cases (2d ed.), 48.

national purposes. So, in the case of *Ware* v. *Hylton* (*a*) [1] it was said to be a clear principle of national law that private rights might be sacrificed by treaty to secure the public safety, though the government would be bound to make compensation and indemnity to the individuals whose rights had thus been surrendered. The power to alienate, and the duty to make compensation, are both laid down by Grotius (*b*) in equally explicit terms.

A treaty of peace is valid and binding on the nation, if made with the present ruling power of the nation, or the government *de facto*. Other nations have no right to interfere with the domestic affairs of any particular nation, or to examine and judge of the title of the party in possession of the supreme authority. They are to look only to the fact of possession. (*c*) And it is an

(*a*) Chase, J., 3 Dallas, 199, 245.

(*b*) B. 3, c. 20, sec. 7. The government of the United States declared to the British government, in reference to the disputed line of the northeastern boundary of the United States, that it had no power to cede any part of the territory claimed by the State of Maine, without the consent of that state. See the letter of Lord Palmerston to Mr. Fox, the British Minister at Washington, November 19, 1837. Though the better opinion would seem to be, that such a power of cession does reside exclusively in the treaty-making power, under the Constitution of the United States, yet sound discretion would forbid the exercise of it without the consent of the local governments who are interested, except in cases of great necessity, in which that consent might be presumed. (*x*) By the treaty made between the United States and Great Britain, in 1842, respecting the disputed boundary line between the State of Maine and the British provinces of New Brunswick and Canada, part of the lands claimed by the State of Maine were, by the line agreed on, placed within the British territory, and ceded to Great Britain; yet the United States did not act on the subject until they had previously and very wisely provided, that commissioners on the part of the states of Massachusetts and Maine should be present at the negotiation, and assenting to the boundary line agreed on.

(*c*) Vattel, b. 4, c. 2, sec. 14, and *vide supra*, [24,] 25.

[1] Little *v.* Watsou, 32 Maine, 214; Meade *v.* United States, 2 Nott & H. (Court of Claims) 224.

(*x*) "But," says Dr. Woolsey (Int. Law, 3d ed. § 99), in referring to this passage, "it might be asked, whether the treaty-making power is not necessarily limited by the existence of states, parties to the confederation, having control for most purposes over their own territory. Could the treaty-making power blot out the existence of a state which helped to create the union, by ceding away all its domain? Such fearful power was never lodged in the general government by the Constitution, and could never be lawfully exercised in the ordinary contingencies of the confederation. Only in extreme cases, where the treaty-making power is called upon to accept the *fact* of conquest, or to save the whole body from ruin by surrendering a part, could such an exercise of power be justified."

acknowledged rule of international law, that the principal party in whose name the war is made cannot justly make peace without including those defensive allies in the pacification who have afforded assistance, though they may not have acted as principals; for it would be faithless and cruel for the principal in the war to leave his weaker ally to the full force of the enemy's resentment. The ally is, however, to be no further a party to the stipulations and obligations of the treaty than he has been willing to consent. All that the principal can require is, that his ally be considered as restored to a state of peace. Every alliance, in which all the parties are principals in the war, obliges the allies to treat in concert, though each one makes a separate treaty of peace for himself. (*d*)

*The effect of a treaty of peace is to put an end to the *168 war, and to abolish the subject of it. Peace relates to the war which it terminates. It is an agreement to waive all discussion concerning the respective rights of the parties, and to bury in oblivion all the original causes of the war. (*a*) It forbids the revival of the same war, by taking arms for the cause which at first kindled it, though it is no objection to any subsequent pretensions to the same thing on other foundations. (*b*) After peace, the revival of grievances arising before the war is not to be encouraged, for treaties of peace are intended to put an end to such complaints; and if grievances then existing are not brought forward at the time when peace is concluded, it is to be presumed that it is not intended to bring them forward at any future time. (*c*) Peace leaves the contracting parties without any right of committing hostility, for the very cause which kindled the war, or for what has passed in the course of it. It is, therefore, no longer permitted to take up arms again for the same cause. (*d*) But this will not preclude the right to complain and resist, if the same grievances which kindled the war be renewed and repeated; for that would furnish a new injury and a new cause of war equally just with the former war. If an abstract right be in

(*d*) Vattel, b. 4, c. 2, sec. 16.

(*a*) Sir William Scott, in the case of the Eliza Ann, 1 Dods. 249. Though private rights existing before the war may not be remitted by peace, the presumption is otherwise as to the rights of kings and nations. Grotius, b. 3, c. 20, sec. 19.

(*b*) Vattel, b. 4, c. 2, sec. 19.

(*c*) Sir William Scott, The Molly, 1 Dods. 396.

(*d*) Vattel, b. 4, c. 2, sec. 19.

question between the parties, the right, for instance, to impress at sea one's own subjects from the merchant vessels of the other, and the parties make peace without taking any notice of the question, it follows, of course, that all past grievances, damages, and injury, arising under such claim, are thrown into * 169 oblivion, * by the amnesty which every treaty implies; but the claim itself is not thereby settled, either one way or the other. It remains open for future discussion, because the treaty wanted an express concession or renunciation of the claim itself. (*a*)

A treaty of peace leaves everything in the state in which it finds it, if there be no express stipulation on the subject. If nothing be said in the treaty of peace about the conquered country or places, they remain with the possessor, and his title cannot afterwards be called in question. (*b*) During war, the conqueror has only a usufructuary right to the territory he has subdued; and the latent right and title of the former sovereign continues, until a treaty of peace, by its silence or by its express stipulation, shall have extinguished his title for ever. (*c*)

The peace does not affect private rights which had no relation to the war. Debts existing prior to the war, and injuries committed prior to the war, but which made no part of the reasons for undertaking it, remain entire, and the remedies are revived (*d*) [1] There are certain cases in which even debts contracted or injuries committed between two subjects of the belligerent powers, during the war, are the ground of a valid claim, as in the case of ransom bills, and of contracts made by prisoners of war for subsistence, or in a trade carrried on under a license. (*e*) This would be the case if the debt between them was contracted, or the injury was committed, in a neutral country. (*f*)

A treaty of peace binds the contracting parties from the moment of its conclusion, and that is understood to be from

(*a*) Vattel, b. 4, c. 2, sec. 19, 20.

(*b*) Vattel, b. 4, c. 2, sec. 19, 21.

(*c*) Sir William Scott, 1 Dods. 452; Vattel, b. 3, c. 13, sec. 197, 198; ib. b. 4, c. 2, sec. 1; Grotius, lib. 3, c. 6, sec. 4, 5; Mably, Droit de l'Europe, i. c. 2, 144.

(*d*) Grotius, b. 3, c. 20, sec. 16, 18.

(*e*) Crawford *v.* The William Penn, 3 Wash. 484; 1 Peters, C. C. 106 s. c.

(*f*) Vattel, b. 4, c. 2, sec. 22.

[1] Alcinous *v.* Nigreu, 4 El. & Bl. 217, 219; *ante*, 67, n. 1; 91, n. 1.

* the day it is signed. (*a*)[1] A treaty made by the minister * 170 abroad, when ratified by his sovereign, relates back to the time of signing; (*b*) but, like a truce, it cannot affect the subjects of the nation with guilt, by reason of acts of hostility subsequent to the date of the treaty, provided they were committed before the treaty was known. All that can be required in such cases is, that the government make immediate restitution of things captured after the cessation of hostilities; and to guard against inconvenience from the want of due knowledge of the treaty, it is usual to fix the periods at which hostilities are to cease at different places, and for the restitution of property taken afterwards. (*c*)

But though individuals are not deemed criminal for continuing hostilities after the date of the peace, so long as they are ignorant of it, a more difficult question to determine is, whether they are responsible *civiliter* in such cases. Grotius (*d*) says, they are not liable to answer in damages, but it is the duty of the government to restore what has been captured and not destroyed. In the case of the American ship *Mentor*, (*e*) which was taken and destroyed, off Delaware Bay, by British ships of war, in 1783, after the cessation of hostilities, but before that fact had come to the knowledge of either of the parties, the point was much discussed; and it was held that the injured party could not pass over the person from whom the alleged injury had been received, and fix it on the commander of the English squadron on that station, who was totally ignorant of the whole transaction, and at the distance of thirty leagues from the place where it passed. There was no instance in the annals of the prize courts of such

(*a*) Vattel, b. 4, c. 3, sec. 24; Martens, Summary, b. 8, c. 7, sec. 5; In the matter of Metzger, N. Y. Legal Observer for March, 1847.

(*b*) Hylton *v.* Brown, 1 Wash. 312.

(*c*) Vattel, b. 4, c. 3, sec. 24, 25; ib. b. 2, c. 12, sec. 156, 157; ib. b. 3, c. 16; 2 Dallas, 40; Azuni, ii. 227; Hylton *v.* Brown, 1 Wash. 311, 312, 342, 351.

(*d*) B. 3, c. 21, sec. 5.

(*e*) 1 C. Rob. 179; [The Ostsee, 9 Moore, P. C. 150, 176.]

[1] Sovereign power over territory ceded ends at the moment of cession, except for municipal purposes and keeping order, for which it continues until delivery. United States *v.* Reynes, 9 How. 127; Davis *v.* Police Jury of Concordia, ib. 280. But in so far as the treaty affects individual rights which were vested before it was ratified, it is not considered as concluded until there is an exchange of ratifications. Haver *v.* Yaker, 9 Wall. 32.

a remote and consequential responsibility in such a case. * 171 The actual wrong-doer is the person to answer in * judgment, and to him the responsibility, if any, is attached. He may have other persons responsible over to him, but the injured party could look only to him. The better opinion was, that though such an act be done through ignorance of the cessation of hostilities, yet mere ignorance of that fact would not protect the officer from civil responsibility in a prize court; and that if he acted through ignorance, his own government must protect him and save him harmless. When a place or country is exempted from hostility by articles of peace, it is the duty of the government to use due diligence to give its subjects notice of the fact; and the government ought, in justice, to indemnify its subjects who act in ignorance of the peace. And yet it would seem from that case that the American owner was denied redress in the British admiralty, not only against the admiral of the fleet on that station, but against the immediate author of the injury. Sir William Scott denied the relief against the admiral; and ten years before that time relief had equally been denied by his predecessor against the person who did the injury. If that decision was erroneous, an appeal ought to have been prosecuted. We have, then, the decision of the English High Court of Admiralty, denying any relief in such a case, and an opinion of Sir William Scott many years afterwards, that the original wrong-doer was liable. The opinions cannot otherwise be reconciled than upon the ground that the prize courts have a large and equitable discretion in allowing or withholding relief, according to the special circumstances of the individual case, and that there is no fixed or inflexible general rule on the subject.

If a time be fixed by the treaty for hostilities to cease in a given place, and a capture be previously made, but with knowledge of the peace, it has been a question among the writers on public law whether the captured property should be restored. The * 172 better and the more reasonable opinion * is, that the capture would be null, though made before the day limited, provided the captor was previously informed of the peace; for, as Emerigon (*a*) observes, since constructive knowledge of the peace, after the time limited in different parts of the world, ren-

(*a*) Valin, Traité des Prises, c. 4, sec. 4, 5; Emerigon, Traité des Ass. c. 12, sec. 19; Azuni on Maritime Law, ed. N. Y. ii. 231.

ders the capture void, much more ought actual knowledge of the peace to produce that effect. (*b*)

*Another question arose subsequent to the treaty of *173 Ghent, of 1814, in one of the British vice-admiralty courts, on the validity of a recapture, by a British ship of war, of a British vessel captured by an American privateer. The capture made by an American cruiser was valid, being made before the period fixed for the cessation of hostilities, and in ignorance of the fact; but the prize had not been carried into port and condemned, and while at sea she was recaptured by the British cruiser after the period fixed for the cessation of hostilities, but without knowledge of the peace. It was decided that the possession of the vessel by the American privateer was a lawful possession, and that the British cruiser could not, after the peace, lawfully use force to divest this lawful possession. The restoration of peace put an end, from the time limited, to all force, and then the general principle applied, that things acquired in war remain, as to title and possession, precisely as they stood when the peace took place. The *uti possidetis* is the basis of every treaty of peace, unless it be otherwise agreed. Peace gives a final and perfect title to captures without condemnation; and as it forbids all force, it destroys all hopes of recovery as much as if the vessel was carried *infra præsidia*, and condemned. (*a*)

(*b*) This point was extensively discussed in the French prize courts, in the case of the capture of the British ship Swineherd, by the French privateer Bellona, in 1801, and what was sufficient knowledge of the fact of the peace to annul the capture was the great question. The English ship was taken possession of, and carried into the Isle of France, and libelled, and condemned as lawful prize of war. The sentence of condemnation was affirmed in 1803, on appeal to the Council of Prizes at Paris, and M. Merlin has reported at large the elaborate argument and opinion of M. Collet-Descotils, the imperial advocate-general in the Council of Prizes, in favor of the captors. The ground he took, and upon which the Council of Prizes proceeded, was, that the king's proclamation of the signature of the preliminary articles of peace, though made known repeatedly to the French cruiser before the capture, but unaccompanied by any French attestation, was not that sufficient and indubitable evidence to the French cruiser of the fact of the peace, upon which he ought to have acted, and that the period of the five months had not elapsed within which it was lawful, in the Indian seas, to continue hostilities. The learned and venerable author of that immense work, the Repertory of Jurisprudence, says, on introducing the case, that he shall be silent on the question, and contents himself with giving the discussions, and particularly the opinion of the advocate-general and the reasons of the Council of Prizes. See Répertoire Universel et Raisonné de Jurisprudence, par M. le Comte Merlin, xiii. tit. Prise Maritime, sec. 5.

(*a*) Case of the Legal Tender, Halifax, April, 1815, cited in Wheaton's Dig. 302.

*174 A similar doctrine was held in the case of *the *Schooner Sophie*, (*a*) and a treaty of peace has the effect of quieting all titles of possession arising from the war, and of putting an end to the claim of all former proprietors to things of which possession was acquired by right of war.

If nothing be said to the contrary, things stipulated to be restored are to be returned in the condition in which they were taken; but this does not relate to alterations which have been the natural consequence of time, and of the operations of war. A fortress or a town is to be restored in the condition it was when taken, so far as it shall still be in that condition when the peace is made. (*b*) There is no obligation to repair, as well as to restore, a dismantled fortress or a ravaged territory. The peace extinguishes all claim for damages done in war, or arising from the operations of war. Things are to be restored in the condition in which the peace found them; and to dismantle a fortification or to waste a country, after the conclusion of the peace, and previous to the surrender, would be an act of perfidy. (*c*)

Treaties of every kind, when made by the competent authority, are as obligatory upon nations as private contracts are binding upon individuals; and they are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts. (*d*) [1] If a treaty should, in fact, be

*175 violated by one of the contracting *parties, either by proceedings incompatible with the particular nature of the

(*a*) 6 C. Rob. 138.

(*b*) Vattel, b. 4, c. 3, sec. 31, 34. (*c*) Ib. sec. 31.

(*d*) Grotius, b. 2, c. 16, sec. 1; Puff. b. 5, c. 12, sec. 1; Rutherforth's Institutes, b. 2, c. 7; Vattel, b. 2, c. 17; Eyre, Ch. J., in 1 Bos. & Pull. 438, 439; Opinion of Sir James Marriott, cited in 1 Chitty, Comm. Law, 44. But if the legislative and executive branches of the government have given and asserted a construction to a treaty with a foreign power, under which it claims dominion over a territory in its possession, the courts of justice will not set up or sustain a different construction. Foster *v.* Neilson, 2 Peters, 253. If a treaty be ambiguous in any part of it, the party who had the power, and on whom it was peculiarly incumbent to speak clearly and plainly, ought to submit to the construction most unfavorable to him, upon the reasonable maxim of the Roman law, that Pactionem obscuram iis nocere, in quorum fuit potestate legem apertius conscribere. Vattel, b. 2, c. 17, sec. 264.

[1] See, as to note (*d*), Wilson *v.* Wall, 6 Wall. 83, 89, *post*, 286, n. 1.

treaty, or by an intentional breach of any of its articles, it rests alone with the injured party to pronounce it broken. The treaty, in such a case, is not absolutely void, but voidable, at the election of the injured party. (*a*) If he chooses not to come to a rupture, the treaty remains obligatory. He may waive or remit the infraction committed, or he may demand a just satisfaction.

There is a very material and important distinction made by the writers on public law between a new war for some new cause, and a breach of a treaty of peace. In the former case, the rights acquired by the treaty subsist, notwithstanding the new war; but, in the latter case, they are annulled by the breach of the treaty of peace on which they are founded. A new war may interrupt the exercise of the rights acquired by the former treaty, and, like other rights, they may be wrested from the party by the force of arms. But then they become newly acquired rights, and partake of the operation and result of the new war. To recommence a war by breach of the articles of a treaty of peace is deemed much more odious than to provoke a war by some new demand and aggression; for the latter is simply injustice, but in the former case the party is guilty both of perfidy and injustice. (*b*) The violation of any one article of a treaty is a violation of the whole treaty; for all the articles are dependent on each other, and one is to be deemed a condition of the other, and a violation of any single article overthrows the whole treaty, if the injured party elects so to consider it. This may, however, be prevented by an express provision, that if one article be broken, the others shall, nevertheless, continue in full force. (*c*) We have a strong instance, in * our *176 own history, of the annihilation of treaties by the act of the injured party. In 1798, the Congress of the United States (*a*) declared that the treaties with France were no longer obligatory on the United States, as they had been repeatedly violated on the part of the French government, and all just claims for reparation refused.

(*a*) Grotius, b. 2, c. 15, sec. 15; b. 3, c. 20, sec. 35-38; Burlamaqui, pt. 4, c. 14, sec. 8, p. 355; Vattel, b. 4, c. 4, sec. 54.

(*b*) Grotius, b. 3, c. 20, sec. 27, 28; Vattel, b. 4, c. 4, sec. 42.

(*c*) Grotius, b. 3, c. 19, sec. 14; Vattel, b. 4, c. 4, sec. 47, 48; b. 2, c. 13, sec. 202.

(*a*) Act of July 7, 1798.

As a general rule, the obligations of treaties are dissipated by hostility, and they are extinguished and gone forever, unless revived by a subsequent treaty. But if a treaty contains any stipulations which contemplate a state of future war, and make provision for such an exigency, they preserve their force and obligation when the rupture takes place. All those duties of which the exercise is not necessarily suspended by the war, subsist in their full force. The obligation of keeping faith is so far from ceasing in time of war, that its efficacy becomes increased, from the increased necessity of it. What would become of prisoners of war, and the terms of capitulation of garrisons and towns, if the word of an enemy was not to be relied on? The faith of promises and treaties which have reference to a state of war is to be held as sacred in war as in peace, and among enemies as among friends. All the writers on public law admit this position, and they have never failed to recommend the duty and the observance of good faith, by the most powerful motives, and the most pathetic and eloquent appeals which could be addressed to the reason and to the moral sense of nations. (*b*) The tenth article of the treaty between the United States and Great Britain, in 1794, may be mentioned as an instance of a stipulation made for war. It provided that debts due from individuals of the one nation to those of the other, and the shares or moneys which they might have in the public funds, or in public or private banks, should never, in any event of war, be

sequestered or confiscated. There can be no doubt that * 177 the obligation of that article was not impaired * by the war

of 1812, but remained throughout that war, and continues to this day, binding upon the two nations, and will continue so, until they mutually agree to rescind the article; for it is a principle of universal jurisprudence, that a compact cannot be rescinded by one party only, if the other party does not consent to rescind it, and does no act to destroy it. In the case of *The Society for Propagating the Gospel* v. *New Haven*, (*a*) the Supreme Court of the United States would not admit the doctrine that treaties became extinguished *ipso facto* by war, unless revived by an express or implied renewal on the return of peace.

(*b*) Vattel, b. 3, c. 10, sec. 174; Grotius, b. 3, c. 25; Heinecc. Jur. Nat. et Gent. b. 2, c. 9, p. 213.

(*a*) 8 Wheaton, 494; Sutton *v.* Sutton, 1 Russ. & My. 663, s. p.

Such a doctrine is not universally true. Where treaties contemplate a permanent arrangement of national rights, or which by their terms are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. They revive at peace, unless waived, or new and repugnant stipulations be made. (*b*)

4. Of Territories Ceded or Acquired. — With respect to the cession of places or territories by a treaty of peace, though the treaty operates from the making of it, it is a principle of public law that the national character of the place agreed to be surrendered by treaty continues as it was under the character of the ceding country, until it be actually transferred. Full sovereignty cannot be held to have passed by the mere words of the treaty without actual delivery. To complete the right of property, the right to the thing and the possession of the thing must be united. This is a necessary principle in the law of property in all systems of jurisprudence. There must be both the *jus in* [*ad*] *rem* and the *jus in re*, according to the distinction of the civilians, and which Barbeyrac (*c*) says they borrowed from the canon law. This general law of property applies to the right of territory, no less than to other rights. *The prac- *178 tice of nations has been conformable to this principle, and

(*b*) The American Ministers, in their negotiations at London, in 1818, with the British government, insisted that the third article of the treaty of September, 1783, *relative to the fisheries*, was a fundamental and permanent article, securing a primary right, not annulled, though the exercise of the right was interrupted by the war of 1812; and that the right remained in full force, after the termination of the war, notwithstanding it was not noticed in the treaty of Ghent. The British commissioners, on the other hand, alleged that the war of 1812 cancelled the provision, and, not being renewed by the subsequent treaty of peace, the right was extinguished. The two nations at last agreed to the convention of the 20th of October, 1818, modifying and settling the question as to the fisheries, without yielding, on either side, their construction of the operation of the war of 1812, upon the treaty of 1783. Rush's Memoranda, 354–368. See the Diplomatic Correspondence between Mr. Adams and Lord Bathurst, in 1815. In this correspondence, the British negotiator admitted that the *acknowledgment* of a right or title in a treaty of peace was, in its own nature, of perpetual obligation. The cession of a right, as that of boundary lines and places, for instance, would seem to fall within the same principle. Such were the treaties of Munster, 1646, and of Utrecht, 1713, which, after long and exhausting wars, settled the rights of the great European powers on a solid and permanent foundation, and are still deemed to be in vigor, and intimately connected with the settlement of Europe. [The history of the fisheries question will be found in 5 Am. Law Rev. 389.]

(*c*) Puff. par Barbeyrac, liv. iv. c. 9, sec. 8, note 2.

the conventional law of nations is full of instances of this kind, and several of them were stated by Sir William Scott in the opinion which he gave in the case of the *Fama*. (*a*) [1]

(*a*) 5 C Rob. 106. It is a settled principle, in the law and usage of nations, that the inhabitants of a conquered territory change their allegiance, and their relation to their former sovereign is dissolved; but their relations to each other, and their rights of property, not taken from them by orders of the conqueror, remained undisturbed. The cession or conquest of a territory does not affect the rights of property. Vattel, b. 3, c. 13, sec. 200; The United States *v.* Percheman, 7 Peters, 51; Mitchel *v.* The United States, 9 Peters, 711; Strother *v.* Lucas, 12 Peters, 410, 438. The laws, usages, and municipal regulations in force at the time of the conquest or cession, remain in force, *until changed by the new sovereign*. Calvin's case, 7 Co. 17; Campbell *v.* Hall, Cowp. 209; 9 Peters, 711, 734, 748, 749; Strother *v.* Lucas, 12 Peters, 410. There is no doubt of the power of the sovereign to change the laws of a conquered or ceded country, unless restrained by the capitulation or treaty of cession. In the case of the Canal Appraisers *v.* The People, in 17 Wendell, 587, Chancellor Walworth declared, that in the case of a country acquired by conquest, no formal act of legislation is necessary to change the law; the mere will of the conqueror is sufficient. This is the case in governments where the conqueror is in possession of the legislative as well as the executive power; and until a nation or territory is wholly subdued, the conqueror is only entitled, by the usage of nations, to hold it as a temporary possession, by military occupation, until the final issue of the conquest is settled by treaty, or by the competent constitutional power. The principle of national law, as declared by the courts of the United States, is, that conquest does not give the conqueror *plenum dominium et utile*. A temporary right of possession and government is only acquired, unless the treaty of peace settles the question otherwise, or there be an absolute abandonment of the territory by the former sovereign, or an irretrievable subjection to the conqueror. United States *v.* Hayward, 2 Gallison, 486; Clark *v.* United States, 3 Wash. 104. The rule is different when a country is claimed by the right of discovery and occupancy, and not by right of conquest or cession. In the former case, the discoverers and new occupants carry with them all the general laws of the mother country applicable to their new situation as colonies, and they become, *ipso facto*, the law of the country. Such was the case with the United States, when they were first colonized by Great Britain; and this was the case, says Chancellor Walworth, with New York, when conquered from the Dutch in 1664; for the English held it, though acquired by conquest from the Dutch, not by that title merely, but by the prior right of discovery. But if he was in error on that point, yet, when the English acquired possession of New York by force, in 1664, the charter granted in that year to the Duke of York contained an explicit declaration of the king's will, that the laws of England should be the established laws of the province, and this put an end to the operation of the Roman Dutch laws imported from Holland. The illustrations above alluded to, of the sovereign power of the conqueror over the laws of the conquered countries, appears in the case of the northern barbarians who overran the south of Europe during the 5th and 6th centuries. They neither adopted their own laws entirely, nor retained those of the conquered countries to their full extent. The Roman provincials were governed between themselves, as to their pos-

[1] See, on the first statement in note (*a*), 211; on the next, Leitensdorfer *v.* Webb, United States *v.* Repentigny, 5 Wall. 20 How. 176.

The release of a territory from the dominion and sovereignty of the country, if that cession be the result of coercion or conquest, does not impose any obligation upon the government to indemnify those who may suffer a loss of property by the cession. (*x*) The annals of New York furnish a strong illustration of this position. The territory composing the State of Vermont belonged to this state; and it separated from it, and erected itself into an independent state, without the consent, and against the will, of the government of New York. The latter continued for many years to object to the separation, and to discover the strongest disposition to reclaim by force the allegiance of the inhabitants of that state. But they were unable to do it; and it was a case of a revolution, effected by force, analogous to that which was then in action between this country and Great Britain. And when New York found itself under the necessity of acknowledging the independence of Vermont, a question arose before the legislature, whether they were bound in duty to make compensation to individual citizens whose property would be sacrificed by the event, because their titles to land lying within the jurisdiction of Vermont, and derived from New York, would be disregarded by the government of that state. The claimants were heard at the bar of the house of assembly, by counsel, in 1787, and it was contended on their behalf that the state was bound, upon the principles of the social compact, to protect and defend the rights and property of all its members; and that whenever it became necessary, upon grounds of public expediency and policy, to withdraw the protection of govern-

ment *from the property of any of its citizens, without *179

sessions and personal rights, by the Roman law; the Salian Franks, by the Salic law; the Franks of the Rhine, by the Ripuarian law; the Alemans and Swabians, by the Alemannic law; and the Lombards by their own law. (Savigny's Hist. of the Roman Law, i.; and see *infra*, iii. 491.) So the Mahometan conquerors of Hindostan introduced their own law so far only as it affected the followers of Mahomet, leaving the conquered Hindoos to enjoy their own laws as between themselves. There is, therefore, now in India one law for Europeans and their descendants, another for the Hindoos, and another for the Mahometans; and these different laws have been adopted in India by the will of the English sovereign, without any parliamentary authority. The conquest of Gibraltar, Trinidad, Ceylon, the Cape of Good Hope, Louisiana, &c., all show that the old laws remain, or the laws of the conquering nation, in whole or in part, are substituted, at the mere will and pleasure of the conqueror.

(*x*) See *supra*, 25, note (*x*).

actually making the utmost efforts to reclaim the jurisdiction of the country, the state was bound to make compensation for the loss. In answer to this argument, it was stated that the independence of Vermont was an act of force beyond the power of this state to control, and equivalent to a conquest of that territory, and the state had not the competent ability to recover, by force of arms, their sovereignty over it, and it would have been folly and ruin to have attempted it. All pacific means had been tried without success; and as the state was compelled to yield to a case of necessity, it had discharged its duty; and it was not required, upon any of the doctrines of public law, or principles of political or moral obligation, to indemnify the sufferers. The cases in which compensation had been made for losses consequent upon revolutions in government were peculiar and gratuitous, and rested entirely on benevolence, and were given from motives of policy, or as a reward for extraordinary acts of loyalty and exertion. No government can be supposed to be able, consistently with the welfare of the whole community, and it is, therefore, not required to assume the burden of losses produced by conquest, or the violent dismemberment of the state. It would be incompatible with the fundamental principles of the social compact.

This was the doctrine which prevailed; and when the act of July 14, 1789, was passed, authorizing commissioners to declare the consent of the state to the independence of Vermont, it was expressly declared that the act was not to be construed to give any person claiming lands in Vermont, under title from this state, any right to any compensation whatsoever from New York.

LECTURE IX.

OF OFFENCES AGAINST THE LAW OF NATIONS.

THE violation of a treaty of peace, or other national compact, is a violation of the law of nations; for it is a breach of public faith. (*a*) Nor is it to be understood that the law of nations is a code of mere elementary speculation, without any efficient sanction. It has a real and propitious influence on the fortunes of the human race. It is a code of present, active, durable, and binding obligation. As its great fundamental principles are founded in the maxims of eternal truth, in the immutable law of moral obligation, and in the suggestions of an enlightened public interest, they maintain a steady influence, notwithstanding the occasional violence by which that influence may be disturbed. The law of nations is placed under the protection of public opinion. It is enforced by the censures of the press, and by the moral influences of those great masters of public law, who are consulted by all nations as oracles of wisdom; and who have attained, by the mere force of written reason, the majestic character, and almost the authority, of universal lawgivers, controlling by their writings the conduct of rulers, and laying down precepts for the government of mankind. No nation can violate public law, without being subjected to the penal consequence of reproach and disgrace, and without incurring the hazard of punishment, to be inflicted in open and solemn war by the injured party. The law of
*nations is likewise enforced by the sanctions of municipal *182
law. It is, says Blackstone, (*a*) adopted in its full extent by the common law of England; and whenever any question arises which is properly the subject of its jurisdiction, it is held to be a part of the law of the land. The offences which fall more immediately under its cognizance, and which are the most obvious, the most extensive, and most injurious in their effects, are the

(*a*) Vattel, b. 2, c. 15, sec. 221; Resolution of Congress of November 23, 1781.
(*a*) Comm. iv. 67; [*ante*, 1, n. 1.]

violations of safe-conduct, infringements of the rights of ambassadors, and piracy. To these we may add the slave-trade, which may now be considered, not, indeed, as a piratical trade, absolutely unlawful by the law of nations, but as a trade condemned by the general principles of justice and humanity, openly professed and declared by the powers of Europe.

1. Violation of Passports.—A safe-conduct or passport contains a pledge of the public faith, that it shall be duly respected, and the observance of this duty is essential to the character of the government which grants it. The statute law of the United States has provided, in furtherance of the general sanction of public law, that if any person shall violate any safe-conduct or passport, granted under the authority of the United States, he shall, on conviction, be imprisoned not exceeding three years, and fined at the discretion of the court. (*b*)

2. Violation of Ambassadors.—The same punishment is inflicted upon those persons who infringe the law of nations by offering violence to the persons of ambassadors and other public ministers, or by being concerned in prosecuting or arresting them or their domestic servants. (*c*) This is an offence highly injurious to a free and liberal communication between different governments, and mischievous in its consequences to the dignity and well-being of the nation. It tends to provoke the resentment of the sovereign whom the ambassador represents, and to bring upon the state the calamities of war. The English Parliament, under an impression of the danger to the community from violation of the rights of embassy, and urged by the spur of a particular occasion, carried the provisions of the statute of 7 Anne, c. 12, to a *183 dangerous extent. That statute prostrated all the *safeguards to life, liberty, and property, which the wisdom of the English common law had established. It declared, that any person convicted of suing out or executing civil process, upon an ambassador, or his domestic servants, by the oath of the party, or of one witness, before the lord chancellor and the two chief justices, or any two of them, might have such penalties and corporal punishment inflicted upon him as the judges should think

(*b*) Act of Congress, April 30, 1790, sec. 27. A foreign minister (and an attaché to a foreign legation is such) cannot waive his privilege, for it belongs to his sovereign who sends him. United States *v.* Benner, 1 Baldw. 234; [*ante*, 39, n. 1.]

(*c*) Act, *supra*, sec. 25, 26.

fit. The preamble to the statute contains a special and inflamed recital of the breach of the law of nations which produced it, by the arrest of the Russian Minister in the streets of London.

The Congress of the United States, during the time of the American war, discovered great solicitude to maintain inviolate the obligations of the law of nations, and to have infractions of it punished in the only way that was then lawful, by the exercise of the authority of the legislatures of the several states. They recommended to the states to provide expeditious, exemplary, and adequate punishment for the violation of safe-conducts or passports granted under the authority of Congress, to the subjects of a foreign power in time of war; and for the commission of acts of hostility against persons in amity or league with the United States; and for the infractions of treaties and conventions to which the United States were a party; and for infractions of the immunities of ambassadors and other public ministers. (*a*)

3. Piracy. — Piracy is robbery, or a forcible depredation on the high seas, without lawful authority, and done *animo furandi*, and in the spirit and intention of universal hostility. (*x*) It is the same offence at sea with robbery on land; and all the writers on the law of nations, and on the maritime law of Europe, agree in this definition of piracy. (*b*) Pirates have been regarded by all civilized nations as the enemies of the human race, and the most atrocious violators of the universal * law of society. (*a*) *184 They are everywhere pursued and punished with death, and the severity with which the law has animadverted upon this crime arises from its enormity and danger, the cruelty that accompanies it, the necessity of checking it, the difficulty of detection, and the facility with which robberies may be committed upon pacific traders in the solitude of the ocean. Every nation has a

(*a*) Journals of Congress, vii. 181.
(*b*) The United States *v.* Smith, 5 Wheaton, 153, and note, ib. 163.
(*a*) Cic. in Verrem, lib. 5; 3 Inst. 113.

(*x*) As maritime warfare is the right of sovereigns, and a depredation committed upon the high seas without their authority is piracy by the law of nations, naval commissions issued by those who wage war without recognition of belligerent rights are void. The Ambrose Light, 25 Fed. Rep. 408. A ship which has been sold at public auction to a *bona fide* purchaser, before proceedings against her by the Crown, cannot afterwards be condemned for earlier piratical acts. Reg. *v.* McCleverty, L. R. 3 P. C. 673; see Att-Gen. for Hong Kong *v.* Kwok-a-Sing, L. R. 5 P. C. 179, 199; Cox *v.* Hakes, 15 A. C. 506, 520.

right to attack and exterminate them without any declaration of war; for though pirates may form a loose and temporary association among themselves, and re-establish in some degree those laws of justice which they have violated with the rest of the world, (*b*) yet they are not considered as a national body, or entitled to the laws of war, as one of the community of nations. They acquire no rights by conquest; and the law of nations, and the municipal law of every country, authorize the true owner to reclaim his property taken by pirates, wherever it can be found; and they do not recognize any title to be derived from an act of piracy. The principle, that *a piratis et latronibus capta dominium non mutant*, is the received opinion of ancient civilians and modern writers on general jurisprudence; and the same doctrine was maintained in the English courts of common law, prior to the great modern improvements made in the science of the law of nations. (*c*)

By the Constitution of the United States, Congress are [is] authorized to define and punish piracies and felonies committed on the high seas, and offences against the law of nations. In pursuance of this authority, it was declared, by the act of Con-
* 185 gress of April 30, 1790, c. 9, sec. 8, that murder or * robbery, committed on the high seas, or in any river, haven, or bay out of the jurisdiction of any particular state, or any other offence which, if committed within the body of a county, would, by the laws of the United States, be punishable with death, should be adjudged to be piracy and felony, and punishable with death. It was further declared, that if any captain or mariner should piratically and feloniously run away with any vessel, or any goods or merchandise to the value of fifty dollars; or should yield up any such vessel voluntarily to pirates; or if any seaman should forcibly endeavor to hinder his commander from defending the ship or goods committed to his trust, or should make a revolt in the ship; every such offender should be adjudged a pirate and felon, and be punishable with death. (*a*) Accessaries to such piracies before

(*b*) Cic. de Off. 2, 11.

(*c*) Bynk. Q. J. Pub. b. 1, c. 17; Rutherforth, b. 2, c. 9; Azuni, ii. 351, 361, 362, ed. N. Y.; Cro. Eliz. 685; Anon. 2 Woodd. Lec. 429. Property found on board a pirate ship goes to the crown, of strict right, as droits of the admiralty; but the claim of the original owner is admitted upon equitable principles, on due application. The Helen, 1 Hagg. Adm. 142.

(*a*) By the act of Congress of March 3, 1835, c. 313, the offence of making a

the fact are punishable in like manner; but accessaries after the fact are only punishable by fine and imprisonment. And, by the act of March 3, 1819, c. 76, sec. 5, Congress declared, that if any person on the high seas should commit the crime of *piracy, as defined by the law of nations*, he should, on conviction, suffer death. This act was but temporary in its limitation, and has expired; but it was again declared, and essentially to the same effect, by the act of Congress of 15th May, 1820, c. 113, sec. 3, that if any person, upon the high seas, or in any open roadstead, or bay, or river, where the sea ebbs and flows, commits the crime of robbery in and upon any vessel, or the lading thereof, or the crew, he shall be adjudged a pirate. So, if any person engaged in any piratical enterprise, or belonging to the crew of any piratical vessel, should land and commit robbery on shore, such an offender shall also be adjudged a pirate. The statute, in this respect, seems to be only declaratory of the law of nations; and upon the doctrine of the case of *Lindo* v. *Rodney*, (*b*) such plunder and robbery ashore, by the crew, and with the aid of vessels, is a marine case, and of admiralty jurisdiction. The statute further declared, that the above provision was not to be construed to deprive any particular state of its jurisdiction over such offences when committed within the body of a county, or to authorize the courts of the United States to try any such offenders, after conviction or acquittance, for the same offence, in a state court. [1]

revolt in a ship is no longer punishable as a capital offence, but only by fine and imprisonment at hard labor.

(*b*) Doug. 613, note.

[1] See the trial of the Savannah Privateers, New York, 1862. It has been made felony for officers or mariners of vessels on waters within the admiralty jurisdiction of the United States to piratically or feloniously run away with the same, or any goods on board such vessel to the value of fifty dollars. Act of Aug. 8, 1846, 9 U. S. St. at L. c. 98, § 5, p. 73. So, any subject or citizen of any foreign state, who shall be found and taken on the sea, making war upon the United States, or cruising against the vessels and property thereof, or of the citizens of the same, contrary to any treaty between the United States and the state of which such person is a citizen or subject, where by such treaty such acts of such person are declared to be piracy, may be punished in the circuit court like other pirates. Act of March 3, 1847, 9 U. S. St. at L. c. 51, p. 175. Moreover, vessels built, purchased, fitted out, or held, for piratical acts, may be seized and condemned, whether any act of piracy shall have been committed or attempted from such vessel or not. Act of Aug. 5, 1861, 12 U. S. St. at L. c. 48, p. 314.

* 186 * Under these legislative provisions it has been made a question, whether it was sufficient to refer to the law of nations for a definition of piracy, without giving the crime a precise definition in terms. The point was settled in the case of the *United States* v. *Smith*; (*a*) and it was there held not to be necessary to give by statute a more logical enumeration in detail of all the facts constituting the offence, and that Congress might as well define it by using a term of a known and determined meaning, as by expressly mentioning all the particulars included in that term. The crime of piracy was defined by the law of nations with reasonable certainty, and it does not depend upon the particular provisions of any municipal code for its definition and punishment. Robbery on the high seas is, therefore, piracy by the act of Congress, as well as by the law of nations. (*b*)

There can be no doubt of the right of Congress to pass laws punishing pirates, though they may be foreigners, and may have committed no particular offence against the United States. It is of no importance, for the purpose of giving jurisdiction, on *whom* or *where* a piratical offence has been committed. A pirate, who is one by the law of nations, may be tried and punished in any country where he may be found; for he is reputed to be out of the protection of all laws and privileges. (*c*) The statute of any government may declare an offence committed on board its own vessels to be piracy, and such an offence will be punishable exclusively by the nation which passes the statute. But piracy, under the law of nations, is an offence against all nations, and punisha-

(*a*) 5 Wheaton, 153.

(*b*) In the case of United States *v.* Brig Malek Adhel, 2 How. 210, it was held, after an elaborate discussion, that an act was *piratical* in the view of the law of Congress of March 3, 1819, c. 77, if the act or acts done be hostile in their character, and wanton and criminal in their commission, without any lawful sanction, whether committed for purposes of plunder, or for purposes of hatred, revenge, or a wanton abuse of power, or a lawless appetite for mischief. They are piratical aggressions in the sense of the law of nations and of the act of Congress, and work a forfeiture of the *ship*, whether the owner be or be not innocent. He is, in that case, bound by the acts of the master. But the *cargo* presents a different consideration, and it is not to be forfeited under the act of Congress or the law of nations, except in cases of extraordinary turpitude and violence. In ordinary torts and injuries the law admits of a compensation in damages. If, however, the owner of the cargo co-operates in the piratical acts, the penalty of confiscation is also inflicted on the cargo as well as on the ship. The more strict rule is also enforced in the case of belligerent rights, and the cargo follows the fate of the ship.

(*c*) Bynk. Q. J. Pub. b. 1, c. 17; Sir Leoline Jenkins, Works, i. 714.

ble by all.[1] In the case of the *United States* v. *Palmer*, (*d*) it was held that the act of Congress of 1790 was intended to punish offences against the United States, and not offences against the human race; and that the crime of robbery, committed by a person who was not a citizen of the United States, on the high seas, on board of a ship belonging * exclusively to subjects * 187 of a foreign state, was not piracy under the act, and was not punishable in the courts of the United States. The offence, in such a case, must, therefore, be left to be punished by the nation under whose flag the vessel sailed, and within whose particular jurisdiction all on board the vessel were. This decision was according to the law and practice of nations; for it is a clear and settled principle, that the jurisdiction of every nation extends to its own citizens, on board of its own public and private vessels at sea. (*a*) The case applied only to the fact of robbery committed at sea, on board of a foreign vessel, at the time belonging exclusively to subjects of a foreign state; and it was not intended to decide that the same offence, committed on board of a vessel not belonging to the subject of any foreign power, was not piracy. The same court afterwards, in the case of the *United States* v. *Klintock*, (*b*) admitted that murder or robbery, committed on the high seas, by persons on board of a vessel not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government or flag whatsoever, fell within the purview of the act of Congress, and was punishable in the courts of the United States. Persons of that description were pirates, and proper objects for the penal code of all nations. The act of Congress did not apply to offences committed against the particular sovereignty of a foreign power; or to murder or robbery committed in a vessel belonging at the time, in fact as well as in right, to the subject of a foreign state, and, in virtue of such property, subject at the time to its control. But it applied to offences committed against all nations, by persons who, by com-

(*d*) 3 Wheaton, 610; United States *v.* Kessler, 1 Baldw. 15, s. p.

(*a*) Rutherforth, Inst. b. 2, c. 9; Mr. Jefferson's Letter to M. Genet, June 17, 1793.

(*b*) 5 Wheaton, 144.

[1] The above passage is cited and said to be the law of England, in Tivnan's Case, 5 Best & Sm. 645, *ante*, 37, n. 1.

mon consent, were equally amenable to the laws of all
* 188 nations. * It was further held, in the case of the *United States* v. *Pirates* (*a*) and in the case of the *United States* v. *Holmes*, (*b*) in pursuance of the same principle, that the moment a vessel assumed a piratical character, and was taken from her officers, and proceeded on a piratical cruise, she lost all claim to national character, and the crew, whether citizens or foreigners, were equally punishable, under the act of Congress, for acts of piracy; and it would be immaterial what was the national character of the vessel before she assumed a piratical character. Piracy is an offence within the criminal jurisdiction of all nations. It is against all and punished by all; and the plea of *autrefois acquit*, resting on a prosecution instituted in the courts of any civilized state, would be a good plea in any other civilized state. As the act of Congress of 1790 declares every offence committed at sea to be piracy, which would be punishable with death if committed on land, it may be considered as enlarging the definition of piracy, so as not only to include every offence which is piracy by the law of nations and the act of Congress of 1819, but other offences which were not piracy, until made so by statute.

An alien, under the sanction of a national commission, cannot commit piracy while he pursues his authority. His acts may be hostile, and his nation responsible for them. They may amount to a lawful cause of war, but they are never to be regarded as piracy. (*c*) The Barbary powers, notwithstanding some doubts which formerly existed, are now, and for a century past have been, regarded as lawful powers, and not pirates. They have all the *insignia* of regular, independent governments, and are competent to maintain the European relations of peace and war. Cicero, and, after him, Grotius, define a regular enemy to be a

power which hath the elements or constituents of a na-
* 189 tion, such * as a government, a code of laws, a national treasury, the consent and agreement of the citizens, and

(*a*) Ib. 184. (*b*) Ib. 412.

(*c*) Martens, Essay on Privateers, translated by Horne, 42; Manning, Comm. 112, 113. States generally prohibit their subjects from taking letters of marque from a foreign power, without the permission of their sovereign; and treaties are numerous in which the contracting parties stipulate, that if the subjects of either party take letters of marque from the enemies of the other, they shall be treated as pirates.

which pays a regard to treaties of peace and alliance; (*a*) and all these things, says Bynkershoek, (*b*) are to be found among the states of Barbary. In some respects their laws of war have retained the barbarity of the middle ages, for they levy tribute or contributions on all such Christian powers as are not able to protect their commerce by force; and they also make slaves of their prisoners, and require a heavy ransom for their redemption. But this, Bynkershoek insists, is conformable to the strict laws of war; and the nations of Europe who carried on war with the Barbary states, such as Spain, Naples, Holland, &c., have heretofore exercised the same rule of ancient warfare, upon the principle of retaliation. When Lord Exmouth, in 1816, attacked Algiers, and compelled the Dey to terms of peace, he compelled him also to stipulate, that, in the event of future wars with any European power, no Christian prisoners of war should be consigned to slavery, but they should be treated with all humanity as prisoners of war, until regularly exchanged, according to the European practice; and at the termination of hostilities the prisoners should be restored without ransom. By that treaty of peace upward of 1000 prisoners belonging to Italy, Spain, Portugal, Holland, and Greece were released from galling slavery, and in which part of them had subsisted for thirty-five years. This stipulation * in favor of general humanity *190 deserves some portion of that exalted eulogy bestowed by Montesquieu (*a*) on the treaty made by Gelon, King of Syracuse, with the Carthaginians. It would have been still more worthy of a comparison, if it had not left color for the construction that the renunciation, by the Dey of Algiers, of the practice of condemning Christian prisoners of war to slavery was to be confined to the "event of future wars with any European power;" and if

(*a*) Cic. Philip. 4, c. 6; Grotius, b. 3, c. 3, sec. 1.

(*b*) Q. J. Pub. b. 1, c. 17. A STATE, in the meaning of public law, is a complete or self-sufficient body of persons, united together in one community, for the defence of their rights, and to do right to foreigners. A state has its affairs and interests; it deliberates, and becomes a moral person, having an understanding and will, and is susceptible of obligations and laws. Grotius, b. 1, c. 1, sec. 14; ib. b. 3, c. 3, sec. 2; Burlamaqui, ii. pt. 1, c. 4, sec. 9; Vattel, b. 1, c. 1. Respublica est cœtus multitudinis, juris consensu et utilitatis communione sociatus. Cic. de Repub. lib. 1, sec. 25. *The State* is founded on the relations of right. Protection is its aim and object, and that protection is but another word for justice, or the obtaining and granting to every one his due. La justice constituée, c'est l'état (Cousin). Lieber, Political Ethics, i.

(*a*) Esprit des Lois, b. 10, c. 5.

a great Christian power on this side of the Atlantic, whose presence and whose trade are constantly seen and felt in the Mediterranean, had not seemed to have been entirely forgotten. (*b*)

But notwithstanding Bynkershoek had insisted, near a century ago, that captures by the Barbary powers worked a change of property by the laws of war, in like manner as captures made by regular powers, yet, in a case in the English admiralty so late as 1801, (*c*) it was contended that the capture and sale of an English ship by Algerines was an invalid and unlawful conversion of the property, on the ground of being a piratical seizure. It was, however, decided that the African states had long acquired the character of established governments, and that though their notions of justice differ from those entertained by the Christian powers, their public acts could not be called in question; and a derivative title founded on an Algerine capture, and matured by a confiscation *in their way*, was good against the original owner. In the time of Richard I., when the laws of Oleron were compiled, all infidels were, by that code, (*d*) regarded as pirates, and their property liable to seizure wherever found. It was a notion, at that time, that such persons could

not have any fellowship or communion with Christians.

* 191 * In a case which occurred in 1675, Sir Leoline Jenkins held that the commander of a privateer regularly commissioned was liable to be treated as a pirate, if he exceeded the bounds of his commission. Bynkershoek justly opposes this dangerous opinion; (*a*) and the true rule undoubtedly is, that the vessel must have lost its national, and assumed a piratical character, before jurisdiction over it, to that extent, could be exercised.

If a natural-born subject was to take prizes belonging to his native country, in pursuance of a foreign commission, he would, on general principles, be protected by his commission from the charge of piracy. But to prevent the mischief of such conduct, the United States have followed the provisions of the English statute of 11 & 12 Wm. III. c. 7, and the general practice of other nations, (*b*) and have, by the act of Congress of April 30,

(*b*) Declaration of the Dey of Algiers, made with Lord Exmouth, August 26, 1816. Annual Register for 1816, app. to Chronicle, 288.

(*c*) The Helena, 4 C. Rob. 3.

(*a*) Q. J. Pub. b. 1, c. 17.

(*d*) Sec. 45.

(*b*) *Vide supra*, 100.

1790, sec. 9, declared, that if any citizen should commit any act of hostility against the United States, or any citizen thereof, upon the high seas, under color of any commission from any foreign prince or state, or on pretence of authority from any person, such offender shall be adjudged to be a pirate, felon, and robber, and, on being thereof convicted, shall suffer death. The act of Congress not only authorizes a capture, but a condemnation in the courts of the United States, for all piratical aggressions by foreign vessels; and whatever may be the responsibility incurred by the nation to foreign powers, in executing such laws, there can be no doubt that courts of justice are bound to obey and administer them. All such hostile and criminal aggressions on the high seas, under the flag of any power, render property taken *in delicto* subject to confiscation by the law of nations. (*c*)

4. Slave-trade. — The African slave-trade is an offence against the municipal laws of most nations in Europe, and it is declared to be piracy by the statute laws of England and the *United States. Whether it is to be considered as an *192 offence against the law of nations, independent of compact, (*x*) has been a grave question, much litigated in the courts charged with the administration of public law; and it will be useful to take a short view of the progress and present state of the sense and practice of nations on this subject.

Personal slavery, arising out of forcible captivity, has existed in every age of the world, and among the most refined and civilized people. The possession of persons so acquired has been invested with the character of property. Captives in war were sold as slaves by Greek and Roman commanders. The slave-trade was a regular branch of commerce among the ancients; and a great object of Athenian traffic with the Greek settlements on the Euxine was procuring slaves from the barbarians for the Greek market. (*a*) In modern times, treaties have been framed,

(*c*) Story, J., 11 Wheaton, 39–41.

(*a*) Mitford, Hist. iv. 236. Cattle and slaves constituted the principal riches of

(*x*) The slave-trade appears to be now piracy *jure gentium*, contrary to the earlier rule. Le Louis, 2 Dods. 210. It was so treated in the Treaty of 1889 between Great Britain and Italy. See 21 Revue de Droit International, 167, 602; 22 id. 57, 138; and the Proclamation, by the President of the United States of July 2, 1890 (27 St. at L. 886), of the general act for the repression of the slave-trade in Africa by civilized nations.

and national monopolies sought, to facilitate and extend commerce in this species of property. (*b*) It has been interwoven in the municipal institutions of all the European colonies in America, and with the approbation and sanction of the parent states. It forms to this day the foundation of large masses of property in the southern parts of these United States. But, for half a century past, the African slave-trade began to awaken a spirit of remorse and sympathy in the breasts of men, and a conviction that the traffic was repugnant to the principles of Christian duty, and the maxims of justice and humanity.

Montesquieu, who has disclosed so many admirable truths and so much profound reflection, in his Spirit of Laws, not only condemned all slavery as useless and unjust, but he animadverted upon the African slave-trade by the most pungent reproaches. It was impossible, he observed, that we could admit the negroes

to be human beings, because if we were once to admit
* 193 them to be men we should * soon come to believe that we

ourselves were not Christians. Why has it not, says he, entered into the heads of European princes who make so many useless conventions, to make one general stipulation in favor of humanity? (*a*) We shall see presently that this suggestion was, in some degree, carried into practice by a modern European congress.

the early ages of Greece. The Byzantines, says Polybius (General History, b. 4, c. 5), supplied, from the Pontus, the Greeks with honey, wax, salted meats, leather, *and great numbers of very serviceable slaves.* It is mentioned in Scripture that the Tyrians traded with the Caucasian provinces for slaves: "Javan, Tubal, and Meshech traded the persons of men and vessels of brass in thy market," Ezek. xxvii. 13; and that they stole the children of the Jews, and sold them as slaves to the Greeks, Joel iii. 6. So the Carthaginians exchanged black slaves from the interior of Africa, in their commerce and barter with the cities of Italy and Greece. The great extent of the slave-trade, which was carried on by the polished nations of antiquity settled on the coasts of the Mediterranean, with Central Africa, by means of caravans, appears from Heeren in his Historical Researches, i., on the land trade of the Carthaginians.

(*b*) By the Assiento Treaty of March 26, 1713, between Great Britain and Spain, the latter power granted to the English South Sea Company, for thirty years, the right of supplying the Spanish colonies in America with negro slaves, at the rate of 4800 annually. This Assiento contract was explained and confirmed by a convention between England and Spain, in May, 1716. A similar contract had been previously agreed on by Spain with the Royal Guinea Company settled in France. Jenkins, Collection of Treaties, London, 1775, i. 375; ii. 179.

(*a*) Esprit des Lois, l. 15, c. 5.

The Constitution of the United States laid the foundation of a series of provisions to put a final stop to the progress of this great moral pestilence, by admitting a power in Congress to prohibit the importation of slaves *after* the expiration of the year 1807. The Constitution evidently looked forward to the year 1808 as the commencement of an epoch in the history of human improvement. Prior to that time, Congress did all on this subject that it was within their competence to do. (*b*) By the acts of March 22, 1794, and May 10, 1800, the citizens of the United States, and residents within them, were prohibited from engaging in the transportation of slaves from the United States to any foreign place or country, or from one foreign country or place to another, for the purpose of traffic. These provisions prohibited our citizens from all concern in the slave-trade, with the exception of direct importation into the United States; and the most prompt and early steps were taken, within the limits of the Constitution, to interdict also that part of the traffic. By the act of 2d March, 1807, it was prohibited, under severe penalties, to import slaves into the United States after the 1st January, 1808; and, on the 20th April, *1818, the penalties and *194 punishments were increased, and the prohibition extended not only to importation, but generally against any citizen of the United States being concerned in the slave-trade. It has been decided (*a*) that these statute prohibitions extend as well to carrying slaves on freight, as to cases where they were the property of American citizens, and to carrying them from one port to another of the same foreign empire, as well as from one foreign country to another. The object was to prevent, on the part of our citizens, all concern whatever in such a trade.

The act of March 3, 1819, went a step further, and author-

(*b*) The continental congress, which assembled at Philadelphia in 1774, gave the first general and authoritative condemnation of the slave-trade by the resolution not to import or purchase any slave imported after the first day of December, in that year, and wholly to discontinue the trade. Journals of Congress, i. 32. The convention of delegates of the people of Virginia, and the provincial congress of North Carolina, had anticipated this measure; for in August preceding they resolved to discontinue the importation of slaves. Pitkin, History, i. App. n. 16; Jones, Defence of the Revolutionary History of North Carolina, 145.

(*a*) The Merino, 9 Wheaton, 391. The declarations of the master connected with his acts in furtherance of the voyage have been held to be evidence on an indictment against the owner of the ship, under the act of 20th April, 1818. United States *v.* Gooding, 12 Wheaton, 460.

ized national armed vessels to be sent to the coast of Africa to stop the slave-trade so far as citizens or residents of the United States were engaged in that trade; and their vessels and effects were made liable to seizure and confiscation. The act of 15th May, 1820, (*b*) went still further, and declared, that if any citizen of the United States, being of the crew of any foreign vessel engaged in the slave-trade, or any person whatever, being of the crew of any vessel owned in whole or in part, or navigated for or on behalf of any citizen of the United States, should land on any foreign shore, and seize any negro or mulatto, not held to service or labor by the laws of either of the states or territories of the United States, with intent to make him a slave; or should decoy, or forcibly bring or receive, such person on board such vessel with like intent; or should forcibly confine or detain on board any negro or mulatto, not lawfully held to service, with intent to make him a slave; or should, on board any such vessel, offer to sell as a slave any negro or mulatto, not held to service as aforesaid; or should, on the high seas, or on any tide water, transfer or deliver over, to any other vessel, any such negro or mulatto, with intent to make him a slave, or should deliver on shore, from on board any such vessel, any negro or mulatto, with like intent, such citizen or person should be adjudged a pirate, and, on conviction, should suffer death.

It is to be observed that the statute operates only where our municipal jurisdiction might be applied, consistently with the general theory of public law, to the persons of our citizens, or to foreigners on board of American vessels. Declaring the *195 crime piracy does not make it so, within the *purview of the laws of nations, if it were not so without the statute; and the legislature intended to legislate only where they had a right to legislate, over their own citizens and vessels. The question, notwithstanding these expressions in the statute, still remained to be discussed and settled, whether the African slave-trade could be adjudged piracy, or any other crime, within the contemplation of the code of international law. It has been attempted, by negotiation between this country and Great Britain, to agree that both nations should consider the slave-trade piratical; but the convention for that purpose between the two nations has not as yet been ratified, though the British nation

(*b*) C. 113, sec. 4, 5.

have carried their statute denunciation of the trade as far as the law of the United States. (*a*) [1]

The first British statute that declared the slave-trade unlawful was in March, 1807. (*b*) This was a great triumph of British justice. It was called for by the sense of the nation, which had become deeply convinced of the impolicy and injustice of the slave-trade; and by the subsequent statute of 51 Geo. III. the trade was declared to be contrary to the principles of justice, humanity, and sound policy; and lastly, by the act of Parliament of 31st March, 1824, the trade is declared to be piracy. (*c*) England is thus, equally with the United States, honestly and zealously engaged in promoting the universal abolition of the trade, and in holding out to the world her sense of its extreme criminality. Almost every maritime nation in Europe has deliberately and solemnly, either by legislative acts, or by treaties and other formal engagements, acknowledged the injustice and inhumanity of the trade, and pledged itself to promote its abolition. By the treaty of Paris of the 30th May, 1814, between Great Britain and France, Louis XVIII. agreed that the traffic was repugnant to the principles of natural justice, and he engaged to unite his efforts at the ensuing congress to induce all the powers of Chris-

(*a*) All these acts of Congress apply exclusively to external commerce in slaves. The *internal* commerce within the United States in slaves is left to the control and discretion of the state governments; and the Northern States, which have abolished slavery, admit of no internal commerce in slaves within their respective states. It is not so in the slaveholding states. Some of them permit a traffic in slaves as between citizens of different states; but in Maryland, as early as 1796, it was declared by law to be unlawful to import or bring into the state, by land or water, any slave for sale or to reside within the state; and every slave brought in contrary to the statute was declared to be free. And in the Constitution of Mississippi of 1833, the introduction of slaves into the state as merchandise, or for sale, was prohibited, though actual settlers were allowed until 1845 to purchase slaves from any state in the Union, and bring them into that state for their individual use.

(*b*) Stat. 47 Geo. III. Denmark abolished, in 1792, the foreign slave-trade, and the importation of slaves into her colonies, though the prohibitions were not to take effect until 1804. Wheaton, Inquiry into the Right of Search, 1842.

(*c*) Stat. 5 Geo. IV. c. 113. The statute of 3 and 4 Wm. IV. c. 73, for the extinction of slavery, has some new and important penal provisions respecting the dealing in slaves on the high seas, or any traffic in them; and the statute of 1 Vict. c. 91, as well as the preceding statute, repeated the declaration, that British subjects concerned in the slave-trade should be adjudged pirates, and punishable accordingly.

[1] The abolition of slavery in the United States by the 13th amendment of the Constitution makes it unnecessary to further investigate this subject.

*196 tendom *to decree the abolition of the trade, and that it should cease definitively, on the part of the French government, in the course of five years. The ministers of the eight principal European powers, who met in Congress at Vienna on the 8th February, 1815, solemnly declared, in the face of Europe and the world, that the African slave-trade had been regarded, by just and enlightened men, in all ages, as repugnant to the principles of humanity and of universal morality, and that the public voice in all civilized countries demanded that it should be suppressed; and that the universal abolition of it was conformable to the spirit of the age and the generous principles of the allied powers. In March, 1815, the Emperor Napoleon decreed that the slave-trade should be abolished; but this effort of ephemeral power was afterwards held to be null and void, as being the act of an usurper; and in July following, Louis XVIII. gave directions that this odious and wicked traffic should from that present time cease. The first French decree, however, that was made public, abolishing the trade, was of the date of the 8th January, 1817, and that was only a partial and modified decree. (*a*) In

(*a*) By the convention between Great Britain and France, of the 30th November, 1841, the mutual right of search was allowed on board the vessels of each of the two nations, within certain specified waters, i. e. along the western coast of Africa from Cape Verd, or 15 degrees north latitude, to 10 degrees south of the equator, — all around the island of Madagascar to the extent of 20 leagues from the island, — to the same distance from the coasts of Brazil, and from the coasts of the islands of Cuba and Porto Rico; the right of searching merchant vessels to be confined to ships of war, under special authority from each of the two governments, and never to be exercised upon the ships of war of either nation. The United States have refused to become a party to any convention authorizing the mutual right of search, and France afterwards refused to ratify the treaty of 1841, conceding the mutual right of search. *Vide supra*, 153. The efforts and the failure of the efforts to sanction the mutual right of search, in respect to the slave-trade, form an instructive item in modern diplomatic history. In 1818, the British government proposed to France the mutual right of search of merchant vessels on the high seas, with a view to the more effectual suppression of the slave-trade, and which had been conceded by Spain, Portugal, and the Netherlands. The proposition was at the same time made to the United States, and rejected by both powers. In November of that year, the British government proposed to the congress of the five great powers, at Aix-la-Chapelle, the following propositions: (1.) The mutual right of search of merchant vessels engaged in the slave-trade; (2.) The declaration that the slave-trade was piracy, under the law of nations. Both propositions were rejected on the part of France, Austria, Prussia, and Russia. The propositions were renewed at the congress at Verona, in 1822, but without success. Afterwards, in 1841, the mutual right of search was conceded by the northern European powers, parties to the Quintuple Treaty, as see *supra*, 153. Though the government of the United States has uniformly objected to the admission

December, 1817, the Spanish government prohibited the purchase of slaves on any part of the coast of Africa, after the 31st of May, 1820; and this was in pursuance of the treaty between Great Britain and Spain of the 23d September, 1817, made for the abolition of the slave-trade immediately, north of the equator, and entirely, after 1820. In January, 1818, the Portuguese government made the like prohibition as to the purchase of slaves on any part of the coast of Africa north of the equator. In 1821, there was not a flag of any European state which could *legally* cover this traffic, to the north of the equator; and yet, in 1825, the importation of slaves covertly continued, if it was not openly countenanced, from the Rio de la Plata to the Amazon, and through the whole American Archipelago. (*b*)

of the right of visitation and search, in time of peace, even in respect to the African slave-trade, yet they agreed, in furtherance of efficient measures for its suppression, by the treaty of Washington, in 1842, with Great Britain, that each party should "prepare, equip, and maintain in service, on the coast of Africa, a sufficient and adequate squadron, or naval force of vessels, of suitable numbers and descriptions, to carry, in all, not less than eighty guns, to enforce, separately and respectively, the laws, rights, and obligations of each of the two countries, for the suppression of the slave-trade, — the said squadrons to be independent of each other; but the two governments stipulating, nevertheless, to give such orders to the officers commanding their respective forces as shall enable them most effectually to act in concert and co-operation, upon mutual consultation, as exigencies may arise."

(*b*) Report of a Committee of the House of Representatives of the United States, February 16, 1825. See also the Quarterly Review, No. 68 and No. 89, pp. 243–246; Alison's History of Europe, vi. 128, 129, and the English parliamentary discussions and documents. It appears that the African slave-trade was carried on to an enormous extent down to the year 1839. The trade was principally between Africa, and Brazil and Cuba. In 1828, 45,000 African slaves were imported into the city of Rio Janeiro. But by a convention between England and Brazil, in 1826, it was made piratical for the subjects of Brazil to be engaged in the trade after the year 1830; and it is understood that the government of Brazil, in 1831, not only put a stop by law to the importation of slaves, but declared that all slaves thereafter imported should be free, and imposed a heavy assessment on the importers, and provided for the transportation of such negroes back to Africa. In the treaty concluded 10th September, 1822, between Great Britain and the Imaun of Muscat, the latter agreed to abolish the foreign slave-trade forever in his dominions. So, by the treaty of the 23d of October, 1817, between Great Britain and Radama, king of Madagascar, it was agreed that there should be, throughout all the dominions of the king of Madagascar, an entire cessation of the sale or transfer of slaves. And in the treaty of commerce and navigation between Great Britain and the United Provinces of Rio de la Plata, February 2, 1825, it was agreed by the latter to prohibit all persons, subject to its jurisdiction, by the most solemn laws, from taking any share in the slave-trade; and yet it was stated by high authority in the British Parliament, May, 1838, as a matter of fact, and agreed to afterwards in an address to the Queen, that notwithstanding

*197 *The case of the *Amedie* (*a*) was the earliest decision in the English courts on the great question touching the legality of the slave-trade, on general principles of international law. That was the case of an American vessel, employed in carrying slaves from the coast of Africa to a Spanish colony. She was captured by an English cruiser, and the vessel and cargo were condemned to the captors, in a vice-admiralty court in the West Indies, and on appeal to the court of appeals in England the judgment was affirmed. Sir William Grant, who pronounced the opinion of the court, observed that the slave-trade being abolished by both England and the United States, the court was authorized to assert, that the trade, abstractly speaking, could not have a legitimate existence, and was, *prima facie*, illegal upon principles of universal law. The claimant, to entitle him to restitution, must show affirmatively a right of property under the municipal laws of his own country; for, if it be unprotected by his own municipal law, he can have no right of property in human beings carried as his slaves, for such a claim is contrary to the principles of justice and humanity. The *Fortuna* (*b*) was condemned on the authority of the *Amedie*, and the same *198 opinion was again affirmed. But in the subsequent * case of the *Diana*, (*a*) the doctrine was not carried so far by Lord Stowell, as to hold the trade itself to be piracy, or a crime against the law of nations. A Swedish vessel was taken by a

all the efforts of Great Britain to put down the slave-trade, it still continued, little diminished in extent, and much aggravated in horror. Portugal was the principal offender. What was once a legal had become now a contraband traffic. She had systematically and grossly violated her treaty engagements on that subject. Since 1829, there had been 153 Portuguese vessels seized as slavers, containing upwards of 163,000 slaves, and Portugal had, since that period, transported a million of slaves. This enormous abuse induced England, in 1839, to authorize by law the forcible examination and search of vessels suspected to be concerned in that trade. The British Minister, Sir Robert Peel, stated in the House of Commons, in July, 1844, that Spain and Brazil were the two powers chargeable with the whole responsibility of the continuance of the slave-trade, and that the island of Cuba was in a precarious, if not a perilous position, from the settled determination of her black population to emancipate themselves; and it is stated, on strong authority, that the English effort to put down the slave-trade by an armed force of British cruisers on the coast of Africa has increased the horrors of the slave-trade, without materially diminishing its amount. See Hill's Narrative of Fifty Days on Board a Slave-Ship, Sir F. Buxton on African Slave-Trade, and the other documents referred to and discussed in Westminster Review for June, 1844, p. 446, &c.

(*a*) 1 Acton, 240. (*b*) 1 Dods. 81. (*a*) 1 Dods. 95.

British cruiser on the coast of Africa, engaged in carrying slaves from Africa to a Swedish island in the West Indies, and she was restored to the owner, on the ground that Sweden had not then prohibited the trade, and had tolerated it in practice. England had abolished the trade as unjust and criminal, but she claimed no right of enforcing that prohibition against the subjects of those states which had not adopted the same opinion; and England did not mean to set herself up as the legislator, and *custos morum*, for the whole world, or presume to interfere with the commercial regulations of other states. The principle of the case of the *Amedie* was, that where the municipal law of the country to which the parties belonged had prohibited the trade, English tribunals would hold it to be illegal, upon general principles of justice and humanity, but they would respect the property of persons engaged in it under the sanction of the laws of their own country.

The doctrine of these cases is, that the slave-trade, abstractly speaking, is immoral and unjust, and it is illegal, when declared so by treaty or municipal law; but that it is not piratical or illegal by the common law of nations, because if it were so, every claim founded on the trade would at once be rejected everywhere and in every court, on that ground alone.

The whole subject underwent further, and a most full, elaborate, and profound discussion, in the case of *Le Louis*. (*b*) [1] A French vessel, owned and documented as a French vessel, was captured by a British armed force on the coast of Africa, after resistance made to a demand to visit and search. She was carried into Sierra Leone, and condemned by a court of vice-admiralty, for being concerned *in the slave-trade, *199 contrary to the French law. On appeal to the British High Court of Admiralty, the question respecting the legality of the capture and condemnation was argued, and it was judicially decided, that the right of visitation and search, on the high seas, did not exist in time of peace. If it belonged to one nation, it equally belonged to all, and would lead to gigantic mischief and universal war. Other nations had refused to accede to the

(*b*) 2 Dods. 210.

[1] Buron *v.* Denman, 2 Exch. 167. See Santos *v.* Illidge, 6 C. B. N. S. 841; S. C. *reversed*, 8 C. B. N. S. 861.

English proposal of a reciprocal right of search in the African seas, and it would require an express convention to give the right of search in time of peace. The slave-trade, though unjust, and condemned by the statute law of England, was not piracy, nor was it a crime by the universal law of nations. To make it piracy, or such a crime, it must have been so considered and treated in practice by all civilized states, or made so by virtue of a general convention. On the contrary, it had been carried on by all nations, even by Great Britain herself, until within a few years, and was then carried on by Spain and Portugal, and not absolutely prohibited by France. It was, therefore, not a criminal traffic by the law of nations; and every nation, independent of treaty, retained a legal right to carry it on. No one nation had a right to force the way to the liberation of Africa, by trampling on the independence of other states; or to procure an eminent good by means that were unlawful; or to press forward to a great principle, by breaking through other great principles that stood in the way. The condemnation of the French vessel at Sierra Leone was, therefore, reversed; and the penalties imposed by the French law (if any there were) were left to be enforced, not in an English, but in a French court.

The same subject was brought into discussion in the King's Bench in 1820, in *Madrazo* v. *Willes*. (*a*) The court held, that the

British statutes against the slave-trade were only applicable
* 200 * to British subjects, and only rendered the slave-trade unlawful when carried on by them. The British Parliament could not prevent the subjects of other states from carrying on the trade out of the limits of the British dominions. If a ship be acting contrary to the general law of nations, she is thereby subject to condemnation; but it is impossible to say that the slave-trade was contrary to the law of nations. It was, until lately, carried on by all the nations of Europe; and a practice so sanctioned can only be rendered illegal, on the principles of international law, by the consent of all the powers. Many states had so consented, but others had not, and the cases had gone no further than to establish the rule, that ships belonging to countries that had prohibited the trade were liable to capture and condemnation, if found engaged in it.

The final decision of the question in this country has been the

(*a*) 3 B. & Ald. 353.

same as in the case of *Le Louis*. In the case of *La Jeune Eugénie*, (*a*) it was decided, in the Circuit Court of the United States, in Massachusetts, after a masterly discussion, that the slave-trade was prohibited by universal law. But subsequently, in the case of the *Antelope*, (*b*) the Supreme Court of the United States declared that the slave-trade, though contrary to the law of nature, had been sanctioned, in modern times, by the laws of all nations who possessed distant colonies; and a trade could not be considered as contrary to the law of nations which had been authorized and protected by the usages and laws of all commercial nations. It was not piracy, except so far as it was made so by the treaties or statutes of the nation to which the party belonged. It might still be lawfully carried on by the subjects of those nations who had not prohibited it by municipal acts or treaties. (*c*)

(*a*) 2 Mason, 409. (*b*) 10 Wheaton, 66.

(*c*) The doctrine in the case of the Antelope, and in the English cases therein referred to, is, that right of bringing in for adjudication, in time of peace, foreign vessels engaged in the slave-trade, and captured on the high seas for that cause, did not exist; and vessels so captured would be restored, unless the trade was also unlawful, and prohibited by the country to which the vessel belonged; and if a claim be put in for Africans as slaves and property, the *onus probandi* is thrown upon the claimant to make specific proof of the individual proprietary interest according to the laws of the country to which the vessel belongs.

PART II.

OF THE GOVERNMENT AND CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES.

LECTURE X.

OF THE HISTORY OF THE AMERICAN UNION.

THE government of the United States was erected by the free voice and joint will of the people of America, for their common defence and general welfare. Its powers apply to those great interests which relate to this country in its national capacity, and which depend for their stability and protection on the consolidation of the Union. It is clothed with the principal attributes of political sovereignty, and it is justly deemed the guardian of our best rights, the source of our highest civil and political duties, and the sure means of national greatness. The constitution and jurisprudence of the United States deserve the most accurate examination; and an historical view of the rise and progress of the Union, and of the establishment of the present Constitution, as the necessary fruit of it, will tend to show the genius and value of the government, and prepare the mind of the student for an investigation of its powers.

The association of the American people into one body politic took place while they were colonies of the British empire,
*202 and owed allegiance to the British crown. That *the union of this country was essential to its safety, its prosperity, and its greatness had been generally known, and frequently avowed, long before the late revolution, or the claims of the British Parliament which produced it. The people of the New England colonies were very early in the habit of confederating together for their common defence. As their origin

and their interests were the same, and their manners, their religion, their laws, and their civil institutions exceedingly similar, they were naturally led to a very intimate connection, and were governed by the same wants and wishes, the same sympathies and spirit. The colonies of Massachusetts, Plymouth, Connecticut, and New Haven as early as 1643, under the impression of danger from the surrounding tribes of Indians, and for protection against the claims and encroachments of their Dutch neighbors, entered into a league, offensive and defensive, which they declared should be firm and perpetual, and be distinguished by the name of the United Colonies of New England. By their articles of confederation, each colony was to have exclusive jurisdiction within its own territory; and in every war, offensive and defensive, each of the confederates was to furnish its quota of men and money in a ratio to its population; and a congress of two commissioners, delegated from each colony, was to be held annually, with power to deliberate and decide on all affairs of war and peace, and on all points of common concern; and every determination, in which three fourths in number of the assembly concurred, was to be binding upon the whole confederacy. (*a*)

This association may be considered as the foundation of a series of efforts for a more extensive and more perfect union of the colonies. It contained some provident and *jealous * 203 provisions, calculated to give security and stability to the whole. It provided that no two colonies were to join in jurisdiction, without the consent of all; and it required the like unanimous consent to admit any other colony into the confederacy; and if any one member violated any article of it, or any way injured another colony, the commissioners of the other colonies were to take cognizance of the matter, and determine upon it. In this transaction, and under the authority of this union, the New England colonies acted, in fact, as independent states, and free from the control of any superior power, because the civil war in which England was then involved occupied the whole

(*a*) Hazard, State Papers, 496, 583, 590; Hutchinson, History of Massachusetts, i. 124, 126; Robertson, Posthumous History of America, b. 10, pp. 191, 192; Winthrop, History of New England, by Savage, ii. 101; Baylies, Historical Memoir, ii. 118; Trumbull, History of Connecticut, i. 124; Plymouth Colony Laws, App. 308, ed. 1836.

attention of the mother country; and this first step towards a future independence was suffered to pass without much notice, and without any animadversion. The confederacy subsisted, with some alterations, for upwards of forty years, and for part of that time, with the countenance of the government in England. It was not dissolved until the year 1686, when the charters of the New England colonies were in effect vacated by a commission from King James II. (*a*)

The people of this country, after the dissolution of this earliest league, continued to afford other instructive precedents of association for their safety. A congress of governors and commissioners from other colonies, as well as from New England, was occasionally held, to make arrangements for the more effectual protection of our interior frontier, and we have an instance of one of these assemblies at Albany, in 1722. (*b*) But a much more interesting congress was held there in the year 1754. It consisted of commissioners from New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, and Maryland, and was called at the instance of the lords commissioners for trade and the plantations, to take into consideration the best

means of defending America, in case of war with France,
* 204 which was then impending. The object of the English * administration in calling this convention was in reference to treaties of friendship with the Indian tribes; but the colonies had more enlarged views; and the commissioners which met in congress, and who enrolled among their number some of the most distinguished names in our colonial history, asserted and promulgated several invaluable truths, the proper reception of which, in the minds of their countrymen, prepared the way for their future independence, and our present greatness. One of the colonies (Massachusetts) expressly instructed her delegates to enter into articles of union and confederation with the other colonies, for their general security in peace as well as in war. The convention unanimously resolved, that a union of the colonies was absolutely necessary for their preservation. They rejected all proposals for a division of the colonies into separate confederacies, and proposed a plan of federal government, consisting of a general council of delegates, to be triennially chosen

(*a*) Hutchinson, History of Massachusetts, i. 126, note.
(*b*) Smith, History of New York, i. 171.

by the provincial assemblies, and a president-general, to be appointed by the crown. In this council was vested, subject to the immediate negative of the president, and the eventual negative of the king in council, the rights of war and peace, in respect to the Indian nations; and the confederacy was to embrace all the then existing colonies, from New Hampshire to Georgia. The council were to have authority to make laws for the government of new settlements, upon territories to be purchased from the Indians, and to raise troops and build forts, and even to equip vessels of force, to guard the coast and protect trade, as well on the ocean as upon the lakes and rivers. They were likewise to make laws, and lay and levy general duties, imposts, and taxes, for those necessary purposes. (*a*) But the times were * not yet ripe, nor the minds of men sufficiently * 205 enlarged, for such a comprehensive proposition; and this bold project of a continental union had the singular fate of being rejected, not only on the part of the crown, but by every provincial assembly. It was probably supposed, on the one hand, that the operation of the union would teach the colonies the secret of their own strength, and the proper means to give it activity and direction; while, on the other, the colonies were jealous of the preponderating influence of the royal prerogative. We were destined to remain, for some years longer, separate, and, in a considerable degree, alien commonwealths, emulous of each other in obedience to the parent state, and in devotion to her interests; but jealous of each other's prosperity, and divided by policy, institutions, prejudice, and manners. So strong was the force of these considerations, and so exasperated were the people of the colonies in their disputes with each other concerning boundaries and charter claims, that Doctor Franklin (who was one of the commissioners to the congress that formed the plan of union in 1754) observed, in the year 1760, that a union of the colonies against the mother country was absolutely impossible, or at least without being forced by the most grievous tyranny and oppression. (*a*)

(*a*) Franklin's Works, edited by Sparks, iii. 22–55; Smith, History of New York, ii. 219–225; Marshall, Life of Washington, i. n. 8; Massachusetts Historical Collections, vii. 203–214.

(*a*) Franklin's Works, edited by Sparks, iv. 42. Governor Pownal, in his work on the Administration of the Colonies (the 4th edition of which appeared in 1768), declared that the colonies had no one principle of association amongst them, and that

The great value of a federate union of the colonies had, however, sunk deep into the minds of men. The subject was familiar to our colonial ancestors. They had been in the habit, especially in seasons of danger and difficulty, of forming associations, more or less extensive. The necessity of union had been felt, its advantages perceived, its principles explained, the way to it pointed out, and the people of this country were led by the force * 206 of irresistible motives * to resort to the same means of defence and security, when they considered that their liberties were in danger, not from the vexatious and irregular warfare of the Indian tribes, but from the formidable claims, and still more formidable power, of the parent state. The assertion by the British Parliament of an unqualified right of binding the colonies in all cases whatsoever, and specifically of the right of taxing them without their consent, and the denial by the colonies of the right of taxation without representation, and the attempt of the King and Parliament to enforce it by the power of the sword, were the immediate causes of the American revolution. Soon after the first unfriendly attempt upon our chartered privileges, by the statute for raising a revenue in the colonies by means of a stamp duty, a congress of delegates from nine colonies was assembled at New York in October, 1765, upon the recommendation of Massachusetts, and they digested a bill of rights, in which the sole power of taxation was declared to reside in their own colonial legislatures. (*a*) This was preparatory to a more extensive and general association of the colonies, which

their manner of settlement, diversity of charters, conflicting interests, and mutual rivalship and jealousies, would render a union impracticable. pp. 35, 36, 93.

(*a*) 2 Belknap's N. H. 326; Journals of the Assembly of the Colony of New York, October, 1765; Marshall's Life of Washington. ii. App. No. 5; Pitkin's Political and Civil History of the United States, i. 178–186, App. No. 7, 8, 9. A full and apparently very authentic "Journal of the Continental Congress of 1765" was published at New York by E. Winchester, 1845, being found among the papers of Cæsar Rodney, one of the delegates to the convention of 1765, and first mentioned in Niles's National Register, in 1812. It was a precursor, in point of ability, intelligence, and spirit, of the proceedings of the Continental Congress of 1774. The 6th and 7th chapters of the first volume of Mr. Pitkin's History contain a clear, authentic, and very interesting detail of the resolutions and acts of the British Parliament, relating to America, subsequently to the peace of 1763; of the proceedings of the British government to enforce them; and of the spirit of opposition and resistance which they met with on the part of the colonies. The resistance kept pace with the parliamentary impositions, and was constantly growing in strength, activity, and determined purpose, until it was consummated by the permanent union of the colonies in 1774.

took place in September, 1774, and laid the foundations of our independence and permanent glory. The more serious claims of the British Parliament, and the impending oppressions of the British crown at this last critical period, induced the twelve colonies, which * were spread over this vast conti- * 207 nent, from Nova Scotia to Georgia, to an interchange of opinions and views, and to unite in sending delegates to Philadelphia, "with authority and direction to meet and consult together for the common welfare." In pursuance of their authority, this first Continental Congress, whose names and proceedings are still familiar to the present age, and will live in the gratitude of a distant posterity, took into consideration the afflicted state of their country; asserted, by a number of declaratory resolutions, what they deemed to be the unalienable rights of English freemen; pointed out to their constituents the system of violence which was preparing against those rights; and bound them by the most sacred of all ties, the ties of honor and of their country, to renounce commerce with Great Britain, as being the most salutary means to avert the one and to secure the blessings of the other. (*a*) [1] These * resolutions received * 208

(*a*) The most material of those declaratory resolutions was the one which stated, that, as the colonies were not, and could not properly be, represented in the British Parliament, they were entitled "to a free and exclusive power of legislation in their several provincial legislatures, in all cases of taxation and internal polity, subject only to the negative of their sovereign." [1] The colonies from the earliest periods of the settlement of the country, with the exception of Pennsylvania, whose charter recognized the force of such laws, had generally claimed, under their charters, an exemption from the operation of the British navigation acts, and of their system of commercial monopoly; and they had, by all indirect means short of open resistance, evaded the force of those laws, and assumed the right to a free trade. (1 Hutch. Hist. 322.) But the Congress of 1774, in the spirit of conciliation, renounced every such pretension, and declared, that "from the necessity of the case, and in regard to the mutual interests of both countries, they cheerfully consented to the operation of such acts of the British Parliament as were *bona fide* restrained to the regulation of their external commerce, for the purpose of securing the commercial advantages of the whole empire to the mother country, and the commercial benefits of its respective members; *excluding every idea of taxation, internal or external, for raising a revenue on the subjects in America, without their consent.*" Journals of Congress, i.

[1] Delolme argued, in chapter 20 of his work on the British Constitution, that the claim of the American colonies directly clashed with one of the vital principles of that constitution. For if the colonies could grant subsidies to the crown, uncontrolled by the imperial Parliament, they so far rendered the crown independent of Parliament. The author adds, in a note, that being with Dr. Franklin at his house in Craven Street, he mentioned this view to the Doctor, who appeared much struck by it.

prompt and universal obedience, and the Union being thus auspiciously formed, it was continued by a succession of delegates in Congress; and through every period of the war, and through every revolution of our government, this Union has been revered and cherished, as the guardian of our peace, and the only solid foundation of national independence.

In May, 1775, a Congress again assembled at Philadelphia, and was clothed with ample discretionary powers. The delegates were chosen, as those of the preceding Congress had been, partly by the popular branch of the colonial legislatures when in session, but principally by conventions of the people in the several colonies. (*a*) They were instructed to "concert, agree upon, direct, order, and prosecute" such measures as they should deem most fit and proper, to obtain redress of American grievances, or, in more general terms, they were to take care of the liberties of the country. (*b*)

Soon after this meeting, Georgia acceded to and completed the confederacy of the thirteen colonies. Hostilities had already commenced in the province of Massachusetts, and the claim of the British Parliament to an unconditional and unlimited sovereignty over the colonies was to be asserted by an appeal to arms. The Continental Congress, charged with the protection of the rights and interests of the people of the united colonies, and intrusted with the power, and sustained by the zeal and confidence of their constituents, prepared for resistance. They published a declaration of the causes and necessity of taking up arms, and proceeded immediately to levy and organize an army, to prescribe rules for the government of their land and naval forces, to contract debts, and emit a paper currency upon the faith of the Union; and gradually assuming all the powers of national sovereignty, they at last, on the 4th day of July, 1776, took a separate and equal station among the nations of the earth, by declaring the united colonies to be free and independent states.

This memorable declaration, in imitation of that published by the United Netherlands on a similar occasion, recapitu-
* 209 lated * the oppressions of the British king, asserted it to be the natural right of every people to withdraw from

(*a*) Journals of Congress, of May, 1775, [i.] 69–74.
(*b*) Journals of Congress, of May, 1775, i. 74.

tyranny, and with the dignity and the fortitude of conscious rectitude, it contained a solemn appeal to mankind in vindication of the necessity of the measure. By this declaration, made "in the name, and by the authority of the people," the colonies were absolved from all allegiance to the British crown, and all political connection between them and Great Britain was totally dissolved. The principle of self-preservation, and the right of every community to freedom and happiness, gave a sanction to this separation. When the government established over any people becomes incompetent to fulfil its purpose, or destructive to the essential ends for which it was instituted, it is the right of that people, founded on the law of nature and the reason of mankind, and supported by the soundest authority, and some very illustrious precedents, to throw off such government, and provide new guards for their future security. This right is the more apparent, and the duty of exercising it becomes the more clear and unequivocal, in the case of colonies which are situated at a great distance from the mother country, and which cannot be governed by it without vexatious and continually increasing inconvenience; and when they have arrived at maturity in strength and resources, or, in the language of Montesquieu, which he applied to our very case, "when they have grown great nations in the forests they were sent to inhabit." If, in addition to these intrinsic causes, gradually and powerfully tending to a separation, the parent state should think fit, in the arrogance of power and superiority, to deny to her colonies the equal blessings of her own free government, and should put forth a claim to an unlimited control, in her own discretion, over all their rights, and the whole administration of their affairs, the consequence would then be almost inevitable, that the colonists would rise and repel the claim; and more certainly would this be the case, if * they were a * 210 spirited and intelligent race of men, true to themselves, and just to their posterity.

The general opinion in favor of the importance and value of the union appears evident in all the proceedings of Congress; and as early as the declaration of independence, it was thought expedient, for its security and duration, to define with precision, and by a formal instrument, the nature of our compact, the powers of Congress, and the residuary sovereignty of the states. On the 11th of June, 1776, Congress undertook to digest and

prepare articles of confederation. But the business was attended with much embarrassment and delay, and, notwithstanding these states were then surrounded by the same imminent dangers, and were contending for the same illustrious prize, it was not until the 15th of November, 1777, that Congress could so far unite the discordant interests and prejudices of thirteen distinct communities as to agree to the articles of confederation. And when those articles were submitted to the state legislatures for their perusal and ratification, they were declared to be the result of impending necessity, and of a disposition for conciliation, and that they were agreed to, not for their intrinsic excellence, but as the best system which could be adapted to the circumstances of all, and, at the same time, afford any tolerable prospect of general assent. (*a*)

These celebrated articles met with still greater obstacles in their progress through the states. Most of the legislatures ratified them with a promptitude which showed their sense of the necessity of the confederacy, and of the indulgence of a liberal spirit of accommodation. But Delaware did not accede to them until the year 1779, and Maryland explicitly rejected them. (*b*) She instructed her delegates to withhold their assent to the articles, until there was an amendment, or additional agreement, to

appropriate the uncultivated and unpatented lands in the
* 211 western part of the Union, as a common * fund to defray
the expenses of the war. (*a*) These lands were claimed by the states within whose asserted limits and jurisdiction they were situated, and several of them, from a deep sense of the importance of the union, agreed to an unconditional ratification of the articles, or, in other words, to a separate confederacy between the states so ratifying the same, though Maryland, or other states, should withhold their approbation and sanction. (*b*) The legislature of New York, by their acts of 23d of October, 1779, and 19th of February, 1780, even consented to a release of the unsettled lands in the western part of the state, for the use and benefit of such of the United States as should become

(*a*) Journals of Congress, iii. The instructions given to the delegates to the Continental Congress by the several colonial congresses, conventions, and assemblies, in 1776, and prior to the declaration of independence, contained an express reservation to each colony of the sole and exclusive regulation of its own internal government, police, and concerns.

(*b*) Id. vii.

(*a*) Journals of Congress, v. 208.

(*b*) Id. v.

members of the federal alliance; and to resign the jurisdiction as well as the right of pre-emption over her waste and uncultivated territory. The refusal of Maryland, so long persisted in, gave encouragement to the enemy, and injured the common cause, and damped the hopes of the friends of America at home and abroad. These considerations at last induced that state to make a generous sacrifice of her pretensions; and on the 1st of March, 1781, and which was upwards of three years from their first promulgation, the articles of confederation received the unanimous approbation of the United States.

The difficulties which impeded the framing and adopting the articles of confederation, even during the pressure of a common calamity, and which nothing at last but a sense of common danger could surmount, form a striking example of the mighty force of local interests and discordant passions, and they teach a monitory lesson of moderation to political councils.

Notwithstanding the articles of confederation conferred upon Congress (though in a very imperfect manner, and under a most unskilful organization) the chief rights of political supremacy, the *jura summi imperii*, by which * our existence * 212 as an independent people was bound up together, and known and acknowledged by the nations of the world, yet they were, in fact, but a digest, and even a limitation, in the shape of written compact, of those undefined and discretionary sovereign powers which were delegated by the people of the colonies to Congress, in 1775, and which had been freely exercised and implicitly obeyed. (*a*) A remarkable instance of the exercise of

(*a*) The government of the Union is considered to have been revolutionary in its nature, from its first institution by the people of the colonies, in 1774, down to the final ratification of the articles of confederation, in 1781, and to have possessed powers adequate to every national emergency, and coextensive with the object to be attained. (Paterson, J., Iredell, J., and Blair, J., in Penhallow *v.* Doane, 3 Dallas, 80, 91, 95, 111; Dane's Abr. ix. App. 1, 13, 16, 21, 25; Judge Wilson, in his argument in support of the ordinance of Congress of December 31, 1781, incorporating the Bank of North America, Wilson's Works, iii. 397; Story, Comm. on the Constitution, i. pp. 186–191.) Mr. Madison, who was a member of Congress at the time, says, that the members were generally of the opinion that they had no power, under the recently adopted articles of confederation, to incorporate the bank. They were, in fact, impelled to do it from the great expediency, if not absolute necessity of the institution, to sustain the war and our credit. The Madison Papers, i. 104. According to Mr. Dane, the government of the United States has passed through three forms: 1. The revolutionary; 2. The confederate; 3. The constitutional; and the first and the third proceeded equally from the people in their original capacity.

this original, dormant, and vast discretion appears on the journals of Congress, the latter end of the year 1776. The progress of the British arms had, at that period, excited the most alarming apprehension for our safety, and Congress transferred to the commander-in-chief, for the term of six months, complete dictatorial power over the liberty and property of the citizens of the United States, in like manner as the Roman senate, in the critical times of the republic, was wont to have recourse to a dictator, *ne quid respublica detrimenti capiat.* (*b*) Such loose, undefined authority as the Union originally possessed was absolutely incompatible with any regular notions of liberty. Though it was exercised, in the instance we have referred to, and in other strong cases, with the best intentions, and under the impulse of an irresistible necessity, yet such an irregular sovereignty never can be durable. It will either dwindle into insignificance, or degenerate into despotism. (*x*)

The powers of Congress, as enumerated in the articles of confederation, would perhaps have been competent for all the essential purposes of the Union, had they been duly distributed among the departments of a well-balanced government, and been carried down, through the medium of a national, judicial, and
*213 executive power, to the individual citizens * of the Union.

The exclusive cognizance of our foreign relations, the rights of war and peace, and the right to make unlimited requisitions of men and money, were confided to Congress, and the exercise of them was binding upon the states. But, in imitation of all the former confederacies of independent states, either in ancient Greece or modern Europe, the articles of confederation carried the decrees of the federal council to the states in their sovereign or collective capacity. This was the great fundamental defect in the confederation of 1781; it led to its eventual overthrow; and it has proved pernicious or destructive to all other federal governments which adopted the principle. Disobedience to the laws of the Union must either be submitted to by the government, to its own disgrace, or those laws must be enforced

(*b*) Journals of Congress, ii. 475.

(*x*) Criticisms upon our present system will be found, *e. g.*, in Sir Henry S. Maine's Popular Government, and 4 Jurid. Rev. 331; 5 id. 49, 248, where Mr. G. W. Wilton observes, *inter alia*, that government as an art is not in the possession of our people. *Cf.* Bryce's American Commonwealth; Lecky's Democracy and Liberty.

by arms. The mild influence of the civil magistrate, however strongly it may be felt and obeyed by private individuals, will not be heeded by an organized community, conscious of its strength and swayed by its passions. The history of the federal governments of Greece, Germany, Switzerland, and Holland afford melancholy examples of destructive civil war springing from the disobedience of the separate members. I will mention only a single instance to this effect, taken from the generally uninteresting annals of the Swiss cantons. By one of the articles of the Helvetic alliance the cantons were bound to submit any difference which might arise between them to arbitrators. In the year 1440, a dispute arose between Zurich on the one side, and the cantons of Schweitz and Glaris on the other, respecting some territorial claims. Zurich refused to submit to a decision against her, and the contending parties took to arms. All Switzerland was, of course, armed against Zurich, the refractory member. She sought protection from her ancient enemy, the house of Austria, and the controversy was not terminated in favor of the federal decree until after six years of furious and destructive war. (*a*)

* Had there been sufficient energy in the government * 214 of the United States, under the articles of confederation, to have enforced the constitutional requisitions, it might have proved fatal to public liberty; for Congress, as then constituted, was a most unfit and unsafe depositary of political power, since all the authority of the nation, in one complicated mass of jurisdiction, was vested in a single body of men. It was, indeed, exceedingly fortunate, as the event has subsequently shown, that the state legislatures even refused to confer upon Congress the right to levy and collect a general impost, notwithstanding the refusal appeared to be extremely disastrous at the time, and was deeply

(*a*) Hist. de la Confed. Helv. par Watteville, liv. v.; Planta, Hist. of Switzerland, i. last chapter. The Swiss Confederation was remodelled by the federal act of 1815, and consists, at the present time, of twenty-five cantons. The federal Diet consists of one deputy from each of the twenty-two cantons, with one vote each, and with a half vote only to the three additional cantons, created on a subdivision. The powers of war and peace, alliance and commerce, reside exclusively in the general Diet, with a common army and treasury; but each canton may conclude separate capitulations and treaties relative to local and municipal matters, and retain its original sovereignty unimpaired for all domestic purposes. Wheaton, Elements of International Law, 3d ed. 93; [8th ed. 83, § 57 *et seq.*, and Dana's note 33.]

regretted by the intelligent friends of the Union. Had such a power been granted, the effort to amend the confederation would probably not have been made, and the people of this country might have been languishing to this day, the miserable victims of a feeble and incompetent union.

There was no provision in the articles of confederation enabling Congress to add a sanction to its laws. In this respect, they were more defective than some of the other federal governments which are to be met with in history. The Amphictyonic council, in Greece, had authority to fine and punish their refractory states. Lacedæmon and Phocis were both prosecuted before the council of the Amphictyons (which was a council of the representatives of twelve nations of Greece), and all the Greek states were required by proclamation to enforce the decree. The Germanic diet, as it formerly existed, could put its members under the ban of the empire, by which their property was confiscated; and it was aided in enforcing obedience to its laws by a federal judiciary and an executive head. (*a*) Congress, under the old confed-

(*a*) The imperial chamber had appellate jurisdiction only. Its sentences were carried into execution against refractory states by the military force of the circles. Pfeffel, Abr. Chro. de l'Hist. d'Allemagne, ii. 100; Potter, Const. Hist. 355. The new Germanic Confederacy, established under the acts of the Congress of Vienna in 1814 and 1815, and modified afterwards in 1832 and 1834, consists of the sovereign princes and free cities of Germany. It includes the great powers of Austria and Prussia, in respect to their possessions, which formerly belonged to the Germanic Empire, Denmark, in respect to the Duchy of Holstein, the Netherlands, Bavaria, Saxony, Hanover, Wurtemberg, and many other lesser principalities and states, together with the free cities of Lubeck, Frankfort, Bremen, and Hamburg. The federative Diet or Congress meets at Frankfort-on-the-Main, and is represented by the respective powers by their ministers, and their votes in the General Assembly or Diet are, in point of numbers, in some degree in a ratio to their relative power. While a few of the great powers have each four votes, others of a lesser degree have respectively three or two votes, and many of the states, and, among others, the free cities, have each only one vote. It is a singular and complicated union of mixed powers, partly national and partly separate and individual. It is declared, in the solemn acts of union, to be a federal league of the sovereign princes and free cities of Germany, formed for the exterior and interior safety of Germany, and the independence and inviolability of the confederated states. In their internal relations, the states are independent between themselves, and bound to each other by reciprocal rights and duties; and in respect to their external relations, they are a consolidated sovereign power, established on the principle of political union. The General Assembly has a great mass of sovereign powers confided to it, but its federal laws do not operate distinctly on the private individual subjects of the states of the union, but only through the agency of their separate governments. Though there are very great restraints upon the internal sovereignty of the states, yet the Germanic Con-

eration, like the states general under the Dutch confed-
eracy, *were restricted from any constructive assumption *215
of power, however essential it might have been deemed to
the complete enjoyment and exercise of that which was given.
No express grant conveyed any implied power; and it is easy to
perceive that a strict and rigorous adherence to the letter of the
grant, without permission to give it a liberal and equitable inter-
pretation, in furtherance of the beneficent ends of the govern-
ment, must, in many cases, frustrate entirely the purposes of the
power. A government too restricted for the due performance of
its high trust will either become insignificant or be driven to
usurpation. We have examples of this in the government of the
United Netherlands, before it was swept away by the violence of
the French revolution. While that government moved within
its constitutional limits, it was more absolutely nerveless than
any other government which ever existed. The states general
could neither make war or peace, or contract alliances, or raise
money; without the consent of every province; nor the provincial
states conclude those points, without the consent of every city
having a voice in their assemblies. The consequence was, that
the federal head was frequently induced, by imperious necessity,
to assume power unwarranted by the fundamental charter of the
union, and to dispense with the requisite unanimity. This was
done in the years 1648, 1657, and 1661, as well as in another
strong instance in 1668, given by Sir William Temple, and of
which he was the author. (*a*)

federacy is essentially an alliance between independent states, though, in many important particulars, they are subject to the confederate power. The sovereign powers are so intermixed and distributed among the members of the union, between the federal head and the separate state, as to render the system exceedingly complex, but it does not fall within the province of this work to enter into detail. A more general and precise sketch is given in Wheaton's Elements of International Law, 3d ed. 79–92.

(*a*) Temple's Works, i. 115, 128, 337. In 1781, a report was made by a committee of Congress, for submitting to the states an amendment to the 13th article of the confederation then recently subscribed by all the states, in which amendment it was to be provided, that in case of refusal or neglect of any one or more of the confederated states to abide by and obey the determinations of Congress, in respect to requisitions of men and money, agreeably to the apportioned quotas, Congress might employ the land and naval forces of the United States to compel compliance by the delinquent states, and to make distress of the property of such state and its citizens, and also prohibit and prevent their trade and commerce with other states and with foreign powers. Mr. Madison, and even General Washington, perceived the neces-

The former confederation of this country was defective in not giving complete authority to Congress to interfere in contests between the several states, and to protect each state from internal violence and rebellion. In many respects our confederation was superior to those of Germany, Holland, or Switzerland, and particularly in the absolute prohibition to the several states
* 216 from any interference or * concern in foreign or domestic alliances, or from the maintenance of land or naval forces in time of peace. But in the leading features which I have suggested, and in others of inferior importance, it was a most unskilful fabric, and totally incompetent to fulfil the ends for which it was erected. Almost as soon as it was ratified, the states began to fail in a prompt and faithful obedience to its laws. As danger receded, instances of neglect became more frequent, and before the peace of 1783, the inherent imbecility of the government had displayed itself with alarming rapidity. The delinquencies of one state became a pretext or apology for those of another. The idea of supplying the pecuniary exigencies of the nation from requisitions on the states was soon found to be altogether delusive. The national engagements seem to have been entirely abandoned. (*a*) Even the contributions for the ordinary expenses of the government fell almost entirely upon the two states which had the most domestic resources. Attempts were very early made by Congress, and in remonstrances the most manly and persuasive, to obtain from the several states the right of levying,

sity of such a coercive federal power. The Madison Papers, i. 81, 86, 88. But the power was never formally proposed to the states, or granted; and if it had been, it never would or could have been executed, without leading to the destruction of the Union.

(*a*) The efforts of Robert Morris, the superintendent of finance, in the years 1781 and 1782, to infuse some portion of life and energy into the languishing powers of the confederation, were incessant, devoted, and masterly, and his appeals to the interests and honor of the states were most eloquent, but utterly unavailing. See, among others, his Circular Letters to the Governors of the States, of the date of January 3, February 15, May 16, and October 21, 1782, and his Letters to Congress, of February 11, and May 17, 1782, and March 17, 1783. Diplomatic Correspondence, edited by J. Sparks, xii. Here we may say, if ever it might be truly said,

Si Pergama dextra
Defendi possent, etiam hac defensa fuissent;

and the perusal of the original correspondence of Mr. Morris, while at the head of the financial department of the United States, cannot but awaken in the breasts of the present generation, in respect to the talents and services of that accomplished statesman, the most lively sentiments of admiration and gratitude.

for a limited time, a general impost, for the exclusive *purpose of providing for the discharge of the national *217 debt. It was found impracticable to unite the states in any provision for the national safety and honor. Interfering regulations of trade and interfering claims of territory were dissolving the friendly attachments and the sense of common interest which had cemented and sustained the union during the arduous struggles of the Revolution. Symptoms of distress and marks of humiliation were rapidly accumulating. It was with difficulty that the attention of the states could be sufficiently exerted to induce them to keep up a sufficient representation in Congress to form a quorum for business. The finances of the nation were annihilated. The whole army of the United States was reduced, in 1784, to eighty persons; and the states were urged to provide some of the militia to garrison the western posts. In short, to use the language of the authors of the Federalist, "each state, yielding to the voice of immediate interest or convenience, successively withdrew its support from the confederation, till the frail and tottering edifice was ready to fall upon our heads, and to crush us beneath its ruins."

Most of the federal constitutions in the world have degenerated or perished in the same way and by the same means. They are to be classed among the most defective political institutions which have been erected by mankind for their security. The great and incurable defect of all former federal governments, such as the Amphictyonic, the Achæan, and Lycian confederacies, in ancient Greece, and the Germanic, the Helvetic, the Hanseatic, and the Dutch republics, in modern history, is, that they were sovereignties over sovereigns, and legislations, not for private individuals, but for communities in their political capacity. The only coercion for disobedience was physical force, instead of the decree and the pacific arm of the civil magistrate. The inevitable consequence, in every case in which a member of such a confederacy chooses to be disobedient, is either a civil war, or an annihilation of national authority.

*The first effort to relieve the people of this country *218 from a state of national degradation and ruin came from Virginia, in a proposition from its legislature in January, 1786, for a convention of delegates from the several states to regulate our commerce with foreign nations. The proposal was well

received in many of the other states, and five of them sent delegates to a convention which met at Annapolis, in September, 1786. (*a*) This small assembly being only a partial representation of the states, and being deeply sensible of the radical defects of the system of the existing federal government, thought it inexpedient to attempt a partial and probably only a temporary and delusive alleviation of our national calamities. They concurred, therefore, in a strong application to Congress for a general convention, to take into consideration the situation of the United States, and to devise such further provisions as should be proper, to render the federal government not a mere phantom, as heretofore, but a real government, adequate to the exigencies of the Union. Congress perceived the wisdom and felt the

(*a*) Though the proximate origin of the federal convention of 1787 was the proposition from Virginia, in 1786, yet the necessity of a national convention, with full authority to amend and reorganize the government, was first suggested, and fully shown, by Colonel Hamilton, in 1780, while he was an aid to General Washington. In his masterly and very extraordinary letter (considering his age of only twenty-three years), addressed to the Honorable James Duane, a member of Congress, from New York, in September, 1780, he showed most manifestly the defects and absolute inefficiency of the articles of confederation; and that the United States, for their safety and happiness, if not for their future existence, stood in need of a national government, clothed with the requisite sovereign powers, such as the confederation theoretically contained, but without possessing any fit organs to receive them. This letter is to be seen at large in the life of Alexander Hamilton, by his son, John C. Hamilton, i. 284–305, and in the Hamilton Papers, i. 428, edited by Dr. Hawks. The earliest legislative suggestion of a convention for the purpose of reforming the government was the concurrent resolutions of the two houses of the legislature of New York, passed on the 20th and 21st of July, 1782. They were introduced into the Senate by General Schuyler, and they stated, that "the radical source of most of our embarrassments was the want of sufficient power in Congress; that the confederation was defective in several essential points, particularly in not vesting the federal government either with a power of providing revenue for itself, or with ascertained and productive funds; that its defects could not be repaired, nor the powers of Congress extended, by partial deliberations of the states separately; and that it would be advisable to propose to Congress to recommend, and to each state to adopt the measure of assembling a general convention of the states, specially authorized to revise and amend the confederation." New York Journals of the Senate and Assembly, July 20 and 21, 1782.

There is no doubt of the justness of the inference drawn by his son (Life of Hamilton, i. 405), that Colonel Hamilton, who was attending the legislature when the resolutions passed, and who had an interview with a joint committee of the two houses, in his public character, under the superintendent of finance, and who was, at the same time, chosen a delegate in Congress, by the legislature, was the distinguished individual, who by his wisdom suggested, and by his influence promoted, that earliest authoritative measure taken for a general convention of the states.

patriotism of the suggestion, and recommended a convention of delegates from the several states, to revise, amend, and alter the articles of confederation. All the states except Rhode Island acceded to the proposal, and appointed delegates, who assembled in a general convention in Philadelphia, in May, 1787.

This was a crisis most solemn and eventful, in respect to our future fortune and prosperity. All the fruits of the Revolution, and perhaps the final destiny of republican government, were staked on the experiment which was then to be made to reform the system of our national compact. Happily for this country, and probably as auspiciously for the general liberties of mankind, the convention combined a very rare union of the best talents, experience, information, patriotism, probity, and character which the country afforded; and it commanded that universal public confidence which such qualifications were calculated to inspire. After several months of tranquil deliberation, the convention agreed, with unprecedented unanimity, on the *plan *219 of government which now forms the Constitution of the United States. This plan was directed to be submitted to a convention of delegates, to be chosen by the people at large in each state, for their assent and ratification. Such a measure was laying the foundations of the fabric of our national polity, where alone they ought to be laid, on the broad consent of the people. The Constitution underwent a severe scrutiny and long discussion, not only in public prints and private circles, but solemnly and publicly, by the many illustrious statesmen who composed these local conventions. Near a year elapsed before it received the ratification of a requisite number of conventions of delegates of the people of the states to give it a political existence. New Hampshire was the ninth state which adopted the Constitution, and thereby, according to one of its articles, it was to become the government of the states so ratifying the same. Her example was immediately followed by the powerful states of Virginia and New York; and on the 4th of March, 1789, the government was duly organized and put into operation. North Carolina and Rhode Island withheld some time longer their assent. Their scruples were, however, gradually overcome, and in June, 1790, the Constitution had received the unanimous ratification of the respective conventions of the people in every state.

The peaceable adoption of this government, under all the circumstances which attended it, presented the case of an effort of deliberation, combined with a spirit of amity and of mutual concession, which was without example. It must be a source of just pride, and of the most grateful recollection, to every American, who reflects seriously on the difficulty of the experiment, the manner in which it was conducted, the felicity of its issue, and the fate of similar trials in other nations of the earth.

LECTURE XI.

OF CONGRESS.

THE power of making laws is the supreme power in a state, and the department in which it resides will naturally have such a preponderance in the political system, and act with such mighty force upon the public mind, that the line of separation between that and the other branches of the government ought to be marked very distinctly, and with the most careful precision.[1]

The Constitution of the United States has effected this purpose with great felicity of execution, and in a way well calculated to preserve the equal balance of the government and the harmony of its operations. It has not only made a general delegation of the legislative power to one branch of the government, of the executive to another, and of the judicial to the third, but it has specially defined the general powers and duties of each of those departments. (*x*) This is essential to peace and safety in any gov-

[1] Mauran *v.* Smith, 8 R. I. 192, 217; [Kilbourn *v.* Thompson, 103 U. S. 168, 190 *et seq.*;] *post*, 322, n. 1. See also *post*, 296, n. 1; 221, n. 1; 323, n. 1. "According to the traditional theory, as it exists in all the books, the goodness of our constitution consists in the entire separation of the legislative and executive authorities; but in truth its merit consists in their singular approximation. The connecting link is *the cabinet*. By that new word we mean a committee of the legislative body selected to be the executive body. . . . As a rule, the nominal prime minister is chosen by the legislature; and the real prime minister for most purposes — the leader of the House of Commons — almost without exception is so." Bagehot on the English Constitution, London, 1867, No. i. p. 12. "Living across the Atlantic, and misled by accepted doctrines, the acute framers of the Federal Constitution, even after the keenest attention, did not perceive the Prime Minister to be the principal executive of the British Constitution, and the sovereign a cog in the mechanism." Ib. No. iv. p. 84.

(*x*) The duties of the executive, legislative, and judicial departments of the government are constitutionally distinct, and one of them cannot lawfully infringe upon the province of another. Thus the action of the Secretary of the Treasury in

ernment, and especially in one clothed only with specific powers for national purposes, and erected in the midst of numerous state governments retaining the exclusive control of their local con-

remitting penalties cannot be revised by the courts. Macheca *v.* United States, 26 Fed. Rep. 845. So a Federal court cannot control the discretion of the postmaster general, under U. S. Rev. Stats., §§ 3929, 4041, to return registered letters which he deems sent to persons conducting a lottery and to forbid payment by postmasters of money orders to such persons. Enterprise S. Ass'n *v.* Zumstein, 64 Fed. Rep. 837. A statute (like 25 St. at L. 424, §§ 9, 10) enabling the Secretary of War to determine whether a bridge obstructs navigation, and if so, to require its alteration, is unconstitutional, being a delegation to that officer of powers exclusively vested in Congress. United States *v.* Rider, 50 Fed. Rep. 406; United States *v.* Keokuk & H. Bridge Co., 45 id. 178. So the system of improving a harbor lawfully adopted by Congress cannot be changed or impeded by the Federal courts. Wisconsin *v.* Duluth, 96 U. S. 379. Congress may constitutionally provide for the exclusion of a certain class of aliens by enacting that the decision of the inspectors of immigration against the right to land shall be final and conclusive unless appeal is taken to the superintendent of immigration, his action being further reviewable by the Secretary of the Treasury. Nishimura Ekiu *v.* United States, 142 U. S. 651; Fong Yue Ting *v.* United States, 149 U. S. 698.

Congress cannot impose upon the courts functions not judicial in their nature. See Reagan *v.* Farmers' Loan & T. Co., 154 U. S. 362; Interstate Commerce Commission *v.* Brimson, id. 447; Travellers' Ins. Co. *v.* Oswego, 59 Fed. Rep. 58. It cannot make the courts its instruments in conducting purely legislative investigations; a commission, like the Pacific Railway Commission, created by act of Congress, is not a judicial tribunal and cannot determine the rights of the government or of the corporations whose affairs it is to investigate. *In re* Pacific Railway Commission, 12 Sawyer, 559. But Congress may grant to the inferior courts of the United States jurisdiction in cases where original jurisdiction is vested in the Supreme Court by the Constitution. Ames *v.* Kansas, 111 U. S. 449. And the appellate jurisdiction of the Supreme Court may be extended to include the judicial action of all inferior courts established by Congress. United States *v.* Coe, 155 U. S. 76. Suits against the United States in their own courts can only be authorized by Congress, and the courts cannot go beyond the letter of its consent when given. Schillinger *v.* United States, 155 U. S. 163.

When land is taken for public use under the right of eminent domain the President's approval of the price to be paid by the United States is not a judicial act. Shoemaker *v.* United States, 147 U. S. 282. The judiciary may in extradition proceedings review the action of the executive when an error has clearly been committed. *Ex parte* Brown, 28 Fed. Rep. 653. And Congress may, without infringing upon the appointing power, impose new duties, germane to the office, upon officers previously appointed. Shoemaker *v.* United States, 147 U. S. 282.

A statute which, as construed by the Supreme Court of a State, allows a railroad commission to establish final rates for railroads, without any inquiry or trial as to their reasonableness, and forbids the courts to control the commission if their rates are unjust and unreasonable, deprives the railroad corporations of their right to a judicial investigation by "due process of law." Chicago, M. & St. P. Ry. Co. *v.*

cerns. It will be the object of this lecture to review the legislative department; and I shall consider this great title in our national polity under the following heads: — (1.) The constituent parts of Congress, and the mode of their appointment. (2.) Their joint and separate powers and privileges. (3.) Their method of enacting laws, with the qualified negative of the President.

1. Of the Division into Two Houses. — By the Constitution, (*a*) all the legislative powers therein *granted are *222 vested in a Congress, consisting of a Senate and House of Representatives.

The division of the legislature into two separate and independent branches is founded on such obvious principles of good policy, and is so strongly recommended by the unequivocal language of experience, that it has obtained the general approbation

(*a*) Art. 1, sec. 1.

Minnesota, 134 U. S. 418. Authority to fix reasonable and just rates for railroad transportation of freight and passengers is a power which the legislature may delegate to railroad commissioners. Storrs *v.* Pensacola & A. R. Co., 29 Fla. 617.

If a city charter makes the common council the judge of the election and qualifications of its own members, their determination that a certain person is elected, cannot properly be interfered with by an injunction or mandamus issued upon his opponent's application. Halloran *v.* Carter, 35 N. Y. State Rep. 884; s. c. 13 N. Y. Sup. 214.

The power to determine the advisability of extending city limits may be conferred by the legislature upon the courts. Callen *v.* Junction City, 43 Kansas, 627. But the extension by the legislature of city limits to include additional territory cannot be interfered with by the courts on the ground that the added territory will not be benefited. People *v.* Riverside, 70 Cal. 461. A State statute which empowers the Governor to remove police commissioners does not confer upon him judicial power. State *v.* Hawkins, 44 Ohio St. 98. The fixing of a State reporter's salary belongs to the legislature and should not be delegated to the courts. Smith *v.* Strother, 68 Cal. 98. So legislative power cannot be delegated to an insurance commissioner. Anderson *v.* Manchester F. A. Co. (Minn.), 63 N. W. Rep. 241. The legislature of a State cannot require its highest court to give written grounds for its decisions. Vaughn *v.* Harp, 49 Ark. 160; or burden the judiciary with new duties such as the preparation of the head notes for the reports. Griffin *v.* State, 119 Ind. 520; nor can it, unless so empowered by the constitution of the State, curtail or regulate the inherent power of its courts to punish for contempt. Burke *v.* Territory (Okl.), 37 Pac. Rep. 829.

A court of equity is without jurisdiction to enjoin the Secretary of a State from issuing notices of election under a statute which the plaintiff claims to be unconstitutional, as this involves political and not civil rights. Such a court cannot protect the citizen's right to vote or to be voted for at an election. Fletcher *v.* Tuttle, 151 Ill. 41.

of the people of this country. One great object of this separation of the legislature into two houses, acting separately and with co-ordinate powers, is to destroy the evil effects of sudden and strong excitement, and of precipitate measures, springing from passion, caprice, prejudice, personal influence, and party intrigue, which have been found, by sad experience, to exercise a potent and dangerous sway in single assemblies. A hasty decision is not so likely to proceed to the solemnities of a law, when it is to be arrested in its course, and made to undergo the deliberation, and probably the jealous and critical revision, of another and a rival body of men, sitting in a different place, and under better advantages to avoid the prepossessions and correct the errors of the other branch.[1] The legislatures of Pennsylvania and Georgia consisted originally of a single house. The instability and passion which marked their proceedings were very visible at the time, and the subject of much public animadversion; and in the subsequent reform of their constitutions, the people were so sensible of this defect, and of the inconvenience they had suffered from it, that in both states a senate was introduced. No portion of the political history of mankind is more full of instructive lessons on this subject, or contains more striking proof of the faction, instability, and misery of states under the dominion of a single unchecked assembly, than that of the Italian republics of the middle ages, which arose in great numbers, and with dazzling but transient splendor, in the interval between the fall of the Western and the Eastern empire of the Romans. They were all alike ill-constituted, with a
* 223 single unbalanced assembly. * They were alike miserable, and all ended in similar disgrace. (*a*)

Many speculative writers and theoretical politicians about the time of the commencement of the French revolution were struck with the simplicity of a legislature with a single assembly, and concluded that more than one house was useless and expensive. This led the elder President Adams to write and publish his great

(*a*) Adams's Defence of the American Constitutions, iii. 502.

[1] Laboulaye, Histoire des États-Unis, ii. Douzième Leçon, 288. *Contra*, Mill on Representative Government, c. 13. "The evil of two co-equal houses of distinct natures is obvious. Each house can stop all legislation, and yet some legislation may be necessary." Bagehot on the English Constitution, No. v. p. 127. See also ib. 137, and Pomeroy, Const. Law, § 188 *et seq.*

work, entitled, "A Defence of the Constitutions of Government of the United States," in which he vindicates, with much learning and ability, the value and necessity of the division of the legislature into two branches, and of the distribution of the different powers of the government into distinct departments. He reviewed the history, and examined the construction of all mixed and free governments which had ever existed, from the earliest records of time, in order to deduce, with more certainty and force, his great practical truth, that single assemblies, without check or balance, or a government with all authority collected into one centre, according to the notion of M. Turgot, were visionary, violent, intriguing, corrupt, and tyrannical dominations of majorities over minorities, and uniformly and rapidly terminated their career in a profligate despotism.

This visionary notion of a single house of the legislature was carried into the constitution which the French National Assembly adopted in 1791. The very nature of things, said the intemperate and crude politicians of that assembly, was adverse to every division of the legislative body; and that as the nation which was represented was one, so the representative body ought to be one also. The will of the nation was indivisible, and so ought to be the voice which pronounced it. If there were two chambers, with a *veto* upon the acts of each other, in some cases they would be reduced to perfect inaction. By such reasoning, the National Assembly of France, consisting of upwards of one thousand members, *after a short and tumultuous debate, almost *224 unanimously voted to reject the proposition of an upper house. (*a*) The same false and vicious principle continued for some time longer to prevail with the theorists of that country; and a single house was likewise established in the plan of government published by the French convention in 1793. The instability and violent measures of that convention, which continued for some years to fill all Europe with astonishment and horror, tended to display, in a most forcible and affecting light, the miseries of a single unchecked body of men, clothed with all the legislative powers of the state. It is very possible that the French nation might have been hurried into the excesses of a revolution, even under a better organization of their government; but if the proposition of M. Lally Tolendal, to constitute a senate or upper

(*a*) New Ann. Reg. for 1791. Hist. 49.

house, to be composed of members chosen for life, had prevailed, the constitution would have had much more stability, and would probably have been much better able to preserve the nation in order and tranquillity. Their own sufferings taught the French people to listen to that oracle of wisdom, the experience of other countries and ages, and which for some years they had utterly disregarded, amidst the hurry and the violence of those passions by which they were inflamed. No people, said M. Boissy d'Anglas, in 1795, can testify to the world with more truth and sincerity than Frenchmen can do, the dangers inherent in a single legislative assembly, and the point to which factions may mislead an assembly without reins or counterpoise. We accordingly find that in the next constitution, in 1795, there was a division of the legislature, and a council of ancients was introduced, to give stability and moderation to the government; and this idea of two houses was never afterwards abandoned.

2. Of the Senate. — The Senate of the United States is composed (*b*) of two senators from each state, chosen by the * 225 legislature thereof, * for six years, and each senator has one vote. (*x*) If vacancies in the Senate 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. (*a*) The Senate at present consists of sixty members, representing the thirty states of the Union. (*b*) In this part of the Constitution we readily perceive the features of the old confederation. Each state has its equal voice and equal weight in

(*b*) Art. 1, sec. 3.

(*a*) It was settled by the Senate of the United States, in the case of Landman, in 1825, that the state executive could not make an appointment in the recess of the state legislature, in anticipation of an approaching vacancy. He must wait until the vacancy has actually occurred before he can constitutionally appoint.

(*b*) In 1840, it was enlarged from 48 to 52 members, by the admission of Michigan and Arkansas as states into the Union, in 1836, *vide infra*, 384, and subsequently to 60 members, by the admission of Iowa, Florida, Wisconsin, and Texas as states into the Union, *vide infra*, 384. The members of the English House of Lords are about 460 in number.

(*x*) The choice of a senator for a full term belongs to the latest legislature that can perform the duty. Opinion of the Court, 60 N. H. 585. The Secretary of State or Supreme Court of a State cannot pass upon the election of a United States senator by the legislature or his appointment by the State executive. State *v.* Crawford, 28 Fla. 441.

the Senate, without any regard to disparity of population, wealth, or dimensions. This arrangement must have been the result of that spirit of amity and mutual concession which was rendered indispensable by the peculiarity of our political condition. It is grounded on the idea of sovereignty in the states; and every independent community, as we have already seen, is equal by the law of nations, and has a perfect right to dictate its own terms, before it enters into a social compact. On the principle of consolidation of the states, this organization would have been inadmissible, for in that case each state would have been merged in one single and entire government. At the time the articles of confederation were preparing, it was attempted to allow the states an influence and power in Congress in a ratio to their numbers and wealth; but the idea of separate and independent states was at that day so strongly cherished, that the proposition met with no success. (*c*)

The election of the Senate by the state legislatures is also a recognition of their separate and independent existence, and renders them absolutely essential to the operation of the national government. (*d*) There were difficulties, some years ago, as to the true construction of the Constitution in the choice of senators. They were to be *chosen by the legislatures*, and the legislature was to prescribe the times, places, and manner of holding elections for senators, and Congress are authorized to make and alter such regulations, except as to the place. (*e*) As the legislature may prescribe the *manner*, it has been considered and settled, in New York, that the legislature may prescribe that they shall be chosen * by joint vote or ballot of the two houses, in case * 226 the two houses cannot separately concur in a choice, and then the weight of the Senate is dissipated and lost in the more numerous vote of the Assembly. This construction has become too convenient, and has been too long settled by the recognition of senators so elected, to be now disturbed; though I should think, if the question was a new one, that when the Constitution directed that the senators should be chosen *by the legislature*, it meant not the members of the legislature *per capita*, but the legis-

(*c*) Journals of Congress, iii. 416.

(*d*) It gives to the state governments, says the Federalist, No. 62, such an agency in the formation of the federal government as must secure their authority.

(*e*) Art. 1, sec. 4.

lature in the true technical sense, being the two houses acting in their separate and organized capacities, with the ordinary constitutional right of negative on each other's proceedings. This was a contemporary exposition of the clause in question, and was particularly maintained in the well-known letters of the Federal Farmer, (*a*) who surveyed the Constitution with a jealous and scrutinizing eye.

The small number and long duration of the Senate were intended to render them a safeguard against the influence of those paroxysms of heat and passion which prevail occasionally in the most enlightened communities, and enter into the deliberation of popular assemblies. In this point of view, a firm and independent Senate is justly regarded as an anchor of safety amidst the storms of political faction; and for want of such a stable body, the republics of Athens and Florence were overturned by the fury of commotions, which the Senates of Sparta, Carthage, and Rome might have been able to withstand. The characteristical qualities of the Senate, in the intendment of the Constitution, are wisdom and stability. The legal presumption is, that the Senate will entertain more enlarged views of public policy, will feel a higher and juster sense of national character, and a greater regard for stability in the administration of the government. These qualities, it is true, may, in most cases, be equally found in the

*227 other branch of the legislature, but *the constitutional structure of the House is not equally calculated to produce them; for, as the House of Representatives comes more immediately from the people, and the members hold their seats for a much shorter time, they are presumed to partake, with a quicker sensibility, of the prevailing temper and irritable disposition of the times, and to be in much more danger of adopting measures with precipitation, and of changing them with levity. A mutable legislation is attended with a formidable train of mischiefs to the community. It weakens the force and increases the intricacy of the laws, hurts credit, lessens the value of property, and it is an infirmity very incident to republican establishments, and has been a constant source of anxiety and concern to their most enlightened admirers. (*a*) A disposition to multiply and change laws, upon the spur of the occasion, and to be making constant and restless experiments with the statute code, seems to be the natural

(*a*) Letter 12. (*a*) Federalist, ii. No. 62.

disease of popular assemblies. In order, therefore, to counteract such a dangerous propensity, and to maintain a due portion of confidence in the government, and to insure its safety and character at home and abroad, it is requisite that another body of men, coming likewise from the people, and equally responsible for their conduct, but resting on a more permanent basis, and constituted with stronger inducements to moderation in debate and to tenacity of purpose, should be placed as a check upon the intemperance of the more popular department. (*b*)[1] (*x*)

The Senate has been, from the first formation of the government, divided into three classes; and the rotation of the classes was originally determined by lot, and the seats of one class are vacated at the expiration of the second year, and one third of the Senate are chosen every second year. (*c*) This provision was borrowed from a similar one in some of the state constitutions, of which Virginia gave the first example; and it is admirably

(*b*) The Constitution of Rhode Island, which was organized and went into operation in 1843, has constituted the Senate of that state upon conservative principles, while the House of Representatives is constructed upon the basis of population, giving to each city and town a representation in a ratio to its number of inhabitants. The Senate is composed of only one member from each city or town, so that the legislative power cannot be wielded by overwhelming numbers in a few great manufacturing towns or cities, to the oppression of the agricultural towns. It is a salutary and provident check to the tyranny of majorities over minorities.

(*c*) Constitution of the United States, art. 1, sec. 3.

[1] See 4 Am. Law Rev. 18.

(*x*) Sir Henry S. Maine, in his "Popular Government" says (p. 179, 248): "There appears to me to be no escaping from the fact that all such institutions as a Senate, a House of Peers, or a Second Chamber, are founded on a denial or a doubt of the proposition that the voice of the people is the voice of God. . . . It is not to be expected that all the hopes of the founders of the American Constitution would be fulfilled. They do not seem to have been prepared for the rapid development of party, chiefly under the influence of Thomas Jefferson, nor for the thorough organization with which the American parties before long provided themselves."

In England, the legislative functions of the House of Lords have undergone many changes since the days of the *Curia Regis*. Yet there are some matters in relation to which exclusive powers are claimed by the House of Lords alone, or by the House of Commons. Thus, bills affecting the rights of the peerage are, it seems, to be first introduced into the House of Lords, and may be rejected but not amended in the House of Commons. So bills for restitution in blood, after corruption, and for restitution of honors, bills of attainder, and bills of pains and penalties have usually been first introduced into the House of Lords. See Pike's Constitutional History of the House of Lords, pp. 310, 335.

*228 calculated, on the one hand, to infuse *into the Senate, biennially, renewed public confidence and vigor; and, on the other, to retain a large portion of experienced members, duly initiated into the general principles of national policy, and the forms and course of business in the House. The Vice-President of the United States is President of the Senate, but has no vote, unless they be equally divided. (*a*) It would seem to be the better opinion, that he has authority as presiding officer, *virtute officii*, and without any special delegation of power by the Senate, to preserve order; but from some scruples on that subject, the Senate, in 1828, established by rule that every question of order should be decided by the President of the Senate without debate, subject to an appeal to the Senate. (*b*)

The superior weight and delicacy of the trust confided to the Senate, and which will be shown more fully hereafter, is a reason why the Constitution (*c*) requires, not only that the senators should be chosen for six years, but that each senator should be thirty years of age, and nine years a citizen of the United States, and, at the time of his election, an inhabitant of the state for which he is chosen.[1] The same age was also requisite for a Roman senator, though in their executive offices no qualification of age was required. Ne ætas quidem distinguebatur quin prima juventa consulatum ac dictaturas inirent. (*d*) It has been also deemed fit and proper, in a country which was colonized originally from several parts of Europe, and has been disposed to adopt the most liberal policy towards the rest of mankind, that a period of citizenship, sufficient to create an attachment to our government, and a knowledge of its principles, should render an emigrant eligible to office. The English policy is not quite so enlarged. No alien-born can become a member of Parliament. This disability was imposed by the act of settlement of 12 Wm. III. c. 2; and no bill of naturalization can be received in either House of Parliament, without such disabling clause in it.

(*a*) Art. 1, sec. 3.
(*b*) Story, Comm. ii. 212, 213 [§ 740].
(*c*) Art. 1, sec. 3.
(*d*) Tac. Ann. lib. 11, 22.

[1] For further qualifications, as to participation in the late rebellion, see the fourteenth amendment of the Constitution, § 3. The question mentioned in note (*f*) is discussed, and the precedents collected in an article in 3 American Law Review, 410.

3. Of the House of Representatives. — The House of Representatives is composed of members chosen every second year by the people of the several states, who are qualified electors of the most numerous branch of the legislature of the state to which they belong. The legislature of each state prescribes the times, places, and manner of holding elections for representatives, but Congress may, at any time, by law, make or alter such regulations. (*e*) (*x*) No person can be a representative until he has attained the age of twenty-five years, and has been seven years a citizen of the United States, and is, at the time of his election, an inhabitant of the state in which he is chosen. (*f*)

*The qualifications of electors of the assembly, or most *229 numerous branch of the legislature, in the several state governments, generally are, that they be of the age of twenty-

(*e*) Art. 1, sec. 4.

(*f*) Art. 1, sec. 2. The question whether the individual states can superadd to, or vary the qualifications prescribed to the representative by the Constitution of the United States, is examined in Mr. Justice Story's Commentaries on the Constitution, ii. 99–103. But the objections to the existence of any such power appear to me to be too palpable and weighty to admit of any discussion. [3 Am. Law Rev. 410].

(*x*) The Act of Feb. 7, 1891 (26 St. at L. 735) provided for the apportionment of representatives among the States, to take effect from Mar. 3, 1893, under the census of 1890. Although this act may have unjustly deprived, of the benefit of the reapportionment, until the 52d Congress, a State entitled to increased representation, the question is political rather than judicial. State *v.* Boyd, 36 Neb. 181. The manner of returning testimony to be used in cases of contested elections for Congress is regulated by the act of Mar. 2, 1887, ch. 318 (24 St. at L. 445), amending Rev. Stats. § 127. As to ordering by a State legislature of a new election for a representative in Congress, see *In re* Representative Election, 17 R. I. 820; *Re* Congressional Election, 15 R. I. 654. A member of the house is *prima facie* entitled to his seat and salary when he receives his certificate of admission and is seated, though the seat is afterwards declared vacant. Page *v.* United States, 23 Ct. of Cl. 4; 127 U. S. 67. The governor and council of a State are not judges of the election of representatives in Congress. Justices' Opinion, 58 N. H. 621.

As Congress is not empowered to regulate the right of suffrage in the States, the changes made in the basis of suffrage by the Mississippi constitution of 1890 are not invalid because they violate the act of Congress of 1870 readmitting that State into the Union. Sproule *v.* Fredericks, 69 Miss. 898. Congress may require State officers of elections to perform the duties defined by State laws as to Congressional elections, and make a failure in this regard an offence against the United States. *In re* Coy, 31 Fed. Rep. 794. Congress may enact laws to protect all voters in national elections. The Ku-Klux Cases, 110 U. S. 651. The Federal courts have no jurisdiction of an offence against election laws which does not affect the election of a member of Congress. United States *v.* Morrissey, 32 Fed. Rep. 147.

one years and upwards, and free resident male citizens of the state in which they vote; and, in some of the states, they are required to possess property, and in the most of them to be white, as well as free citizens.[1] The description is, almost everywhere, so large as to include all persons who are of competent discretion, and are interested in the welfare of the government, and liable to bear any of its duties or burdens. The House of Representatives may, therefore, very fairly be said to represent the whole body of the American people. (*a*) Some of the state

(*a*) In almost all the states, no property qualification whatever, not even paying taxes, or serving in the militia, or being assessed for and working on the public highway, is requisite for the exercise of the right of suffrage. Every free male (and in a majority of the states) white citizen of the age of twenty-one years, and who shall have been a resident for some short given period, varying in those states from two years to three months, is entitled to vote. In Illinois, it has been adjudged that the word *inhabitant*, in the constitution of the state, means all persons who have a fixed permanent *residence bona fide*, and not one casual or temporary, and that a residence of six months entitles every inhabitant to vote; that under the ordinance of 1787, and the constitution of the state, and the statutes of 1819, 1821, 1823, 1829, and 1833, *aliens*, being residents, are entitled to vote, though the distinction between citizens and inhabitants is sustained for various other purposes; and that it belongs to the states respectively to prescribe the qualifications of persons entitled to exercise the right of suffrage, not only as to state, but to congressional elections. Spragins *v.* Houghton, 2 Scammon, 377. This latitudinary extension of the right of suffrage to aliens seems to be peculiar to some of the states formed out of the Northwestern Territory, under the ordinance of the Confederation Congress in 1787. The State of Michigan adopted it; so has Wisconsin, by her constitution in 1846; but in Ohio, by the act of 1831, the right of suffrage is restricted to natural-born and naturalized citizens, and so I think it ought to be in all sound policy; and the view taken of the subject in the above case, by one of the counsel who argued the cause, is a masterly argument. In the states of Massachusetts, Connecticut, Pennsylvania, Delaware, Georgia (the words of the constitution of Georgia are, that the electors shall "have paid all taxes which may have been required of them, and which they may have had an opportunity of paying, agreeably to law, for the year preceding the election"), Ohio, and Louisiana, the elector is required, in addition to age and residence, to have been assessed and paid, or, in Ohio, *charged* with a state or county tax, or, in Connecticut, to have served in the militia. The revised constitution of Pennsylvania, in 1838, requires the elector to have resided one year in the state, and ten days in the district, immediately preceding the election, and having within two years, if of twenty-two years of age, paid a tax, assessed ten days before the election. And in the amended constitution of Louisiana, in 1845, the qualification of having paid a tax is dropped, and the elector is only required to have been two years a citizen of the United States, or

[1] See the fourteenth amendment of the Constitution. By the fifteenth amendment, 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.

constitutions have prescribed the same or higher qualifications as to property, in the elected than in the electors, and some of

resident in the state for two consecutive years next preceding the election, and the last year in the parish where he proposes to vote, and no person shall vote except in his own parish or election precinct. In Rhode Island, New Hampshire, Virginia, and North Carolina, a qualification as to property is still requisite. The Rhode Island charter of 1663 prescribed no regulation as to the right of suffrage. The power of admitting freemen was exercised by the general assembly, until they authorized the towns to admit freemen. In 1724 an act was passed by the general assembly, providing that no person should be admitted a freeman, unless he owned a *freehold* estate of a certain value, or was the eldest son of such a freeholder. Such has been the law ever since, and the requisite value of the estate is said to be $134. But the new constitution of Rhode Island, which went into operation in May, 1843, has established and defined the property qualification of electors, being native citizens, as to real estate, to be of the value of $134, over and above all incumbrances, and together with a previous residence and home in the state for one year, and of six months in the city or town in which he votes; or, without it, the elector must have had his residence and home in the state two years, and in the town or city in which he votes, six months next preceding the election, and his name must be registered in the city or town before the end of December preceding the election, and he must have paid a tax of $1, or been enrolled in the militia, and done military service or duty therein. No pauper shall be permitted to be registered or to vote. Naturalized citizens are required to have a freehold estate of the value before required; and no person can vote to impose a tax, or to expend money, in any town or city, unless he shall have paid a tax within the year preceding, upon property valued at least at $134. These provisions, together with that relating to the judicial tenure and compensation, mentioned *infra*, at p. 295, render the aspect of the constitution of that state more wise and conservative than any other state constitution recently formed or amended. Indeed, that constitution seems to stand pre-eminent in value in the guards it introduces against one of the most alarming evils incident in large towns and cities to our democratical establishments. I mean the fraudulent abuse of the right of suffrage. The previous residence of the elector in the town or ward where he offers his vote, and his ascertained qualifications, ought to be defined and registered, as absolutely essential to the order and purity of elections. The legal provision on this subject in Massachusetts is valuable. Every citizen must have resided within the state one year, and within the town in which he may claim a right to vote, six months preceding the election. The selectmen of each town, ten days before the first Monday in March, and before the second Monday in November, annually, are to make out a correct list of all qualified voters for officers to be elected at those periods, and ten days before the election to cause their lists to be posted up in two public places in each town. The selectmen are also to meet in session within forty-eight hours next preceding the election, to receive evidence of the qualification of persons claiming to vote, and to correct the lists, and to meet for the like purpose for one hour on the day of election, and before the opening of it. The moderator at town meetings refuses, of course, to receive the votes of persons not on the list. Mass. R. S. pp. 63, 64. The constitution of the State of Florida, of 1839, contains a wholesome provision on this subject, in declaring that the legislature should, at its first session, provide for the registration of all the qualified electors in each county, and thereafter, from time to time, of all who may become such qualified electors, and that

them have required a religious test. But the Constitution of the United States requires no evidence of property in the represent-

every free white male qualified elector, when he offers to vote, must be a citizen, and have had his home, domicile, or permanent abode in the state for two years next preceding, and for the last six months in the county in which he offers to vote. The constitution of the State of Texas, of 1845, is quite latitudinary on the subject, and all white male citizens who have resided in the state one year, and six months in the district, county, city, or town, are entitled to vote. The constitution of Iowa, in 1846, goes much further, and gives the right of suffrage to every citizen who has resided in the state six months, and in the county thirty days. In Virginia, the elector must be either a freeholder or owner of a leasehold estate, or a householder, and have been assessed and paid taxes. In North Carolina, the electors of the Senate must be freeholders, as was the case formerly in New York, and the electors of the House of Commons must have paid public taxes, and none but freeholders can be members of either house of the legislature. In Georgia, the constitution of 1789 required a property qualification in the members of the legislature, over and above the amount requisite to discharge their debts; but this qualification was dropped in the amended constitution of 1798. In New Hampshire, a state senator must be seized of a freehold estate, in the state, in his own right, of the value of £200, and a state assemblyman must have an estate within his district, of the value of £100, one half thereof to be a freehold. Rhode Island and New Jersey were the only states in the Union that brought down their constitutions from 1776 triumphantly against every assault; but the former of those states changed its constitution in 1842, and the latter in 1844. The progress and impulse of popular opinion is rapidly destroying every constitutional check, every conservative element, intended by the sages, who framed the earliest American constitutions, as safeguards against the abuses of popular suffrage. Thus, in Massachusetts, by the constitution of 1780, a defined portion of real or personal property was requisite in an elector, and that qualification was dispensed with by the amended constitution of 1821. By the practice, under the charters of Rhode Island and Connecticut, a property qualification was requisite to constitute freemen and voters. This test is still continued in Rhode Island, but done away with in Connecticut by their constitution in 1818. The New York constitution of 1777 required the electors of the Senate to be freeholders, and of the Assembly to be either freeholders, or to have rented a tenement of the yearly value of forty shillings. The amended constitution of 1821 reduced this qualification down to payment of a tax, or performance of militia duty, or assessment and work on the highways. But the constitution, as again amended in 1826, swept away all these impediments to universal suffrage. In the further Revised Constitution of New York, in 1846, art. 3, sec. 3, 5, the Senate is divided into 32 senator districts, and each district to choose one senator. So the members of assembly are to be divided into 128 assembly districts, and each district to choose one member. This appears to be a valuable improvement on the election of members of the legislature. To entitle a person to vote in the election districts, he must have been a citizen for ten days, and an inhabitant of the state one year next preceding the election, and for the last four months a resident of the county where he may offer to vote, and he must vote in the election district of which he shall be a resident at the time, and for thirty days next preceding the election. The constitution further provides, that, for the purpose of voting, no person should 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

ative, nor any declaration of religious belief. He is only required to be a citizen of the competent age, and free from any undue bias or dependence, by not holding any office under the United States. (*b*) [2]

the waters of the state, or of the United States, or of the high seas, nor while a student in any seminary of learning, nor while kept at any almshouse or other asylum at public expense, nor while confined in any public prison. Art. 2, sec. 1, 3. These provisions are very good, if duly and faithfully construed and observed. The constitution further adds, sec. 4, that laws shall be made for ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage. There was the same as this last provision in the constitution of 1821, and the legislature in the year 1840 carried the constitutional provision into effect, according to its spirit and meaning, by the act entitled, "An act to prevent illegal voting in the city of New York, and to promote the convenience of legal voters," 63d sess. c. 78, by dividing the city into election districts, and providing for *a registry of the legal voters* in each district, to be made in each year, and the registry was made conclusive evidence of the right of persons so registered to vote. This act worked well, and was admirably calculated to prevent illegal voting and frauds in election, by which the right of suffrage in the city had been grossly perverted and abused. But the registry provision was repealed on the 28th February, 1842 (65th sess. c. 56), and the abuses, impositions, and frauds attending the city elections left to reassume their wonted mischiefs. The constitutional provision of 1846, as it stands, is therefore a delusive provision, unless wiser counsels prevail in future legislatures. In Maryland, by their constitution of 1776, electors were to be freeholders, or possessing property to £30; but by legislative amendments in 1801 and 1809 (and amendments are allowed to be made in that state by an ordinary statute, if confirmed by the next succeeding legislature), all property qualification was disregarded. The constitution of Virginia, in 1776, required electors to be freeholders; but the constitution of 1830 reduced down the property qualification to that of being the owner of a leasehold estate, or a householder. In Mississippi, by the constitution of 1817, electors were to have been enrolled in the militia, or paid taxes; but those impediments to universal suffrage were removed by the new constitution of 1833. So the freehold qualification, requisite, in certain cases, by the constitution of Tennessee of 1796, is entirely discontinued by the constitution of 1835. All the states and constitutions, formed since 1800, have omitted to require any property qualifications in an elector, except what may be implied in the requisition of having paid a state or county tax; and even that is not in the constitutions more recently formed or amended, except in the Rhode Island constitution of 1843. In some of the states, as in New Hampshire, for instance, a property qualification is still required in the elected, as governor or as members of the two houses of the legislature. Such a rapid course of destruction of the former constitutional checks (and of which further examples are hereafter noticed, *vide infra*, 295, note) is matter for grave reflection; and to counteract the dangerous tendency of such com-

(*b*) Art. 1, sec. 6. [See the fourteenth amendment of the Constitution.]

[2] By the fifteenth amendment, 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 term for which a representative is to serve ought not to be so short as to prevent him from obtaining a comprehensive acquaintance with the business to which he is deputed; nor so long as to make him forget the transitory nature of his seat, and his state of dependence on the approbation of his constituents. It ought also to be considered as a fact deeply interesting to the character and utility of representative republics, that very frequent elections have a tendency to render the office less important than it ought to be deemed, and the people inattentive in the exercise of their right, or else to nourish restlessness, instability, and factions; whilst, on the other hand, long intervals between the elections are apt to make them produce too much excitement, and consequently to render the periods of their
* 230 * return a time of too much competition and conflict for the public tranquillity. The Constitution has certainly not deviated in this respect to the latter extreme in the establishment of biennial elections. It has probably selected a medium, which, considering the situation and extent of our country, combines as many advantages, and avoids as many inconveniences, as any other term which might have been inserted.

The representatives are directed to be apportioned among the states, according to numbers, which is determined by adding to the whole number of free persons, including those bound to service for a term of years, and exclusive of Indians not taxed, three fifths of all other persons. (*a*) [1] The number of representatives cannot exceed one for every thirty thousand, but each state is entitled to have at least one representative. The actual enumeration or census of the inhabitants of the United States is to be made every ten years, and the representatives newly apportioned upon the same, under a new ratio, according to the relative increase of the population of the states. (*b*) The number fixed by the Constitution in the first instance, and until a census was

bined forces as universal suffrage, frequent elections, all offices for short periods, all officers elective, and an unchecked press; and to prevent them from racking and destroying our political machines, the people must have a larger share than usual of that wisdom which is *first pure, then peaceable, gentle, and easy to be entreated.*

(*a*) Art. 1, sec. 2. (*b*) Art. 1, sec. 2.

[1] By 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, &c.

taken, was sixty-five members. The apportionment under the fourth census, by the act of Congress of 7th March, 1822, was to a ratio of one representative for every forty thousand persons in each state, and it made the whole number of representatives amount to two hundred and thirteen members. Under the fifth census, completed in 1831, and which made the population of the United States amount to twelve million eight hundred and fifty-six thousand persons, the ratio of representation was enlarged to one representative for every forty-seven thousand and seven hundred persons, making, in the whole, two hundred and forty members. (*c*) The rule of apportionment of the representatives among the several states according to numbers has been attended with great difficulties in the application, because the relative numbers in each state do not, and never will, bear such an exact proportion to the aggregate that a common divisor for all will leave no fraction in any state. Every decennial apportionment

(*c*) Act of Congress, May 22, 1832, c. 91. In 1836 the territories of Michigan and Arkansas were admitted as states into the Union. *Vide infra*, 384. And in 1845 the territories of Iowa and Florida were also admitted as states. *Vide infra*, 384. And in 1846 the territory of Wisconsin, and in 1845 the Republic of Texas. Id. By the 6th census, completed in 1841, the number of persons in the United States was 17,069,453, making an increase, over the census of 1830, of 4,202,646 inhabitants, and showing a gain in a ratio exceeding 32½ per cent for the last ten years; and by the act of Congress of June 25, 1842, c. 47, the ratio of representation was enlarged to one representative for every 70,680 persons in each state, and one additional representative for each state having a greater fraction than one moiety of the said ratio. This ratio reduced the number of the members of the House of Representatives, after the 3d March, 1843, to 223 members, besides a delegate from the three territories then existing. By this reduction, and with the addition of members from the new states, the House of Representatives consisted, on the 1st January, 1847, of 230 members, and representation by delegates of certain territories had ceased. The act of Congress last mentioned also prescribed that the number of representatives in each state, under the apportionment, should be elected *by districts* composed of contiguous territory, equal in number to the number of representatives to which the state should be entitled; and that no one district should elect more than one representative. This direction was authorized by the provision in the Constitution (art. 1, sec. 4), that "the times, places, and manner of holding elections for senators or 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 place of choosing senators." The election of members of Congress by districts had been heretofore adopted in some of the states, and not in others. Uniformity on this subject was desirable, and the measure itself was recommended by the wisdom and justice of giving, as far as possible, to the local subdivisions of the people of each state a due influence in the choice of representatives, so as not to leave the aggregate minority of the people in a state, though approaching perhaps to a majority, to be wholly overpowered by the combined action of the numerical majority, without any voice whatever in the national councils.

has raised and agitated the embarrassing question. As an absolute, exact, relative equality is impossible, the principle which has ultimately prevailed is the principle of approximation, by making the apportionment among the several states according to their numbers, *as near as may be.* This is done by allowing to every state a member for every fraction of its numbers, exceeding a moiety of the ratio, and rejecting all representations of fractions less than a moiety. (*d*)

The rule of apportionment established by the Constitution is exposed to the objection that three fifths of the slaves in the southern states are computed in establishing the apportionment of the representation. But this article was the result of * 231 necessity, and grew out of the fact of the existence * of domestic slavery in a portion of our country.[1] The evil has been of too long standing, and is too extensive and too deeply rooted, to be speedily eradicated, or even to be discussed without great judgment and discretion. But the same rule which apportions the representatives extends to direct taxes; and the slaves in the southern states, while they give those states an increased number of representatives, contribute, on the other hand, when that mode of taxation is resorted to, equally to increase the measure of their contributions. (*a*)

The number of the House of Representatives would seem to be quite large enough, on its present computation; and, unless the ratio be hereafter enlarged from time to time, as the exigency may require, the House would be in danger of increasing too rapidly, and would probably become, in time, much too un-

(*d*) See Story, Comm. on the Constitution, ii. pp. 141–171, where the subject is fully examined, and the opinion of Mr. Jefferson on the one side, and Mr. Webster's report in the Senate, in April, 1832, on the other, are given at large. These documents contain the substance of the arguments for and against the principle of apportionment as adopted and settled by Congress. The same difficulty arose in the legislature of New York, in 1791, on the apportionment of the state representation, according to the census then recently taken, and the same principle of approximation was adopted; and the author of this note was then one of the members of the House of Assembly who concurred in that rule. (Journal of the Assembly of New York for 1791, 26.) But the constitution of New York gave greater facility to such a rule, for it directed the senators in each district to be apportioned according to the number of the qualified electors, *as near as may be;* and this is the manner in which the amended constitution of 1822 expresses itself on the subject.

(*a*) Federalist, ii. No. 54.

[1] *Ante*, 195, n. 1; 230, n. 1.

wieldy a body for convenience of debate and joint consultation. A due acquaintance with the local interests of every part of the Union ought to be carried into the House, and a sufficient number collected, for all the purposes of information, discussion, and diffusive sympathy with the wants and wishes of the people. When these objects are obtained, any further increase neither promotes deliberation nor increases the public safety. All numerous bodies of men, although selected with the greatest care, are too much swayed by passion, and too impatient of protracted deliberation.

The United States, in their improvements upon the exercise of the right of representation, may, as we apprehend, claim pre-eminence over all other governments, ancient and modern. Our elections are held at stated seasons, established by law. The people generally vote by ballot, in small districts, and public officers preside over the elections, receive the votes, and maintain order and fairness. (*b*) Though the competition between candidates is active, and the zeal * of rival parties * 232 sufficiently excited, the elections are everywhere conducted with tranquillity. The legislature of each state prescribes the times, places, and manner of holding elections, subject, however, to the interference and control of Congress, which is permitted them for the sake of their own preservation, and which, it is to be presumed, they will not be disposed to exercise, except when any state shall neglect or refuse to make adequate provision for the purpose. The privilege of voting, as we have already seen, is conferred upon all persons who are of sufficient competency by their age, and of sufficient ability to take care of themselves. The ancient Greeks and Romans had not only very imperfect notions of the value of representation, but the number and power of their popular assemblies were so great, and they were so liable to disorder, as to render it a very provident measure with them, to be guarded in diffusing the privileges of free citizens. Not a tenth part of the people of Athens were admitted

(*b*) Voting by ballot was introduced in the province of Massachusetts in 1634. In New York, the people voted *viva voce*, until after the Revolution, and then voting by ballot was constitutionally established. Elections in Virginia and Kentucky are still *viva voce*, and not by ballot, and this provision is established by the existing constitutions of those states. In Georgia, also, by the constitution of 1790, all elections by the people were by votes *viva voce*; but the legislature might otherwise direct; and they have since declared all elections to be by ballot.

to the privilege of voting in the assemblies of the people; and, indeed, nine tenths of the inhabitants throughout all Greece were slaves. (*a*) In Sparta, the number of votes was fixed at ten thousand. In Rome, this privilege was for many ages confined to the *Pomœria* of the city, (*b*) and it continued to be so con-

(*a*) Mitford's Greece, i. 354, 357. In the treatise of G. F. Schömann, a profound German scholar, De Comitiis Atheniensium, published in Latin in 1819, and translated into English, at Cambridge, in England, in 1838, the democratical government of Athens is discussed with masterly erudition. He states that during the vigor of the Athenian democracy, every citizen of the age of eighteen had a right to hold offices, and to give a vote at the assemblies of the people. That the most crowded assemblies rarely exceeded 8,000, though Attica contained 20,000 citizens; pp. 65, 69, 128. That all were reckoned citizens whose parents were both such; p. 66. To assume unlawfully the rights of a citizen, was punished by being sold into slavery; p. 74. The assemblies of the people were convened by magistrates (*Prytanes and Strategi*), and the chairmen or presidents (*Prytanes and Proedri*) presided at them, and proposed the subjects to be discussed, and had the bills, which had been previously prepared and sanctioned by the senate (for the fundamental law allowed none others to be considered), recited, and gave permission to the orators to speak, though the liberty of addressing the people on the subject from the Bema was open to all. The chairman also put the question to vote, whether to adopt or reject the proposition. The assembly had the right to vary or alter it; pp. 53, 81, 90, 101, 104, 107, 130, 245. The people generally voted by show of hands, and sometimes by ballot; p. 127. They voted by tribes (of which there were ten), but a majority of the whole assembly, collectively, decided.

The structure and history of the Athenian democracy has much to warn, and very little to console, the friends of freedom. From the incurable defect, among others, of assembling the people to make laws in masses, and not by representation, and from the want of a due and well-defined separation of the powers of government into distinct departments, that celebrated republic became violent and profligate in its career, and ended in despotism and slavery. The general assemblies of the people, without any adequate checks, assumed and exercised all the supreme powers of the state, legislative, executive, and judicial.

(*b*) Thirty-five tribes voted in the *comitia* held in the city of Rome; but the city tribes (*Plebs urbana*) consisted only of four within the walls of the city, and the *Liberti* were inscribed in the city tribes. The other thirty-one tribes were rural tribes, who occupied the lands for a considerable district of country around the city, and they were the ruling and influential body. See Lond. Q. Review, No. 112, for June, 1836, the Review of Professor Druman's History of Rome. But the Roman slaves were not represented, and Rome exercised the right of absolute sovereignty over the dominions of its auxiliaries. The Roman citizens, who exclusively exercised as voters the powers of government, bore, therefore, a very small proportion in numbers to the gross amount of the inhabitants. The Roman mode of passing laws, and voting in their *comitia*, was orderly, and under great checks, during the best periods of the government. When a law was proposed and discussed, and the religious rites duly performed, and no intercession made, the people proceeded to vote, and every citizen was ordered to repair to his century. The method of voting was originally *viva voce*, but after the year of the city 614, it was by ballot by the *leges tabellariæ*, which applied

fined, and to be tolerable in its operations, until the memorable social war *extended it to all the inhabitants of *233 Italy, south of the Rubicon and the Arnus. As no test of property or character was required, and as the people assembled within the walls of Rome in immense masses, and not merely to vote, but to make laws, this great innovation produced the utmost anarchy and corruption, and has justly been regarded as precipitating the fall of that commonwealth. (*a*)

The English nation, in common with the other feudal governments of Europe, anciently enjoyed the blessings of popular representation, and the knights, citizens, and burgesses were intended to represent the farmers, merchants, and manufacturers, being the several orders and classes of people of which the nation was composed. (*b*) But the mutations of time and commerce, in

equally to the election of magistrates, to public trials, and to making and repealing laws. The people were made to pass in order over some narrow planks, called *pontes*, into the *septa*, or enclosures, where certain officers delivered to every voter two tablets, one for and one against the proposition, and each person threw into a chest which of them he pleased, and they were pointed off, and the greatest number of points, either way, determined the sense of the century, and the greatest number of centuries passed for the voice of the whole people, who either passed or rejected the law. See Heineccius, Antiquit. Rom. Jur. lib. 1, tit. 2, sec. 3–11, Opera, iv., where the ancient learning on the subject is collected. And see Hooke's Rom. Hist. b. 1, c. 7, sec. 4, note. Cicero condemned the secret vote by ballot, as being a cover for corrupt and hypocritical votes. His object was to obtain or measure the moral value of the votes by a consideration of the persons who gave them. Cic. de Legibus, b. 3. Mr. Barnham, the translator of Cicero's treatises, De Republica and De Legibus, in his note to b. 3, De Legibus, learnedly discusses the superior value and safety of open voting by poll; but the orderly and specific mode of voting by ballot seems to render the latter preferable in that point of view. [See as to notes (*a*) and (*b*) Fustel de Coulanges, La Cité Antique.]

(*a*) Montesquieu's Esprit des Lois, i. lib. 2, c. 2; Grand. et Decad. des Rom. c. 9. Augustus allowed the Decurions, or privileged citizens, in the provincial chartered cities in Italy, to vote at home for Roman magistrates, and to send *in writing their ballots under seal to the polls at Rome.* This, says Suetonius, was conferring upon them, in a degree, the privileges and dignity of Rome itself. Sueton. Aug. c. 46.

(*b*) 1 Black. Comm. 174; Millar on the English Constitution, b. 2, c. 6, sec. 1. In all the northern nations, says Turner, in his learned History of England during the Middle Ages, i. 416, great councils were attached to the ruling chief, from their first emerging from the woods of Germany. The destruction of the Anglo-Saxon nobility, in their revolts against William the Conqueror, and the confiscation of their property among his Norman barons, had annihilated the members of their ancient witenagemotes, but did not terminate the institution. The Norman barons were as independent as the Saxon witena, and they surrounded the sovereign in a national council, as well after the conquest as before. But though the national councils, which were common to the Celtic and Teutonic tribes, may have contained within them the germ of the English Parliament, yet the modern antiquarians generally conclude that the

depopulating ancient boroughs, and in establishing new cities and great manufacturing establishments, without any direct parliamentary representation, insensibly changed the structure of the House of Commons, and rendered it, in theory at least, a very inadequate and imperfect organ of the will of the nation.

*234 Archdeacon Paley observed, *many years ago, (*a*) that about one half of the Commons were elected by the people, and the other half came in by purchase, or by the nomination of single proprietors of great estates. So extremely unequal was the popular vote at elections in England, that less than seven thousand voters returned nearly one half of the House of Commons. (*b*) [1] But notwithstanding the great imperfection of the

Anglo-Saxon witenagemotè had no representation of the ceorls, or inferior freemen. It consisted of the monarch, the aristocracy, and the clergy, with very little of the real liberty of deliberation and voting. Hallam on the Middle Ages, c. 8, pt. 1; Turner's Hist. of the Anglo-Saxons, iii.; Palgrave's Hist. of England, i.; Sir Wm. Betham's Dignities, Feudal and Parliamentary. The latter writer concludes, from a careful examination of an immense mass of ancient documents, that there existed no deliberative legislative assembly in England prior to the reign of Henry III. That was the era of the establishment of *magna charta*, which declared that no taxation (the three feudal *aids* excepted) was to be imposed but by Parliament, which was to consist of the higher clergy and nobility, and of the tenants in chief under the crown. This was the era of the introduction of popular representation in England, and of the establishment of the House of Commons in the time of Henry III. and Edward I. Lands held by feudal tenure were held on the condition of performing certain services; and being performed or rendered, the feudatory could not rightfully be assessed further without his consent. The royal towns obtained charters of privileges by which they were relieved from arbitrary taxation on paying or rendering the stipulated assessments. When the wants of the crown increased, and further aids were necessary, it was deemed expedient for the king and his council of peers to consult the wishes, and take the consent of the small country freeholders, and the inhabitants of the cities and boroughs; and knights, citizens, and burgesses were accordingly summoned to appear by representation in the great council or legislature under the feudal system. The first edict for the election of a representation of the commonalty of the realm of knights, citizens, and burgesses, from counties, cities, and boroughs, was issued under the usurpation of Simon Montfort, in the 49th of Hen. III. The great council of the nation had hitherto consisted of the prelates and barons, assisted by the officers of the state, and the judges. [See Stubbs's Select Charters, Clarendon Press, 1870. Freeman, Growth of the English Constitution].

(*a*) Moral Philosophy, 369, ed. 1786.

(*b*) In 1831, it was asserted, that out of six hundred and fifty-eight members, of which the English House of Commons consisted, the number of four hundred and eighty-seven were elected by one hundred and forty-four peers, and one hundred and twenty-three commoners. In 1832, the English House of Commons was reformed by three several statutes, passed *to amend the representation of the people of England*

[1] See Essays on Reform (Macmillan & Co., 1867), App. 327.

constitution of the English House of Commons, if it were to be tested by the arithmetical accuracy of our own political standards, nevertheless, in all periods of English history, it felt strongly the vigor of the popular principle. While on the continent of Europe the degeneracy of the feudal system, the influence of the papal hierarchy, the political maxims of the imperial or civil law, and the force of standing armies, extinguished the bold and irregular freedom of the Gothic governments, and abolished the representation of the people, the English House of Commons continued to be the asylum of European liberty; and it maintained its station against all the violence of the Plantagenet line of princes, the haughty race of the Tudors, and the unceasing spirit of despotism in the house of Stuart. And when we take into consideration the admirable plan of their judicial polity, and those two distin-

and Wales, Scotland and Ireland. Under the first of these statutes, fifty-six English boroughs were totally disfranchised, and thirty boroughs were reduced each to the right of returning only one member. Twenty-two new boroughs were created, with a right to each of returning two members; and Manchester, Birmingham, Leeds, and Sheffield were among the towns invested with that privilege. Sixteen other new boroughs were created, with the right to each of returning one member. Thirty-four shires were subdivided in respect to members of Parliament, so as to give an increase of sixty-three knights. The qualifications of electors, consisting of freeholders, lessees, and copyholders, were altered, and the name of every voter required to be previously registered. The number of members of the reformed House of Commons consists in the aggregate of 658, the same number as before the reformed bill, viz. 417 members for England, 29 for Wales, 53 for Scotland, 105 for Ireland. By the English Reform Act of 2 & 3 Wm. IV. c. 45, the qualifications of electors of the commons house of Parliament, for *knights of the shires*, were substantially as follows: That they must have a freehold or copyhold estate in possession, or as lessee or assignee in possession of the unexpired residue of a term of sixty years, of the clear yearly value in either case of not less than £10, above all rents and charges thereon; or of the unexpired residue in possession of a term of twenty years, of the clear yearly value of £50 above all rents and charges; or be a tenant in occupation of lands, liable to a yearly rent of £50. The elector must also have been duly registered, and, to be entitled to the registry, he must have been in the actual possession of the house, or of the rents and profits thereof, for six months previous to the last day of July in each year. The elector for *citizens and burgesses* must occupy, as owner or tenant, a house or building, either separately or jointly, with land within the borough, of the clear yearly value of £10, and rated to the poor-rate, and been duly registered, and a resident for six months previous to the last day of July in each year. The regulations respecting the registry and the revision of the lists are specific and minute, to guard more effectually against the destructive evil of fraudulent and spurious votes. No person is entitled to vote unless his name appears on the register of electors, and his qualifications cannot be questioned at the polls, except on three points: (1.) His identity with the person registered; (2.) as to having voted already at the election; (3.) that he continues to possess the registered qualification.

guished guardians of civil liberty, trial by jury and the freedom of the press, it is no longer a matter of astonishment that the nation, in full possession of those inestimable blessings, should enjoy greater security of person and property than ever was enjoyed in Athens or Sparta, Carthage or Rome, or in any of the commonwealths of Italy during the period of the middle ages.

I proceed next to consider the privileges and powers of the two houses of Congress, both aggregately and separately. The Congress is to assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they by law appoint a different day. (*c*)

*235 **4. Privileges of the Two Houses.** — *Each house is made the sole judge of the election return and qualifications of its members. (*a*) [1] (*w*) The same power is vested in the British House of Commons, and in the legislatures of the several states; and there is no other body known to the Constitution, to which such a power might safely be trusted. It is requisite to preserve a pure and genuine representation, and to control the evils of irregular, corrupt, and tumultuous elections; and as each house acts in these cases in a judicial character, its decisions, like the decisions of any other court of justice, ought to be regulated by known principles of law, and strictly adhered to, for the sake of

(*c*) Art. 1, sec. 4.

(*a*) Art. 1, sec. 5. [See People *v.* Hall, 80 N. Y. 117, as to the effect of a power given to any other than a legislative body to be the judge of the election and qualifications of its members. — B.]

[1] See the concurrent resolution of the House of Representatives and Senate appointing a joint committee to report on the right of the states which formed the so-called Confederate States to be represented in either house, and the debate in the Senate upon the same, December 12, 1865.

(*w*) A member of parliament, who does not believe in the existence of a Supreme Being, and upon whom an oath is binding only as a solemn promise, is incapable of taking the oath of allegiance prescribed by the English statutes. Att.-Gen. *v.* Bradlaugh, 14 Q. B. D. 667. The manner of holding an election for Congress may be regulated by a State legislature, but not qualifications. Stone *v.* Charlestown, 114 Mass. 227; 3 Am. Law Rev. 410.

The requirement, by a general State statute, of notice of petitions before they are presented to the legislature, has been held to interfere unlawfully with the power of each house to regulate its own proceedings. Justices' Opinion, 63 N. H. 625.

The qualification and election of the members of a Constitutional convention duly convened are questions belonging, it seems, exclusively to the convention and not subject to the action of the courts by prohibition or otherwise. See 49 Albany L. J. 384; 28 Am. L. Rev. 903.

uniformity and certainty. A majority of each house constitutes a quorum to do business, (*x*) but a smaller number may adjourn from day to day, and compel the attendance of absent members, in such manner and under such penalties as each house may provide. (*b*) Each house, likewise, determines the rules of its proceedings, and can punish its members for disorderly behavior; and, with the concurrence of two thirds, expel a member. (*c*) Each house is likewise bound to keep a journal of its proceedings, and from time to time publish such parts as do not require secrecy, and to enter the yeas and nays on the journal, on any question, when desired by one fifth of the members present. (*d*) Neither house, during the session of Congress, can, without the assent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting. (*e*) The members of both houses are likewise privileged from arrest during their attendance on Congress, and in going to and returning from the same, except in cases of treason, felony, and breach of the peace. (*f*) (*y*) These privileges of the two houses are obvi-

(*b*) In the English House of Commons forty members are requisite to form a quorum for business; but in 1833, the requisite number was reduced to twenty, so far as related to the morning sittings, appropriated to private business and petitions. The House of Lords may proceed to business if only three lords be present.

(*c*) The power of expulsion is in its nature discretionary, and its exercise of a more summary character than the power of judicial tribunals. Case of J. Smith, 1807. The cases are numerous in which members of the House of Commons in England have been called to account and punished by admonition, imprisonment, or expulsion, as the case might require, for offensive words or conduct before the House. May's Treatise on the Law of Parliament, 80.

(*d*) Art. 1, sec. 5. (*e*) Art. 1, sec. 5.

(*f*) Art. 1, sec. 6. This privilege is confined to the members, and does not extend to their servants, and it applies as well to arrests on execution as to arrests on mesne

(*x*) If a quorum is present in the House, a bill may be passed by the votes of a majority of that quorum. United States *v.* Ballin, 144 U. S. 1. If the journal of the Federal house of representatives may properly be referred to, to ascertain whether a law was passed by a quorum or by sufficient votes, its correctness cannot be impeached by oral evidence. United States *v.* Ballin, 144 U. S. 1; see Somers *v.* State (S. D.), 58 N. W. Rep. 804; Field *v.* Clark, 143 U. S. 649, 661, note, 672; State *v.* Jones, 6 Wash. St. 452.

(*y*) In England, freedom from arrest, as a Parliamentary privilege, which was enjoyed by both Lords and Commons, never extended to criminal offences, and has been so reduced by legislation in civil actions as now to be of little value. See Pike's Constitutional History of the House of Lords, p. 259.

The exemption of a member of Congress from arrest when on his way to attend a session includes also the mere service of process, and is not lost by a slight deviation from the route or limited by the

ously necessary for their preservation and character; and what is still more important to the freedom of deliberation, no member can be questioned out of the house for any speech or debate therein. (*g*) [2] (*z*)

There is no power expressly given to either house of Congress to punish for contempts, except when committed * 236 * by their own members; (*x*) but in the case of Anderson,

process. The arrest is illegal and void, and after the cessation of the privilege, the member may be arrested *de novo* for the same cause. If elected a member *while in custody*, on civil process of any kind, his privilege as a member operates to entitle him to his discharge during the continuance of the privilege. This is the English parliamentary law. May's Treatise, &c., 93, 97. But by several statutes in the reign of George III. (10 Geo. III., 45 Geo. III., 47 Geo. III.), privilege is no stay of proceedings in civil suits, down to judgment and execution, with the exception of personal arrest and imprisonment, nor does the privilege extend to commitments for contempts in courts of justice. Wellesley's Case and Charlton's Case, cited in May's Treatise, &c., 108, 109.

(*g*) Art. 1, sec. 6. The question whether a senator or member of the House of Representatives is liable to impeachment for conduct in his legislative capacity, is considered by Mr. Justice Story, in his Commentaries, ii. pp. 259–262; and the weight of authority, and the reason and policy of the thing, are decidedly in the negative, and in favor of the principle that members of Congress should be exempt from impeachment and punishment for acts done in their collective or congressional capacity. Though a member of Congress is not responsible out of Congress for words spoken there, though libellous upon individuals; yet if he causes his speech to be published, he may be punished as for a libel by action or indictment. This is the English and the just law. The cases of Lord Abingdon and of Creevy, 3 Esp. 228, 1 Maule & Sel. 276.

[2] However it may be in case of the publication of a separate speech, it is now settled that faithful reports in the newspapers of parliamentary debates are privileged. Wason *v.* Walter, L. R. 4 Q. B. 73. But this decision professed to leave unshaken the determination in Stockdale *v.* Hansard, that an order of the House of Commons would not protect the publication of matter not otherwise privileged, for that would be allowing one branch of the legislature to change the law.

shortest time required for the journey. Miner *v.* Markham, 28 Fed. Rep. 387; see Rhodes *v.* Walsh (Minn.), 23 L. R. A. 632, and note. *Contra*, as to the first point, Merritt *v.* Giddings, 4 MacArthur, 55.

An inhabitant of one State, going into another State voluntarily and solely to appear and testify before a joint committee of the legislature as to his claim against the State, is privileged from arrest on civil process. Thompson's Case, 122 Mass. 428.

(*z*) Fair and accurate reports of the proceedings of bodies constituted by the legislature, such as county councils or a Council of Medical Education and Registration, are doubtless privileged. Allbutt *v.* General Council, 23 Q. B. D. 400, 412.

(*x*) See Stewart *v.* Blaine, 1 MacArthur, 453. A member of parliament is only liable to arrest for a contempt which, in its

who was committed by order of the House of Representatives, for a contempt of the House, and taken into custody by the sergeant-at-arms, an action of trespass was brought against the officer, and the question on the power of the House to commit for a contempt was carried by writ of error to the Supreme Court of the United States. (*a*) The court decided that the House had that power, and that it was an implied power, and of vital importance to the safety, character, and dignity of the House. The necessity of its existence and exercise was founded on the principle of self-preservation; and the power to punish extends no further than imprisonment, and that will continue no longer than the duration of the power that imprisons. The imprisonment will terminate with the adjournment or dissolution of Congress. (*b*) [1]

(*a*) Anderson *v.* Dunn, 6 Wheaton, 204.

(*b*) The duration of imprisonment for contempts terminates also in England upon the close of the existing session of Parliament. Stockdale *v.* Hansard, cited in May's

[1] As to the powers and privileges of the Parliament of Great Britain, see Howard *v.* Gosset, 10 Q. B. 359, 411. See also generally on commitment for contempt, not including a refusal to be examined on oath as a witness in bankruptcy proceedings. *In re* Armstrong, [1892] 1 Q. B. 327. In England, the Crown may remit a sentence for contempt of court. *Re* A Special Reference, [1893] A. C. 138.

The common council of a city has no judicial power and cannot be constitutionally empowered to commit and punish for contempt, without right of appeal or trial by jury. Whitcomb's Case, 120 Mass. 116. As the courts alone can punish for contempt, a board of tax commissioners, created by the legislature with power to summon and examine witnesses, cannot be constitutionally empowered to fine and imprison for contempt. Langenberg *v.* Decker, 131 Ind. 471. The judicial power of the United States extends to a petition filed in a Circuit Court under § 12 of the Interstate Commerce Act of 1887, in aid of its inquiries, to compel a witness before the Commission to testify or to produce books or documents before it; and although a jury is not required by due process of law in matters of contempt, yet the final determination whether such witness can, by fine or imprisonment, be compelled so to act cannot be left solely to the judgment of a subordinate or executive tribunal. Interstate Commerce Commission *v.* Brimson, 154 U. S. 447.

Congress can only compel the production of private papers in or by judicial proceedings, and not for the purpose of aiding an investigating committee. *In re* Pacific Railway Commission, 32 Fed. Rep. 241.

Congress may, it seems, require any witness to appear as a witness before its committee, even without paying the witness his fees for attendance. Lilley *v.* United States, 14 Ct. of Cl. 539.

Any member of Congress may now administer the oath to witnesses, under the Act of June 26, 1884, ch. 123 (23 St. at L. 60).

The House of Representatives has the exclusive right of originating all bills for raising revenue, and this is the only privilege

Treatise on the Privileges of Parliament, 75; [9 Ad. & El. 1; 11 Ad. & El. 253, 273, 297; *ante*, 235, n. 2.] The decision of the Supreme Court, in the case of Anderson, is accompanied with a course of reasoning which would seem to be sufficient to place the authority of either house of Congress to punish contempts and breaches of privileges on the most solid foundation, independent of the absolute authority of the decision. The constitutional exercise of the same power by each house of Parliament has been repeatedly vindicated in Westminster Hall in the most masterly manner. Lord Ch. J. De Grey, in Rex *v.* Crosby, 3 Wils. 188; Lord Ellenborough, in Burdett *v.* Abbott, 14 East, 1. It is a power inherent in all legislative assemblies, and is essential to enable them to execute their great trusts with freedom and safety; and it has been frequently exercised, not only in Congress, but by the respective branches of the state legislatures, and may be considered as indisputably acknowledged and settled. Story, Comm. ii. pp. 305–317. What acts shall amount to a contempt of either house of Congress are not defined, and must be left to the judgment and discretion of the house, under the circumstances of each case. In England, libels upon the character or proceedings of either house of Parliament, or any of its members, are regarded as breaches of privilege, and punishable as for contempts, by imprisonment. May's Treatise on the Law and Privileges of Parliament, 62; Burdett *v.* Abbott, *supra*. But with us such a course of redress has not been adopted, and the house that was injured would probably, if redress was sought, direct a public prosecution by indictment. The act of Congress of 14th July, 1798, made it an indictable offence to libel the government, Congress, or President of the United States. *Vide infra*, ii. 24.

tempt, the case of Fernandes, 6 Hurlst. & N. 717, and 10 C. B. N. S. 3. The legislative assemblies of the British colonies have, in the absence of express grant, no power to adjudicate upon, or punish for, contempts committed beyond their walls. Doyle *v.* Falconer, L. R. 1 P. C. 328, 339; Kielley *v.* Carson, 4 Moore, P. C. 63; Fenton *v.* Hampton, 11 Moore, P. C. 347; *In re* Brown, 33 L. J. N. S. Q. B. 193, 5 Best & S. 280. Nor, even for a contempt committed in their presence and by one of their members. The right to remove for self-security is one thing, the right to inflict punishment is another. The latter power is judicial, and is not necessary to the existence of a legislative assembly. Doyle *v.* Falconer, L. R. 1 P. C. 328, 340 (citing and seemingly disapproving Anderson *v.* Dunn). When a statute gives the power, see Speaker of Leg. Ass. of Victoria *v.* Glass, L. R. 3 P. C. 560. The Massachusetts House of Representatives can commit for contempt a party who refuses to attend as a witness and testify before a committee of the House. But the Supreme Court can inquire on *habeas corpus* into the propriety of the commitment. Burnham *v.* Morrissey, 14 Gray, 226; State *v.* Matthews, 37 N. H. 450. In Sanborn *v.* Carleton, 15 Gray, 399; s. c. 23 Law Rep. 7, it was held that the sergeant-at-arms of the United States Senate, having a warrant to arrest a party for contempt, could not delegate his authority, and authorize an arrest by his deputy in Massachusetts. [In Kilbourn *v.* Thompson, 103 U. S. 168, the power of the House of Representatives to punish for contempt received elaborate discussion. Kilbourn had been arrested and imprisoned by order of the House for refusing to answer certain questions propounded and to produce certain books and papers called for by a committee of the House.

that house enjoys in its legislative character, which is not shared equally by the other; and even those bills are amendable by the Senate in its discretion. (*c*) The two houses are an entire and perfect check upon each other, in all business appertaining to legislation; and one of them cannot even adjourn, during the session of Congress, for more than three days, without the consent of the other, nor to any other place than that in which the two houses shall be sitting. (*d*)

The powers of Congress extend generally to all subjects of a national nature. Many of those powers will hereafter become the subject of particular observation and criticism. At present, it will be sufficient to observe, generally, that Congress are authorized to provide for the common defence and general welfare; and for that purpose, among other express grants, they are authorized to lay and collect taxes, *duties, *237 imposts, and excises; to borrow money on the credit of the United States; to regulate commerce with foreign nations, and among the several states, and with the Indian tribes; to declare war, and define and punish offences against the law of nations; to raise, maintain, and govern armies, and a navy; to organize, arm, and discipline the militia; and to give full efficacy to all powers contained in the Constitution. Some of these powers, as the levying of taxes, duties, and excises, are

(*c*) Art. 1, sec. 7.

(*d*) Art. 1, sec. 5.

He brought an action for false imprisonment against the sergeant-at-arms and the members of the committee at whose instance the arrest was ordered by the House. In reviewing the English cases, the court pointed out that the power in Parliament arose originally from the character of that body as a *court*, and not from its character as a legislative body. That no such character was given to Congress, at least except in certain strictly limited cases. It was held that at most the House had only power to punish for contempt when acting within these limits in a judicial capacity; and further, that it was open to the court to inquire into the question whether the House was so acting in this case. It was held that the inquiry in which the committee was engaged at the time of plaintiff's refusal to testify was beyond the powers of Congress, and that the power to punish for contempt did not exist in the case, and hence that the order of the House was no protection to the defendants. The reasoning of Anderson *v.* Dunn was disapproved. It was held, however, that those of the defendants who were members of the House were protected by the last clause of sec. 6, of Art. I of the Constitution, "and for any speech or debate in either House they shall not be questioned elsewhere;" the words "speech or debate" being held to cover everything said or done by a member as such. — B.]

concurrent with similar powers in the several states; but in most cases, these powers are exclusive, because the concurrent exercise of them by the states separately would disturb the general harmony and peace, and because they would be apt to be repugnant to each other in practice, and lead to dangerous collisions. The powers which are conferred upon Congress, and the prohibitions which are imposed upon the states, would seem, upon a fair and just construction of them, to be indispensable to secure to this country the inestimable blessings of union. The articles of confederation, digested during the American war, intended to confer upon Congress powers nearly equal to those with which they are now invested; but that compact gave them none of the means requisite to carry those powers into effect. And if the sentiment which has uniformly pervaded the minds of the people of this country be a just one, that the consolidated union of these states is indispensable to our national prosperity and happiness, — and if we do not wish to be once more guilty of the great absurdity of proposing an end, and denying the means to attain it, — then we must conclude that the powers conferred upon Congress are not disproportionate to the magnitude of the trust confided to the Union, and which the Union alone is competent to fulfil.

The rules of proceeding in each house are substantially the same; and though they are essential to the transaction of business with order and safety, they are too minute to be
*238 treated at length in an elementary *survey of the constitutional polity and general jurisprudence of the United States. The House of Representatives choose their own Speaker, but the Vice-President of the United States is, *ex officio*, President of the Senate, and gives the casting vote when they are equally divided. The proceedings and discussions in the two houses are public. This affords the community early and authentic information of the progress, reason, and policy of measures pending before Congress, and it is likewise a powerful stimulus to industry, to research, and to the cultivation of talent and eloquence in debate. Though these advantages may be acquired at the expense of much useless and protracted discussion, yet the balance of utility is greatly in favor of open deliberation; and it is certain, from the general opposition to the experiment that was made and continued for some years by the Senate of the United States, of sitting with closed doors, that such a

practice, by any legislative body in this country, would not be endured.

5. Manner of passing Laws. — The ordinary mode of passing laws is briefly as follows: (*a*) One day's notice of a motion for leave

(*a*) See the standing rules and orders of the House of Representatives, printed in 1795, by Francis Childs. The rules and forms of proceeding in legislative bodies are not only essential to orderly and free discussion and deliberation, but those forms become substance; for they operate as safeguards of liberty, and a protection to the minority against the violence and tyranny of the majority. It was an observation of Mr. Onslow, for many years Speaker of the English House of Commons, that he had often heard old and experienced members say, that nothing tended more to throw power into the hands of the administration, than a neglect of or departure from the rules of proceeding. Hatsel's Precedents of Proceedings in the House of Commons, and Jefferson's Manual of Parliamentary Practice, and especially May's Treatise upon the Law, Privileges, Proceedings, and Usage of Parliament, London, 1844, and Cushing's Rules of Proceeding and Debate in Deliberative Assemblies, Boston, 1845, ought to be thoroughly studied by all leading and efficient members in legislative assemblies.

Among the rules of the House of Representatives, the establishment of what is termed *the previous question* is of great importance. It is understood not to apply when a bill or motion is under discussion in a committee of the whole House, but only when the same is before the House, with the Speaker in the chair. The previous question is admitted when demanded by a majority of the members present; and it enables a majority at any time to put an end *in the House* to all discussion, and to put the minority to silence by a prompt and final vote on the main question. It is whether the question under debate shall now be put; and, until it is decided, it precludes all amendment and debate of the main question, and all motions to amend, commit, or postpone the main question. If the previous question be decided affirmatively, the main question is to be put instantaneously, and no member is allowed to amend or discuss it. The previous question has long been in use in the English House of Commons; and if it be carried in the affirmative, no alteration can then take place, no debate is suffered to intervene, and the Speaker puts the main question immediately. Dwarris on Statutes, 1830, p. 291. During the period of the Continental Congress, under the articles of confederation, the previous question was regarded rather as a preliminary inquiry into the propriety of the main question. This was also the case under the present Constitution of the United States, for many years. Its object was to avoid decision on delicate questions, as inexpedient, and if it was decided that the main question be put, the main question was open to debate. It was not until 1811 that the previous question attained its present absolute sway. The Hon. William Gaston, a member of the House of Representatives from North Carolina, in 1816, made a fruitless effort to expunge the previous question from the rules of the House. His speech was a very able and well-informed discussion of the merits of the rule, and he regarded it as a formidable instrument of tyranny of majorities over minorities, and, to the extent to which it is carried, without a precedent in the annals of any free deliberative assembly.

Legislation was a science cultivated with so much care and refinement among the ancient Romans, that they had laws to instruct them how to make laws. The Lex Licinia and Lex Ebutia, the Lex Cæcilia and Lex Didia, provided checks, that the

to bring in a bill, in cases of a general nature, is required. Every bill must have three readings previous to its being passed, and these readings must be on different days, and no bill can be committed or amended until it has been twice read. Such little checks in the forms of doing business are prudently intended to guard against surprise or imposition. In the House of Representatives, bills, after being twice read, are committed to a
* 239 committee of the whole House, when the * Speaker leaves the chair, and takes a part in the debate as an ordinary member, and a chairman is appointed to preside in his stead. When a bill has passed one house, it is transmitted to the other, and goes through a similar form; though in the Senate there is less formality, and bills are often committed to a select committee, chosen by ballot. If a bill be altered or amended in the house to which it is transmitted, it is then returned to the house in which it originated, and if the two houses cannot agree, they appoint committees to confer together on the subject. (*a*)

6. President's Negative. — When a bill is engrossed, and has passed the sanction of both houses, it is transmitted to the President of the United States for his approbation. If he approves of the bill, he signs it. If he does not, it is returned, with his objections, to the house in which it originated, and that house enters the objections at large on its journals, and proceeds to reconsider the bill. (*x*) If, after such reconsideration, two thirds of

law should not unintentionally contain any particular personal privileges, or weaken the force of former laws, or be crowded with multifarious matter. Gravina, De Ortu et Progressu Juris Civilis, lib. 1, c. 29.

(*a*) By the revised constitution of New York, of 1846, it is declared that no bill shall be passed unless by the assent of a majority of all the members elected to each branch of the legislature; and the question upon the final passage shall be taken immediately upon its last reading, and the yeas and nays entered on the journal.

(*x*) With respect to the President's veto power, and the contention that it should be limited, as it has not recently been, to cases where the bill is not in his judgment within the constitutional power of Congress, Mr. Justice Miller (on the U. S. Constitution, p. 175) says: "Undoubtedly there is a just medium on this subject, and it is probable that a sound view would be that the occasion which requires or justifies the President in returning without his approval a bill passed by both Houses of Congress, with his objections thereto, should be of a grave and serious character, and the measure itself of much public importance. There remains to the President, in all cases, the alternative of declining to sign, and failing to veto a bill, and thus permitting it by the lapse of ten days, without any action on his part, to become a law of the land upon the sole responsibility of its

that house should agree to pass the bill, it is sent, together with the objections, to the other house, by which it is likewise reconsidered, and, if approved by two thirds of that house, it becomes a law. (*b*) But, in all such cases, the votes of both houses are determined by yeas and nays, and the names of the persons voting for and against the bill are entered on the journals. If any bill shall not be returned by the President, within ten days (Sundays excepted) after it shall have been presented to him, the same becomes a law, equally as if he had signed it, unless Congress, by adjournment, in the mean time, prevents its return, and then it does not become a law. (*c*) [1] (*y*)

The practice in Congress, and especially in the second or last session of each Congress, of retaining most of their bills until within the last ten days, is attended with the disadvantage of shortening the time allowed to the President for perusal and reflection upon them, and of placing within the power of the President the absolute negative of every bill presented within the last ten days preceding the 4th of *March; *240 and this he can effect merely by retaining them, without being obliged to assign any reason whatever; for he is entitled

(*b*) The Constitution does not say whether the vote of two thirds of each house on the reconsideration of a bill returned by the President, with objections, shall be two thirds of the members elected, or only two thirds of the members present. It is understood that the latter construction has been adopted in practice.

(*c*) Art. 1, sec. 7.

[1] In New York, it has been decided, under a similar constitutional provision, that a bill which passed the second house [and was presented to the Governor for his action ?] the day before the end of the session, and signed by him after it, but within ten days of the time when it was so presented to him, was a valid law. People *v.* Bowen, 21 N. Y. 517.

passage by the Senate and House of Representatives." See Hart's edition of Mason on the Veto Power (1890); 4 Harvard L. Rev. 243; J. H. Benton, Jr.'s pamphlet on the Veto Power.

The mayor of a city may veto executive as well as legislative action by its common council. People *v.* Fitchie, 76 Hun, 80.

(*y*) In United States *v.* Weil, 29 Ct. Cl. 523, it was held that the President can approve an act of Congress within ten days after its adjournment for the winter holidays. See also 39 Cent. L. J. 68; 8 Harvard L. Rev. 114; John V. Farwell Co. *v.* Matheis, 48 Fed. Rep. 363; Burns *v.* Sewell, 48 Minn. 425.

The number of days within which a bill is to be approved by the governor of a State includes days when the legislature is not in session, if it has not finally adjourned. Justices' Opinion, 45 N. H. 607, 610.

to ten days to deliberate. Most of the bills that are presented to the President in the second session of every Congress were, a few years ago, presented to him within the last ten days, and generally within the last two days; but the rules of Congress have latterly checked the evils and danger of such an accumulation of business on the last days of the session.

This qualified negative of the President upon the formation of laws is, theoretically at least, some additional security against the passage of improper laws, through prejudice or want of due reflection; but it was principally intended to give to the President a constitutional weapon to defend the executive department, as well as the just balance of the Constitution against the usurpations of the legislative power.[1] To enact laws is a transcendent power; and if the body that possesses it be a full and equal representation of the people, there is danger of its pressing with destructive weight upon all the other parts of the machinery of the government. It has, therefore, been thought necessary, by the most skilful and most experienced artists in the science of civil polity, that strong barriers should be erected for the protection and security of the other necessary powers of the government. Nothing has been deemed more fit and expedient for the purpose than the provision that the head of the executive department should be so constituted as to secure a requisite share of independence, and that he should have a negative upon the passing of laws; and that the judiciary power, resting on a still more permanent basis, should have the right of determining upon the validity of laws by the standard of the Constitution. A qualified negative answers all the salutary purposes of an absolute one, for it is not to be presumed that two thirds of both houses of Congress, on reconsideration, with the reasoning of the President in opposition to the bill spread at large upon their journals,
* 241 will ever concur in any unconstitutional * measure. (*a*)

In the English constitution, the king has an absolute negative; but it has not been necessary to exercise it since the time

[1] *Ante*, 221, n. 1.

(*a*) This qualified negative of the President has, in the progress of the administration of the government, since the first publication of these Commentaries, in 1826, become a very grave power, and applied, under the ordinary name of *veto*, with a familiarity which appears not to have been anticipated by the generation which adopted the Constitution.

of William III. The influence of the crown has been exerted in a more gentle manner, to destroy any obnoxious measure in its progress through the two houses of Parliament. Charles I. stood for a long time upon the strict and forbidding rights of his prerogative; but he was compelled, by the spirit and clamor of the nation, to give his assent to bills which cut down that prerogative, and placed the power of government in the hands of the Parliament. The peremptory *veto* of the Roman tribunes, who were placed at the door of the Senate, would not be reconcilable with the spirit of deliberation and independence which distinguishes the councils of modern times. The French constitution of 1791, a labored and costly fabric, on which the philosophers and statesmen of France exhausted all their ingenuity, and which was prostrated in the dust in the course of one year from its existence, gave to the king a negative upon the acts of the legislature, with some very feeble limitations. Every bill was to be presented to the king, who might refuse his assent; but if the two following legislatures should successively present the same bill in the same terms, it was then to become a law. The constitutional negative given to the President of the United States appears to be more wisely digested than any of the examples which have been mentioned. (*b*)

(*b*) The organization of the two houses of Congress, and the principles on which it rests, were profoundly discussed in the Federalist, from No. 52 to No. [64,] inclusive. There is no work on the subject of the Constitution, and on republican and federal government generally, that deserves to be more thoroughly studied. The Federalist appeared originally in a series of numbers, published in the New York daily papers, between October, 1787, and June, 1788. They were read with admiration and enthusiasm as they successively appeared, and by no person more so than the author of this note, who made a fruitless attempt at the time to abridge them for the benefit of a country village print. No constitution of government ever received a more masterly and successful vindication. I know not, indeed, of any work on the principles of free government that is to be compared, in instruction and intrinsic value, to this small and unpretending volume of the Federalist; not even if we resort to Aristotle, Cicero, Machiavel, Montesquieu, Milton, Locke, or Burke. It is equally admirable in the depth of its wisdom, the comprehensiveness of its views, the sagacity of its reflections, and the fearlessness, patriotism, candor, simplicity, and elegance with which its truths are uttered and recommended. Mr. Justice Story acted wisely in making the Federalist the basis of his Commentary; and as we had the experience of nearly fifty years since the Federalist was written, the work of Judge Story was enriched with the results of that experience, and it is written in the same free and liberal spirit, with equal exactness of research and soundness of doctrine, and with great beauty and elegance of composition.

LECTURE XII.

OF JUDICIAL CONSTRUCTIONS OF THE POWERS OF CONGRESS.

I PROCEED to consider the cases in which the powers of Congress have been made the subject of judicial investigation. (*a*)

1. Of Priority of Payment claimed by the United States. — Congress have declared by law that the United States were entitled to priority of payment over private creditors in cases of insolvency, and in the distribution of the estates of deceased debtors. The act of Congress of 31st July, 1789, sec. 21, confined the priority to custom-house bonds. The act of 4th August, 1790, c. 35, sec. 45, limited the priority in the same manner. The act of 2d May, 1792, placed the surety in a custom-house bond, who paid the debt, on the same footing, in respect to priority, as the United States; and it confined the cases of insolvency mentioned in the former law to those of a voluntary assignment, and of attachments against absconding, concealed, or absent debtors.

(*a*) Mr. Justice Story, in his Commentaries on the Constitution of the United States, i. pp. 382–442, has given a very rational view of the rules of interpretation applicable to the Constitution. I have confined myself in this lecture to those authoritative expositions which have been given to it by the courts of the United States; and I agree entirely with that learned commentator, that we are to look to the instrument itself, "as a constitution of government ordained and established by the people of the United States." The instrument furnishes essentially the means of its own interpretation; and to resort to it was the practice of the late Chief Justice Marshall, in those clear and admirable judicial views of the Constitution which, so far as they go, leave us nothing more perfect to expect or desire. It is, at the same time, just and true, that "the most unexceptionable source of *collateral* interpretation is from the practical exposition of the government itself, in its various departments, upon particular questions discussed, and settled upon its own intrinsic merits. These approach the nearest in their own nature to judicial expositions, and have the same general recommendation that belongs to the latter. They are decided upon solemn argument, *pro re nata*, upon a doubt raised, upon a *lis mota*, upon a deep sense of their importance and difficulty, in the face of the nation, with a view to present action, in the midst of jealous interests, and by men capable of urging or repelling the grounds of argument, from their exquisite genius, their comprehensive learning, or their deep meditation upon the absorbing topic." Story's Comm. i. 392. See also *infra*, 313, to s. P.

The act of 3d March, 1797, c. 74, sec. 5, went further, and gave the United States a preference in all cases whatsoever, whoever might be the debtor, or however he might be indebted, in case the debtor became insolvent, or the assets in the hands of his representatives, after his death, were insufficient to pay his debts. This priority was declared to extend to cases in which the insolvent debtor had made a voluntary assignment of all his property, or in which his effects had been attached as an absconding, concealed, or absent debtor, or in which an act of legal bankruptcy had been committed. This act applies and gives the preference as against deceased debtors, whether the debt was contracted before or after the passage of the act, provided there be only general creditors, without any specific lien created. (*b*) The act of March 2, 1799, c. 128, sec. 65, provided, that in like cases *of insolvency, or where any estate in the *244 hands of executors, administrators, or assignees should be insufficient, debts due to the United States, on bonds taken under the collection act, should have preference; and sureties in such bonds, on paying the same, had the same preference as was reserved to the United States. (*a*)

These were the legislative provisions, giving preference to debts due to the United States; and in *United States* v. *Fisher*, (*b*) the authority of Congress to pass such laws was drawn in question. The point discussed in that case was, whether the United States, as holders of a protested bill of exchange, negotiated in the ordinary course of trade, were to be preferred to the general creditors, when the debtor becomes bankrupt. The Supreme Court decided that the acts of Congress, giving that general priority to the United States, were constitutional. It was a power founded

(*b*) Commonwealth *v.* Lewis, 6 Binney, 266. [See Lewis *v.* United States, 92 U. S. 618; Bayne *v.* United States, 93 id. 642. The corresponding provision of the Revised Statutes (§ 3466) does not apply to demands against an insolvent national bank. Cook Co. Nat. Bank *v.* United States, 107 U. S. 445. — B.]

(*a*) Hunter *v.* United States, 5 Peters, 173. In the case of the United States *v.* Couch, C. C. U. S. New York, April Term, 1841, it was declared to have been the unvaried construction of the 65th section of the act of March 2, 1799, that the priority therein given to the United States, to be paid out of the estate of an insolvent debtor, takes effect only when the insolvency is established by an assignment of all his property, either by his own act or by act of law, and when such assignment is carried into execution by the assignees. Hunt's Merchants' Magazine, New York, August, 1841, 168; United States *v.* Wood & Ives, ib. 170, S. P.

(*b*) 2 Cranch, 358.

on the authority to make all laws which should be necessary and proper to carry into effect the powers vested by the Constitution in the government of the United States. Where the end was within the lawful powers of the government, Congress possessed the choice of the means, and were empowered to use any means which were in fact conducive to the exercise of the powers granted. The government is to pay the debts of the Union, and must be authorized to use the means most eligible to effect that object. It has a right to make remittances, by bills or otherwise, and to take those precautions which will render the transaction safe. If this claim of priority interferes with the right of the state sovereignties, respecting the dignity of debts, and defeats the measures which they would otherwise have a right to adopt to secure themselves, it is a necessary consequence of the supremacy of the laws of the Union, on all subjects to which the legislative power of Congress extends. (*x*)

(*x*) So, in the Legal Tender Case (Juilliard *v.* Greenman), 110 U. S. 421, 440, the court, relying in great part upon United States *v.* Fisher, held that the power of Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," includes power to make the U. S. treasury notes a legal tender in payment of private debts, in times of peace or war.

Under the bankruptcy acts, the United States might prove their claim and assert their priority, but was not obliged so to do, as not being affected by the proceedings. United States *v.* Barnes, 31 Fed. Rep. 705, 708; *In re* Huddell, 47 id. 206; United States *v.* Lewis, 13 N. B. R. 33. The equity rule, recognized by the bankrupt law, that the creditors of a bankrupt partnership were to be paid from the firm's assets, and individual creditors from the individual assets, did not apply to the United States, which could enforce its priority against both sets of assets. Lewis *v.* United States, 14 N. B. R. 64; 92 U. S. 618. A person who pays the duty on imported goods, in order to take them out of the bonded warehouse, is subrogated to the rights of the United States against the failing sureties on the bond. *Re* Chase, 14 N. B. R. 139, 157.

If the Government's priority is based upon a statutory penalty, the debt arises when the penalty is incurred. *Re* Rosey, 6 Ben. 507.

Under the U. S. Rev. Stats. §§ 3466, 3467, the priority of the United States extends to all classes of debts whether liquidated or unliquidated, joint or several, legal or equitable; and when the insolvent debtor has made a voluntary general assignment, or committed an act of bankruptcy, such priority extends to all his estate which comes to the hands of his assignee. The assignee becomes a trustee for the United States, and is bound to pay their debt first out of the proceeds of the debtor's property. United States *v.* Barnes, 24 Blatch. 466, 469; see Bush *v.* United States, 14 Fed. Rep. 321; United States *v.* Griswold, 8 id. 496; Cottrell *v.* Pierson, 12 id. 805.

The United States, when suing in equity as a creditor to set aside in a federal court a fraudulent conveyance by its debtor, are bound by the principles which

The principle was here settled, that the United States are *entitled to secure to themselves the exclusive privi- *245 lege of being preferred as creditors to private citizens, and even to the state authorities, in all cases of the insolvency or bankruptcy of their debtor. But the court observed, that no lien was created by the statutes giving the preference. No *bona fide* transfer of property, in the ordinary course of business, was overreached. It was only a priority of payment, which, under different modifications, was a regulation in common use; and a *bona fide* alienation of property, before the right of priority attached, was admitted to be good.

The next case that brought into discussion this question of priority was that of the *United States* v. *Hooe.* (*a*) It was there held that the priority to which the United States were entitled did not partake of the character of a lien on the property of public debtors. The United States, in the mere character of creditor, have no lien on the real estate of their debtor. If the priority existed from the time the debt was contracted, and the debtor should continue to transact business with the world, the inconvenience would be immense. The priority only applied to cases where the debtor had become actually and notoriously insolvent, and, being unable to pay his debts, had made a voluntary assignment of all his property, or having absconded or absented himself, his property had been attached by process of law. A *bona fide* conveyance of *part* of the property of the debtor, not for the fraudulent purpose of evading the law, but to secure a fair creditor, is not a case within the act of Congress giving priority. (*b*)

(*a*) 3 Cranch, 73.

(*b*) United States *v.* Hooe, *supra;* United States *v.* Clark, 1 Paine, 629; United States *v.* Monroe, 5 Mason, 572; United States *v.* Hawkins, 16 Martin (La.), 317. In England, a provisional assignment in bankruptcy will defeat the king's extent, if it precedes the test of the writ. King *v.* Crump, Parker, 126; Lord Eldon, 14 Vesey, 88. In the case of the United States *v.* McLellan, 3 Sumner, 345, it was held that a conveyance, by a known insolvent debtor, of all his property to one or more creditors, in discharge of their debts, not exceeding the amount due, and not for the benefit of any other creditors, was not a voluntary assignment within the act of 1799, so as to be affected by the priority of the United States.

control an individual in such a suit. United States *v.* Ingate, 48 Fed. Rep. 251. And in general, when the government voluntarily appears in a suit in which its interests are involved, the same principles apply as in the case of an individual. United States *v.* Beebee, 17 Fed. Rep. 36; United States *v.* McElroy, 25 id. 804.

In this case of the *United States* v. *Hooe*, a collector of the revenue had mortgaged part of his property to his
* 246 surety in his official bond, to * indemnify him from his responsibility as surety, and to secure him from his existing and future indorsements for the mortgagor at bank; and the mortgage was held valid against the claim of the United States, although the collector was, in point of fact, unable to pay all his debts at the time the mortgage was given; and although the mortgagee knew, when he took the mortgage, that the mortgagor was largely indebted to the United States.

Afterwards, in *Harrison* v. *Sterry*, (*a*) it was held that in the distribution of a bankrupt's effects, the United States were entitled to their preference, although the debt was contracted by a foreigner in a foreign country, and the United States had proved their debt under a commission of bankruptcy. Though the law of the place where the contract is made be, generally speaking, the law of the contract, yet the right of priority forms no part of the contract. The insolvency which was to entitle the United States to a preference was declared, in *Prince* v. *Bartlett*, (*b*) to mean a legal and known insolvency, manifested by some notorious act of the debtor, pursuant to law. This was giving to the world some reasonable and definite test by which to ascertain the existence of the latent and dangerous preference given by law to the United States. In this last case, the effects of an insolvent debtor, duly attached in June, were considered not to be liable to the claim of the United States, on a custom-house bond given prior to the attachment, and put in suit in August following. The private creditor had acquired a lien by his attachment, which could not be devested by process on the part of the United States subsequently issued. Nor will the lien of a judgment creditor, duly perfected, be displaced by the mere priority of the United States. The word "insolvency," in the acts of Congress of 1790, 1797, and 1799, means a legal insolvency; and a mere state of insolvency, or inability in a
* 247 debtor to pay all his * debts, gives no right of preference to the United States, unless it be accompanied by a voluntary assignment of all the property, for the benefit of creditors, or by some legal act of insolvency. If, before the right of preference

(*a*) 5 Cranch, 289.

(*b*) 8 Cranch, 431; s. p. United States *v.* Canal Bank, 3 Story, 79.

has accrued, the debtor has made a *bona fide* conveyance of his estate to a third person, or has mortgaged the same to secure a debt, or if the property has been seized under an execution, the property is devested from the debtor, and cannot be made liable to the United States. (*a*)

(*a*) Thelusson *v.* Smith, 2 Wheaton, 396; Conard *v.* The Atlantic Insurance Company, 1 Peters, 386; Brent *v.* Bank of Washington, 10 Peters, 596. The priority of the United States does not affect any *lien*, general or specific, existing when the event took place, which gave the United States a claim of priority, nor prevent the transmission of the property to assignees, executors, and administrators subject to the lien. Ib. In England, in the case of Giles *v.* Grover, before the House of Lords (9 Bing. 128), it was decided, after a most elaborate discussion, in conformity with the opinions of a majority of the twelve judges, that the goods of a debtor, already seized under a *fi. fa.* at the suit of a subject, but not sold, might be taken under a writ of extent for a debt of the crown, and which writ of extent was tested after the seizure under the *fi. fa.* The seizure under the *fi. fa.* was considered as not devesting the debtor of his general property in the goods seized, or in any manner altering the property, and that no property was thereby acquired therein by the execution creditor, or by the sheriff. The claims of the crown and the subject on the goods were held to stand in equal degree, and the two executions to be in effect concurrent; and in such cases the king's prerogative had the preference. Quando jus Domini Regis et subditi insimul concurrunt jus regis præferri debet. (9 Co. 129, b.) The sheriff had the legal custody of the goods, and a special property in them by virtue of the seizure, for the purpose of protection and sale; but until the sale, which was the dividing line as [to] the ownership of the goods, the absolute property of the debtor was not altered or devested. The priority of the government claims in this country is not carried to that extent, according to the opinion of Judge Washington, in Thelusson *v.* Smith; but it is to be observed, that the observation of Judge Washington was a mere *dictum*, and not a turning-point in the case. The same remark applies to what was said by the judge who delivered the opinion of the court in Conard *v.* The Atlantic Insurance Company; for the *dictum* was quoted in the course of the opinion incidentally, and without any criticism upon it, or particular attention to it. In Hoke *v.* Henderson, 3 Dev. (N. C.) 17, Judge Ruffin considered the prerogative of the sovereign as to priority equally applicable here as in England, and that it went to the extent claimed in the above case of Giles *v.* Grover. On the other hand, in Wilcocks *v.* Waln; 10 Serg. & Rawle, 380, and in United States *v.* Mechanics' Bank, Gilpin, 51, it was held that the priority of the United States gave no lien on property *seized* under a *fieri facias*, when the lien accrued, for the debtor was devested of the property. A very contested question has been raised and discussed in the courts in this country, on the conflicting claims of a judgment or attaching creditor under state laws, and the assignee under the bankrupt law of the United States. It was declared and adjudged by Mr. Justice Story, in the Circuit Court of the United States, in Massachusetts, and by Mr. Justice Ware, in the District Court of Maine, that an attachment under a state law was not an absolute lien, but a contingent one, dependent upon a subsequent judgment in the attaching suit; and that a bankrupt's discharge upon a petition in bankruptcy, filed after the attachment and during the process of such suit, would be a bar to the recovery of any judgment thereon, and that the lien created by the attachment must give way and becomes avoided, and the debt also, by the *subsequent*

The United States have, accordingly, a preference as creditors, to the extent above declared, in four cases, viz.: (1.) In the case of the death of the debtor without sufficient assets; (2.) bankruptcy, or legal insolvency, manifested by some act pursuant to law; (3.) a voluntary assignment by the insolvent of all his

decree and discharge in bankruptcy. *Ex parte* Foster, 2 Story, 131; In the Matter of Cook, 2 Story, 376; In the Matter of Bellows and Peck, 3 Story, 428; Smith *v.* Gordon, 6 Law Reporter, 313; Everett *v.* Stone, 3 Story, 447. The courts of the United States, and several of the state courts, maintain a different doctrine. The doctrine is, that a creditor, by his suit in equity, commonly called a creditor's bill, on his unsatisfied judgment, thereby acquires an equitable lien, and which operates as an attachment of property, and creates a right to priority of payment as against the assignee of a bankrupt, under a petition in bankruptcy *subsequently* made. That such a lien was not devested by a decree in bankruptcy, upon a petition filed subsequent to the commencement of a chancery suit, or the levy of the attachment. That the assignee in such a case takes the debtor's property subject to the creditor's lien, even independent of the proviso in the bankrupt act, and upon general principles applicable to insolvency and bankruptcy in this country and in England. That the assignee of the bankrupt or insolvent takes only such rights, and subject to such equities as belonged to the bankrupt himself at the time of the bankruptcy. That the judgment creditor had also a lien, upon the true construction of the proviso in the 2d section of the bankrupt law, paramount to the claim of the assignee, and as strong upon this proviso as upon general principles of law, for the word *securities* reaches all mortgages and liens, and they may be enforced in the state courts. The attachment is a lien, and the creditor's bill a lien within the proviso, and the property of the bankrupt was not devested until the decree in bankruptcy. The decisions in the circuit courts of the United States in Vermont, New Jersey, and Pennsylvania, and of the district courts of Vermont, of Northern New York, and of several of the state courts, are all cited in support of this doctrine, by the Ass't V.-Ch. of New York, in the case of Storm *v.* Waddell, 3 N. Y. Legal Observer, 367, s. c. 2 Sandf. Ch. 494, and which case is distinguished for its learning and ability, and its logical vindication of the doctrine. The two cases of Kittredge *v.* Warren and of Kittredge *v.* Emerson, decided in the Supreme Court of New Hampshire, in the year 1844, and in which the judgment of the court was delivered by Mr. Ch. Justice Parker, are equally worthy of special notice for their learned research, and powerful, if not irresistible, deductions.[1] See also, Doremus *v.* Walker, 8 Ala. 194, and Mabry *v.* Herndon, ib. 848, to the s. p., and in favor of the right of the state courts to inquire into the validity of a discharge upon the allegation that the bankrupt did not render a true inventory of his property, but fraudulently concealed the same.

[1] 14 N. H. 509; 15 N. H. 227. The doctrine of the New Hampshire courts was that finally established in the Supreme Court of the United States. Peck *v.* Jenness, 7 How. 612; Colby *v.* Ledden, ib. 626. But by the Bankrupt Law of March 2, 1867, § 14, the assignee takes the property of the bankrupt, although the same is then attached on mesne process, and the assignment dissolves any such attachment made within four months next preceding the commencement of the proceedings. It may be further remarked here, that under the same law, § 28, the United States have a preference as creditors.

property to pay his debts; (4.) in the case of an absent, concealed, or absconding debtor, whose effects are attached by process of law. The priority was intended to operate only where, by law, or by the act of the debtor, his property was sequestered for the use of his creditors; and it is proper that this prerogative right of the United States should be strictly construed and precisely defined, for it is in derogation of the general rights of creditors. (*b*)

The government was a privileged creditor, under the Roman law, and entitled to priority in the payment of debts. The *cessio bonorum* was made subject to this priority. This is generally the case, in all modern bankrupt and insolvent laws. In England, the king's claim is preferred to that of a subject, provided the king's process was commenced before the subject had obtained judgment. (*c*) As to the fiscal lien of the government of the United States, it * was held in *Harris* v. *Den-* * 248 *nie*, (*a*) that the government had a lien on goods imported, for the payment of duties accruing on them, and not secured by bond; and that the United States were entitled to the custody

(*b*) Watkins *v.* Otis, 2 Pick. 102. The priority given by law to the United States does not extend to the real estate, or the proceeds of the real estate, belonging to or vested in the heirs of the debtor. The priority does not attach *as against the heir*, but only when the real estate, or the proceeds thereof, passes to, or is vested by law in the hands of, an assignee of an insolvent debtor, or his executors or administrators. United States *v.* Crookshank, 1 Edw. Ch. 233. It does not extend so as to take the property of a partner in partnership effects, to pay the separate debt of such partner, when the partnership effects are not sufficient to satisfy the creditors of the partnership. United States *v.* Hack, 8 Peters, 271. It does not extend so as to reach the allowance made by the judge of probate to the widow of the deceased debtor, under the law of distribution of intestates' estates. Postmaster-General *v.* Robbins, Ware, 165. It does not extend to a surety to a custom-house bond, so as to entitle him, after paying the debt, to be subrogated to the rights of the United States as against his co-surety, or to give his demand for contribution a preference over other creditors. Pollock *v.* Pratt, 2 Wash. 490; Bank *v.* Adger, 2 Hill, Ch. (S. C.) 266. But this priority, as given by the statute of 1797, applies to *equitable* as well as legal debts. Howe *v.* Sheppard, 5 Sumner, 133. It was further held, in Beaston *v.* Farmers' Bank of Delaware, 12 Peters, 102, that no lien was erected [created] by the statute of March 3, 1797, and that the priority established by it could never attach, while the debtor continues the owner and in possession of the property, though he be unable to pay his debts, — that no evidence of his insolvency can be received, until he has been devested of his property; and when thus devested, the person who takes the title becomes a trustee for the United States. See Conkling's Treatise, 2d ed. 469–476, for a condensed view of the statutes and judicial decisions on this question of priority asserted by the United States.

(*c*) Stat. Hen. VIII. c. 39.

(*a*) 3 Peters, 292.

of the goods until the duties were paid or secured; and any attachment of the goods under state process, during such custody, was void. On the other hand, it was held that the government had no general lien on the goods of the importer, for duties due by him upon other importations. (*b*)

(*b*) In Maryland, by statute, passed in 1778, the commencement of a suit *by the state* against a public debtor created a lien on the lands of the debtor, and a preference over all other creditors, who had not, prior to the commencement of the suit, secured a lien by judgment, mortgage, or otherwise. Davidson *v.* Clayland, 1 Harr. & Johns. 546. The preference in payment of debts was a branch of government prerogative at common law, and it was introduced as such into Maryland. It is the law still, where the property of the debtor remains in hand, and there is no lien standing in the way. State of Maryland *v.* Bank of Maryland, 6 Gill & John. 205. In Connecticut, the state has a priority of claim against the estate of an insolvent debtor; and state sureties paying the debt have the same privilege. Revised Statutes of Connecticut, 1826, 212. The state reference rests, in this country, upon statutes; and the common law gives none over other creditors. The State *v.* Harris, 2 Bailey, S. C. 598. Keckley *v.* Keckley, 2 Hill, Ch. (S. C.) 256. The common-law prerogative of the king, to be paid in preference to all other creditors, is therefore not universally adopted in this country. It prevails in the government of the United States, and in Maryland, North Carolina, Indiana, Connecticut, &c., but not in South Carolina. In Georgia, state taxes have preference over all incumbrances whatsoever. State *v.* Pemberton, Dudley, 15. In Indiana, the state has preference of all other creditors; and real and personal estate is bound on behalf of the state from the teste of the first process. Rev. Stats. 1838, 283.

As to the lien of judgments obtained by individuals in the federal courts, it was decided in the Circuit Court of the United States, in New York, in November, 1829, in the case of Konig *v.* Bayard, that judgments in the circuit and district courts in New York were a lien upon lands as against subsequent purchasers, from the time they were regularly docketed, according to the practice of those courts, and that the usage of docketing those judgments had prevailed since 1795. The same doctrine was assumed in reference to judgments in the federal courts in Pennsylvania, in the case of Conard *v.* Atlantic Ins. Co., 1 Peters, 386; and the principles contained in this last case were reviewed and confirmed in Conard *v.* Nicoll, 4 Peters, 291. The same rule as to judgments in the Circuit Court of the United States in Ohio. Sellers *v.* Corwin, 5 Ohio, 400. There is no act of Congress making judgments in the United States courts a lien on lands. Such a lien depends upon the local laws of the state where the land lies. Tayloe *v.* Thomson, 5 Peters, 358. In New York, therefore, a judgment in one of the federal courts within that state is a lien upon the lands of the debtor within the state, for the term of ten years from the docketing of the judgment. The Manhattan Company *v.* Evertson, 6 Paige, 457. Indeed, in every state, the judgments of the federal courts have the same lien, to the extent of its jurisdiction, as the judgments of the highest court of the state. Den *v.* Jones, 2 McLean, 78, 83.[1]

Debtors to the United States for moneys received, their executors and administra-

[1] The lien of judgments and decrees in the federal courts arises out of the adoption of the state laws upon that subject, and the lien may be considered a

2. Power to incorporate a Bank. — The next case which called forth a construction from every part of the government as to the implied powers of Congress, was, whether Congress had power

tors, &c., omitting, on due notice, to render to the Auditor of the Treasury their accounts and vouchers for the expenditure of such moneys, are to be sued under the direction of the Comptroller of the Treasury, and are to be subject to the costs and charges of such suits, *whether the ultimate decision be in their favor or against them.* (Act of Congress, March 3, 1795, c. 113.) So receivers of public moneys, including all public officers, who shall fail to account and pay over the same, they and their sureties *may be proceeded against forthwith by warrant of distress,*[2] and have their goods and chattels seized and sold, and if not sufficient, they may be imprisoned. The amount due is a lien on the real estate from the time of the levy of the distress warrant; and for want of sufficient goods and chattels, the lands may be sold on three weeks' notice, and a conveyance executed to the purchaser by the marshal. (Act of Congress, *supra*, sec. 3, and act of May 15, 1820, sec. 2, 3.) Any person aggrieved by the distress may apply by bill to the district judge for relief under the process of injunction, and

rule of property and rule of decision under the thirty-fourth section of the Judiciary Act. Clements *v.* Berry, 11 How. 398, 411; *post*, 342, n. 1. But the state laws, it is said, are adopted, not by the courts, but by the acts of Congress regulating the process of the courts of the United States. (*x*) Brown *v.* Pierce, 7 Wall. 205, 217; Ward *v.* Chamberlain, 2 Black, 430, 439 *et seq.* On these principles it was held in the last case that an admiralty decree *in personam* for the payment of a sum of money was a lien, in a state by whose laws a decree in equity had that effect. But equity will protect the interest of a party in land which he has conveyed under duress, against the general lien of judgment creditors of the legal owner. Brown *v.* Pierce, *supra.*

[2] This provision is constitutional. Murray *v.* Hoboken L. & I. Co., 18 How. 272. (*y*)

(*x*) Federal judgments and decrees, in the absence of Federal legislation, are governed by State laws. Perkins *v.* Brierfield Iron & Coal Co., 77 Ala. 403. They are liens to the same extent as similar judgments and decrees of the State courts of general jurisdiction, and by U. S. Rev. Stats. § 967, they cease to be liens "in the same manner and at like periods." Brown *v.* Pierce, 7 Wall. 217; Myers *v.* Tyson, 13 Blatch. 242; U. S. Stat. of Aug. 1, 1888, ch. 729 (25 St. at L. 357); see 18 Am. L. Rev. 261. When a local statute gives a remedy in equity to remove a cloud upon the legal title, without requiring the complainant to obtain prior possession, that remedy may be administered in appropriate cases by the Federal courts, without, however, affecting the distinction between legal and equitable rights and remedies, which, in procedure, uniformly prevails thoughout those courts. Holland *v.* Challen, 110 U. S. 15: United States *v.* Wilson, 118 U. S. 86.

(*y*) See also as to what is "due process of law," Davidson *v.* New Orleans, 96 U. S. 97; Springer *v.* United States, 102 U. S. 586; Hurtado *v.* Cal., 110 U. S. 516; Spencer *v.* Merchant, 125 U. S. 345; 18 Am. L. Rev. 459; Lent *v.* Tillson, 140 U. S. 316; Conery *v.* New Orleans W. Co., 142 U. S. 79; New York *v.* Squire, 145 U. S. 175; Baker *v.* Kilgore, id. 487; Yesler *v.* Washington H. L. Com'rs, 146 U. S. 646; McNulty *v.* California, 149 U. S. 645; Ramsey *v.* People, 142 Ill. 380; *supra*, 221, n. (*x*); *infra*, 391 n. (*x*).

to incorporate a bank. In the year 1791, the Secretary of the Treasury had recommended the institution of a national bank, as being of primary importance to the prosperous administration of the finances, and of the greatest utility in the operations connected with the support of public credit. But the bill for establishing a bank was opposed in the House of Representatives, as not authorized by the Constitution. It was contended *249 that the government of the United *States was limited to the exercise of the enumerated powers, and that the power to incorporate a bank was not one of them, and, if vested in the government, it must be an implied power; and it was contended, that the power given to Congress to pass all laws necessary and proper to execute the specified powers must be limited to means necessary to the end, and incident to the nature of the specified powers. On the other hand, it was urged in favor of the bill, that incidental, as well as express powers, necessarily belonged to every government, and that when a power was delegated to effect particular objects, all the known and usual means of effecting them passed as incidental to them; and it was insisted that a bank was a known and usual instrument, by which several of the enumerated powers of government were

if still unredressed, he may appeal to the Circuit Court. (Act of Congress, 15th May, 1820, sec. 4, 6.) He may also, if in prison, be relieved upon *habeas corpus* by the Circuit Court of the United States. (United States *v.* Nourse, 9 Peters, 8; ib. 12, note.) The doctrines of the government and courts of the United States are quite stringent in respect to the obligation of importers of goods. The import duty is held to be a personal debt chargeable upon the importer, as well as a lien on the goods themselves, and that the personal debt continues, though the goods be deposited with a bond given for the duties, and the goods be lost or destroyed. Meredith *v.* United States, 13 Peters, 486, 494. Another part of that case wears the same forbidding aspect. The enforcement of fines, penalties, or forfeitures, under the revenue laws of the United States, is extremely strict and rigorous; but the act of Congress of March 3, 1797, sec. 1, made perpetual by act of Feb. 11, 1800, authorizes the Secretary of the Treasury, on application, to mitigate or remit the penalties of these laws, when, from the facts of the case, first judicially ascertained, he should be of opinion that such penalties have been incurred *without wilful negligence, or any intention of fraud.* (*z*)

(*z*) The right to duties on imported goods accrues on their arrival at the port of destination, with intent to unlade. McAndrew *v.* Robertson, 29 Fed. Rep. 246; 'McLean *v.* Hager, 31 id. 602. As revenue statutes are not remedial, or founded upon any permanent public policy, they are construed in favor of the taxpayer and most strongly against the government. American Net & Twine Co. *v.* Worthington, 141 U. S. 468; Rice *v.* United States, 53 Fed. Rep. 910.

exercised. After the bill had passed the two houses of Congress, the question touching its constitutionality was agitated with equal ability and ardor in the executive cabinet. The Secretary of State and the Attorney-General conceived that Congress had transcended their powers, but the Secretary of the Treasury maintained the opposite opinion. Their respective opinions were founded on a train of reasoning, denoting great investigation of all the leading and fundamental principles of the Constitution, and they were submitted to the consideration of the President of the United States. It was argued against the constitutionality of the act, that the power to incorporate a bank was not among the enumerated powers, and to take a single step beyond the boundaries specially drawn around the powers of Congress would be to take possession of an undefined and undefinable field of power; that though Congress were authorized to make all laws necessary and proper for carrying into execution the enumerated powers, they were confined to those means which were necessary, and not merely convenient. It meant those means without which the grant of the power would be nugatory, and that if such a latitude of construction were allowed, as to give to Congress any implied power on the ground of convenience, *it would swallow up all the list of enumerated *250 powers, and reduce the whole to one phrase. On the other hand, it was contended that every power vested in a government was, in its nature, sovereign, and gave a right to employ all the means fairly applicable to the attainment of the end of the power, and not specially precluded by specified exceptions, nor contrary to the essential ends of political society; that though the government of the United States was one of limited and specified powers, it was sovereign with regard to its proper objects, and to its declared purposes and trusts; that it was incident to sovereign power to erect corporations, and, consequently, it was incident to the United States to erect one, in relation to the objects intrusted to its management; that implied powers are as completely delegated as those which are expressed, and the power of erecting a corporation may as well be implied as any other instrument or means of carrying into execution any of the specified powers; that the exercise of the power in that case had a natural relation to the lawful ends of the government, and it was incident to the sovereign power to regulate, and to

employ all the means which apply with the best advantage to that regulation; that the word *necessary*, in the Constitution, ought not to be confined to those means, without which the grant of power would be nugatory, and it often means no more than needful, requisite, useful, or conducive to, and that was the true sense in which the word was used in the Constitution. The relation between the measure and the end was the criterion of constitutionality, and not whether there was a greater or less necessity or utility. The infinite variety, extent, and complexity of national exigencies necessarily required great latitude of discretion in the selection and application of means; and the authority intrusted to government ought and must be exercised on principles of liberal construction.

President Washington gave these arguments of his cab- *251 inet a deliberate and profound consideration, and it *terminated in a conviction, that the incorporation of a bank was a measure authorized by the Constitution, and the bill passed into a law.

This same question came before the Supreme Court of the United States, in 1819, in the case of *M' Culloch* v. *The State of Maryland*, (*a*) in reference to the Bank of the United States, which was incorporated in 1816, and upon which the legislature of Maryland had imposed a tax. Notwithstanding the question arising on the construction of the powers of Congress had been settled, so far as an act of Congress could settle it, in 1791, and again in 1816, it was thought worthy of a renewed discussion in that case. The Chief Justice, in delivering the opinion of the court, observed, that the question could scarcely be considered an open one, after the principle had been so early introduced and recognized by many successive legislatures, and had been acted upon by the judicial department, as a law of undoubted obligation. He admitted that it belonged to the Supreme Court alone to make a final decision in the case, and that the question involved a consideration of the Constitution in its most interesting and vital parts.

It was admitted that the government of the United States was one of enumerated powers, and that it could exercise only the powers granted to it; but though limited in its powers, it was supreme within its sphere of action. It was the government of

(*a*) 4 Wheaton, 316.

the people of the United States, and emanated from them. Its powers were delegated by all, and it represented all, and acted for all. In respect to those subjects on which it can act, it must necessarily bind its component parts; and this was the express language of the Constitution, when it declared that the Constitution, and the laws made in pursuance thereof, were the supreme law of the land and required all the officers of the state governments to take an oath of fidelity to it. There was nothing

*in the Constitution which excluded incidental or implied *252 powers. The articles of the confederation gave nothing to the United States but what was expressly granted; but the new Constitution dropped the word *expressly*, and left the question whether a particular power was granted, to depend on a fair construction of the whole instrument. No constitution can contain an accurate detail of all the subdivisions of its powers, and of all the means by which they might be carried into execution. It would render it too prolix. Its nature requires that only the great outlines should be marked, and its important objects designated, and all the minor ingredients left to be deduced from the nature of those objects. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, were intrusted to the general government; and a government intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation vitally depended, must also be intrusted with ample means for their execution. Unless the words imperiously require it, we ought not to adopt a construction which would impute to the framers of the Constitution, when granting great powers for the public good, the intention of impeding their exercise, by withholding a choice of means.

The powers given to the government imply the ordinary means of execution; and the government, in all sound reason and fair interpretation, must have the choice of the means which it deems the most convenient and appropriate to the execution of the power. The power of creating a corporation, though appertaining to sovereignty, was not a great, substantive, and independent power, but merely a means by which other objects were accomplished; in like manner as no seminary of learning is instituted in order to be incorporated, but the corporate charter is conferred to subserve the purposes of education. The power of creating a

corporation is never used for its own sake, but for the purpose of effecting something else. It is nothing but ordinary
*253 *means to attain some public and useful end. The Constitution has not left the right of Congress to employ the necessary means for the execution of its powers to general reasoning. It is expressly authorized to employ such means; and *necessary* means, in the sense of the Constitution, does not import an absolute physical necessity, so strong that one thing cannot exist without the other. It stands for any means calculated to produce the end. The word "necessary" admits of all degrees of comparison. A thing may be necessary, or very necessary, or absolutely and indispensably necessary. The word is used in various senses, and in its construction, the subject, the context, the intention, are all to be taken into view. The powers of the government were given for the welfare of the nation. They were intended to endure for ages to come, and to be adapted to the various crises of human affairs. To prescribe the specific means by which government should in all future time execute its power, and to confine the choice of means to such narrow limits as should not leave it in the power of Congress to adopt any which might be appropriate and conducive to the end, would be most unwise and pernicious, because it would be an attempt to provide by immutable rules for exigencies which, if foreseen at all, must have been seen dimly, and would deprive the legislature of the capacity to avail itself of experience, or to exercise its reason, and accommodate its legislation to circumstances.

If the end be legitimate, and within the scope of the Constitution, all means which are appropriate and plainly adapted to this end, and which are not prohibited, are lawful; and a corporation was a means not less usual, nor of higher dignity, nor more requiring a particular specification, than other means. A national bank was a convenient, a useful, and essential instrument in the prosecution of the fiscal operations of the government. It was clearly an appropriate measure; and while the Supreme Court declared it to be within its power and its
*254 duty to maintain that an act *of Congress exceeding its power was not the law of the land, yet if a law was not prohibited by the Constitution and was really calculated to effect an object intrusted to the government, the court did not pretend

to the power to inquire into the degree of its necessity. That would be passing the line which circumscribes the judicial department, and be treading on legislative ground.

The court therefore decided, that the law creating the Bank of the United States was one made in pursuance of the Constitution; and that the branches of the national bank, proceeding from the same stock, and being conducive to the complete accomplishment of the object, were equally constitutional.

The Supreme Court were afterwards led, in some degree, to review this decision, in the case of *Osborn* v. *The United States Bank*; (*a*) and they there admitted that Congress could not create a corporation for its own sake, or for private purposes. The whole opinion of the court in the case of *M'Culloch* v. *The State of Maryland* was founded on, and sustained by, the idea that the bank was an instrument which was necessary and proper for carrying into effect the powers vested in the government. It was created for national purposes only, though it was undoubtedly capable of transacting private as well as public business; and while it was the great instrument by which the fiscal operations of the government were effected, it was also trading with individuals for its own advantage. The bank, on any rational calculation, could not effect its object, unless it was endowed with the faculty of lending and dealing in money. This faculty was necessary to render the bank competent to the purposes of government, and, therefore, it was constitutionally and rightfully engrafted on the institution. (*b*) [1] (*x*)

(*a*) 9 Wheaton, 859, 860.

(*b*) It is worthy of notice that the power of Congress to establish a national bank, even under the articles of confederation, seems not, at the time, to have been much questioned; and Congress did actually approve of such a proposition on the 26th of May, 1781; and on the 31st of December following, they proceeded by ordinance to institute and incorporate the Bank of North America. Journals of Congress, vii. 87, 197. The constitutionality and validity of this ordinance were ably enforced by Judge

[1] *Legal Tender Cases.* — The most important discussion of the implied powers of Congress that has ever taken place, has arisen on the question of the constitutionality of the legal tender acts. The acts of 1862 and 1863 authorized the issue of United States notes, and enacted that they should be lawful money and a legal tender in payment of all debts, public and private, within the United States, with certain exceptions. After a large number of the state courts had decided

(*x*) The same reasoning makes the national bank act of 1864 constitutional. Farmers' Nat. Bank *v.* Dearing, 91 U. S. 29.

3. **Taxation.** — The construction of the powers of Congress relative to taxation was brought before the Supreme Court, in

Wilson. See Wilson's Works, iii. 397, and see *supra*, 212, n. .The first and the second banks of the United States were established by statutes which received the approbation of Presidents Washington and Madison, and the constitutionality of the establishment of those banks being repeatedly declared by the Supreme Court of the United States, it was considered as a settled question, not open for further discussion. The Constitution declared that "all *legislative powers* therein granted should be vested in the Congress of the United States;" and that "the *executive power* should be vested in a President of the United States;" and that "the *judicial power* of the United States should be vested in one Supreme Court, and in such inferior courts as the Congress might from time to time ordain and establish;" and that "*the judicial power should extend to all cases in law and equity arising under the Constitution.*" (Art. 1, sec. 1; Art. 2, sec. 1; Art. 3, sec. 1, 2.) This simple and beautiful distribution of power would seem to be too clear to be mistaken, and too sacred to be invaded. The oath to support the Constitution necessarily includes, in its meaning and efficacy, the support of this distribution of power, and of the judicial cognizance of all cases arising under the Constitution. That cognizance extends, of course, to the question whether Congress have the constitutional power to incorporate a national bank. It is *a case arising under the Constitution;* and the decisions of the Supreme Court were in favor of the existence of such a power, and of the valid exercise of it in the establishment of a national bank. The words *necessary and proper* in the Constitution were not to be confined to means that were *indispensable* in the exercise of any express power; but extended to all means that Congress should deem *expedient and useful*, and conducive to the end proposed in the execution of any express power. That construction is binding and conclusive, as well upon the other departments of the government as upon the nation at large. The Congress, in whom is vested the legislative power, and the President, in whom is vested the executive power, are respectively bound to receive and obey that construction of the Constitution which has been duly settled by the judicial power. See, further, *infra*, 449, 456, note *b*.

that these enactments were within the powers of Congress, the question whether the act of 1862 was constitutional as to debts contracted and due before its passage came before the Supreme Court of the United States. The court, consisting of eight judges, was not unanimous, and decided against the act by a bare majority. The arguments of the Chief Justice in favor of the decision, and of Mr. Justice Miller for the dissenting members, both went very much on the question whether the act was a "necessary and proper" means of carrying out some of the powers expressly given to Congress. The further ground was adverted to that the act was inconsistent with the "spirit of the Constitution," as impairing the obligation of contracts, taking private property for public use without compensation, &c. Hepburn *v.* Griswold, 8 Wall. 603. Some other arguments of a more technically legal character were called out by this decision. A letter to the American Law Review may be specially referred to, iv. 768. The question is not whether the Constitution prohibits the exercise of the power in question, but whether it grants it; of course, a power as to which the Constitution is silent, may be given by implication as a necessary or proper means of carrying out other powers which are expressly conferred; but it is hard to see how a limited power which is expressly given, and which does not come up to a desired height, can be enlarged as an in-

1796, in the case of *Hylton* v. *The United States.* (*c*) By the act of *5th June, 1794, Congress laid a duty upon *255 carriages for the conveyance of persons, and the question was whether this was a *direct* tax, within the meaning of the Constitution. If it was not a direct tax, it was admitted to be rightly laid, under that part of the Constitution which declares that all duties, imposts, and excises shall be uniform throughout the United States; but if it was a direct tax, it was not constitutionally laid, for it must then be laid according to the census, under that part of the Constitution which declares that direct taxes shall be apportioned among the several states according to numbers. The Circuit Court in Virginia was divided in opinion on the question; but on appeal to the Supreme Court, it was decided, that the tax on carriages was not a direct tax, within the letter or meaning of the Constitution, and was therefore constitutionally laid.

(*c*) 3 Dallas, 171.

cident to some other express power; an express grant seems to exclude implications; the power to "coin money" means to strike off metallic medals (*coin*), and to make those medals legal tender (*money*); if the Constitution says expressly that Congress shall have power to make metallic legal tender, how can it be taken to say by implication that Congress shall have power to make paper legal tender? 7 Am. Law Rev. 146.

In December, 1870, the subject was brought once more before the Supreme Court, the composition of which had been changed in the mean time by the resignation of one judge and the appointment of two others, and the whole matter was allowed to be reargued. The court took considerable time to deliberate, and at length overruled their former decision, and affirmed the constitutionality of the acts, both as to contracts made before and after the passage, by a majority of five to four. Legal Tender Cases, Knox *v.* Lee; Parker *v.* Davis, 12 Wall. 457. The majority do not go further into the expediency of the measure than to show that it was not improper under the circumstances, but devote themselves more to showing that it was not inconsistent with the spirit of the Constitution and to overthrowing the argument stated above. Mr. Justice Strong suggests, as an answer, that the grant of power to punish counterfeiting, treason, &c., has been held not to exclude an implied power to make other offences punishable (citing United States *v.* Marigold, 9 How. 560). See also United States *v.* Dewitt, 9 Wall. 41, 44, *post*, 439, n. 1. The implied power, moreover, need not be deduced from any one of those expressly granted, but may be inferred from the sum of all the powers which make the United States a nation, and the fact that whatever power there is over the currency is vested in Congress. Field, J., in his able dissenting opinion, *inter alia*, reproduces the argument stated above, with great force. 12 Wall. 649, 655. See Trebilcock *v.* Wilson, *post*, 326, n. 1; Railroad Co. *v.* Johnson, 15 Wall. 195. [See especially Legal Tender Case, 110 U. S. 421.]

The question was deemed of very great importance, and was elaborately argued. It was held that a general power was given to Congress to lay and collect taxes of every kind or nature, without any restraint. They had plenary power over every species of taxable property, except exports. But there were two rules prescribed for their government: the rule of uniformity, and the rule of apportionment. Three kinds of taxes, viz. duties, imposts, and excises, were to be laid by the first rule; and capitation, and other direct taxes, by the second rule. If there were any other species of taxes, as the court seemed to suppose there might be, that were not direct, and not included within the words "duties, imposts, or excises," they were to be laid by the rule of uniformity or not, as Congress should think proper and reasonable.

The Constitution contemplated no taxes as direct taxes, but such as Congress could lay in proportion to the census; and the rule of apportionment could not reasonably apply to a tax on carriages, nor could the tax on carriages be laid by that rule, without very great inequality and injustice. If two states, equal in census, were each to pay 8,000 dollars, by a tax on *256 carriages, *and in one state there were 100 carriages, and in another 1,000, the tax on each carriage would be ten times as much in one state as in the other. While A., in the one state, would pay for his carriage eight dollars, B., in the other state, would pay for his carriage eighty dollars. In this way, it was shown by the court, that the notion that a tax on carriages was a direct tax, within the purview of the Constitution, and to be apportioned according to the census, would lead to the grossest abuse and oppression. This argument was conclusive against the construction set up, and the tax on carriages was considered as included within the power to lay duties; and the better opinion seemed to be, that the direct taxes contemplated by the Constitution were only two, viz., a capitation, or poll tax, and a tax on land.[1] (x) The court concluded that

[1] This is sustained by the language of the Supreme Court in later cases, with the possible addition of taxes on personal property by general valuation and assessment of the various descriptions possessed within the several states. Chief Justice

(x) See Springer v. United States, 102 U. S. 586; Scholey v. Rew, 23 Wall. 331; Minot v. Winthrop, 161 Mass. 113, 119, 128. The Federal income tax of 1894 upon personal "gains, profits, and income," is unconstitutional, as being a

the tax on carriages was an indirect tax on expense or consumption, and, therefore, properly laid, pursuant to the rule of uniformity.

In *Loughborough* v. *Blake*, (*a*) the power of taxation was again brought under judicial discussion. The question was immediately of a local nature, and it was, whether Congress had the right to impose a direct tax upon the unrepresented District of Columbia; but there were principles involved in the decision

(*a*) 5 Wheaton, 317.

Chase intimates that the definitions of direct taxes by political economists cannot be used satisfactorily for the purpose of construing the phrase in the Constitution. Thus, a tax on the circulation by banks of state bank notes is held not to be direct. Veazie Bank *v.* Fenno, 8 Wall. 533, 541, 546; and so of a tax on incomes of insurance companies. Pacific Ins. Co. *v.* Soule, 7 Wall. 433.

direct tax. Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 429; 158 U. S. 601. See 29 Am. L. Rev. 550; 9 Harv. L. Rev. 198. Succession taxes and taxes upon the franchises of corporations are now usually held to be excises, and not direct taxes. See Minot *v.* Winthrop, 162 Mass. 113, 119, 120, 128, and cases there cited. A direct tax upon lands does not, of itself, create any liability on the part of the States to pay the tax. United States *v.* Louisiana, 123 U. S. 32.

Statutes which impose taxes, though not mandatory in terms, are to be so regarded when necessary for the tax-payer's protection. Erhardt *v.* Schroeder, 155 U. S. 124.

The provision of the U. S. Rev. Stats. § 3224, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," applies not only to valid assessments, but also to any tax which the government claims to be constitutionally valid. Snyder *v.* Marks, 109 U. S. 189; Kensett *v.* Stivers, 18 Blatch. 397; Miles *v.* Johnson, 59 Fed. Rep. 38; Alkan *v.* Bean, 8 Biss. 83. The same principle should also, it seems, be applied to unjust taxation by a State, especially when the entire tax is not illegal, the remedy of the tax-payer being, after payment, to sue for re-payment. State Railway Tax Cases, 92 U. S. 516, 617; Tennessee *v.* Sneed, 96 U. S. 69; Pacific Express Co. *v.* Seibert, 44 Fed. Rep. 310; 142 U. S. 339; McTwigan *v.* Hunter (R. I.), 30 Atl. Rep. 962; Odlin *v.* Woodruff, 31 Fla. 160; 22 L. R. A. 699, note. A State statute, which provides a remedy by injunction against the collection of an illegal tax, may be enforced by a Federal court in the State, although the statute also provides for recovering back the tax when paid, by an action at law. Meyers *v.* Shields, 61 Fed. Rep. 713.

A suit against a State officer to restrain the assessment or collection of a State tax, is not a suit against the State, though it is named as a party, and it may be prosecuted in the Federal Courts. Poindexter *v.* Greenhow, 114 U. S. 270; Secor *v.* Singleton, 35 Fed. Rep. 376. If a State officer seizes for taxes, and refuses to surrender, property in the hands of the receiver of a Federal court, a proceeding for contempt for that cause is not a suit against the State. *Ex parte* Tyler, 149 U. S. 164; see *infra*, 297, notes.

which had an extensive and important relation to the whole United States.

It was declared that the power to tax extended equally to all places over which the government extended. It extended as well to the District of Columbia, and to the territories which were not represented in Congress, as to the rest of the United States. Though duties were to be uniform, and taxes were to be apportioned according to numbers, the power was coextensive with the empire. The inhabitants of the then territories of Michigan, and of Florida, and Arkansas, for instance, as well as the District of Columbia, though without any representa-
* 257 tion in Congress, were subject to the *full operation of the power of taxation, equally as the people of New York or Massachusetts. But the court held that Congress are not bound, though they may, in their discretion, extend a direct tax to the territories as well as to the states. A direct tax, if laid at all, must be laid on every state conformably to the census, and therefore Congress has no power to exempt any state from its due share of the burden. But it was understood that Congress were under no necessity of extending a tax to the unrepresented District of Columbia, and to the territories; though if they be taxed, then the Constitution gives the rule of assessment. This construction was admitted to be most convenient, for the expense of assessing and collecting a tax in a territory, as the Northwest Territory, for instance, then existed, might exceed the amount of the tax. Here was an anomalous case in our government, in which representation and taxation are not inseparable, though the principle that the power of taxation could not rightfully exist without representation was a fundamental ground of our Revolution. The court did not consider a departure from a general principle, in this case, to be very material or important, because the case was that of territories which were in a state of infancy, advancing to manhood, and looking forward to complete equality, as soon as that state of manhood should be attained. It was the case, also, of the District of Columbia, which had voluntarily relinquished the right of representation, and adopted the whole body of Congress for its legitimate government.

4. Pre-emption of Indian Lands. — Congress have the exclusive right of pre-emption to all Indian lands lying within the territo-

ries of the United States. This was so decided in the case of *Johnson* v. *M'Intosh.* (*a*) Upon the doctrine of the court in that case, and in that of *Fletcher* v. *Peck,* (*b*) the United States own the soil as well as the jurisdiction of the immense tracts of unpatented lands included within their territories, and of *all the productive funds which those lands may here- *258 after create. The title is in the United States by the treaty of peace with Great Britain, and by subsequent cessions from France and Spain, and by cessions from the individual states; and the Indians have only a right of occupancy, and the United States possess the legal title, subject to that occupancy, and with an absolute and exclusive right to extinguish the Indian title of occupancy, either by conquest or purchase. (*x*) The title of the European nations, and which passed to the United States, to this immense territorial empire, was founded on discovery and conquest, and, by the European customary law of nations, prior discovery gave this title to the soil, subject to the possessory right of the natives, and which occupancy was all the right that European conquerors and discoverers, and which the United States, as succeeding to their title, would admit to reside in the native Indians. The principle is, that the Indians are to be considered merely as occupants, to be protected while in peace in the possession of their lands, but to be deemed incapable of transferring the absolute title to any other than the sovereign of the country. The Constitution (*a*) gave to Congress the power to dispose of, and to make all needful rules and regulations respecting the territory or other property belonging to the United States, and to admit new states into the Union. Since the Constitution was formed, the value and efficacy of this power have been magnified to an incalculable extent, by the pur-

(*a*) 8 Wheaton, 543. (*b*) 6 Cranch, 142, 143. (*a*) Art. 4, sec. 3.

(*x*) The United States, having the complete control of the fee of lands reserved by treaty for Indian occupation, conveys both title and right of possession when it makes such a grant as a railroad right of way, which necessarily involves possession. Missouri, K. & T. Ry. Co. *v.* Roberts, 152 U. S. 114; see Buttz *v.* No. Pac. R. Co., 119 U. S. 55; United States *v.* Ordway, 30 Fed. Rep. 30; Denny *v.* Dodson, 32 id. 899. But lands which are reserved from sale, &c., until the President decides upon their being set aside as an Indian reservation, cannot pass by a railroad grant prior to his decision. No. Pac. R. Co. *v.* Maclay, 61 Fed. Rep. 554. A State legislature cannot authorize leases on Indian lands. Buffalo, &c. R. Co. *v.* Lavery, 27 N. Y. S. 443.

chase of Louisiana and Florida; and, under the doctrine contained in the cases I have referred to, Congress have a large and magnificent portion of territory under their absolute control and disposal. This immense property has become national and productive stock, and Congress, in the administration of this stock, have erected temporary governments under the provisions of the ordinance of the Congress under the confederation, and under the constitutional power; and they have appointed the officers to each territory, and allowed delegates in Congress to *259 be chosen by the *inhabitants every second year, and with a right to debate, but not to vote, in the House of Representatives. (*a*)

The unpatented lands belonging to the United States, within the states of Ohio, Indiana, Illinois, Michigan, and the territory of Wisconsin, arose from cessions from the states of Virginia, Massachusetts, Connecticut, and New York, before the adoption of the present Constitution of the United States. (*b*) North

(*a*) Ordinance of Congress of 18th July, 1787. Acts of Congress of August 7, 1789; January 14, 1805; March 3, 1817; February 16, 1819; April 24, 1820; March 30, 1822. The acquisition of the foreign territories of Louisiana and Florida by the United States, by purchase, was to be supported only by a very liberal and latitudinary construction of the incidental powers of the government under the Constitution. The objections to such a construction, which were urged at the time, are stated in 3 Story's Comm. 156–161. But the constitutionality of the acquisition of foreign territory is vindicated, established, and settled by the Supreme Court, as one necessarily flowing from the power of the Union to make treaties. American Ins. Co. *v.* Canter, 1 Peters, 511. It belongs, therefore, upon that principle, exclusively to the President, with the advice and consent of two-thirds of the members of the Senate present to make the acquisition. But in 1845, Congress, by joint resolution, under the power in the Constitution (art. 4, sec. 3), that "new states may be admitted by the Congress into this Union," admitted the foreign and independent state of Texas into the Union as a separate state, upon terms to which Texas afterwards acceded. Resolution of Congress of March 1, 1845. This was giving a new legislative construction, of enormous efficacy and extent, to the constitutional power to acquire foreign states, and would appear to be contrary to the principle of construction recognized by the Supreme Court, that the annexation of foreign states, out of the limits of the United States, must be the act of the treaty-making power.

(*b*) That of New York was made March 1, 1781, under the authority of the act of the legislature of that state, of the 19th February, 1780. That of Virginia was made March 1, 1784, under the authority of an act of the 20th December, 1783. That of Massachusetts, on the 19th of April, 1785, under the authority of the acts of that state, of 13th November, 1784, and 17th March, 1785; and that of Connecticut on the 14th September, 1786, under the authority of an act of that state of May, 1786. That of South Carolina, in August, 1787. The title to the lands belonging to the United States *west of the Mississippi* is supported by treaties made with Great Britain,

Carolina, South Carolina, and Georgia made similar cessions of their unpatented lands, and which now compose the states of Tennessee, Alabama, and Mississippi. The lands so ceded were intended to be, and were considered, as constituting a common fund, for the benefit of the Union; and when the states in which the lands are now situated were admitted into the Union, the proprietary right of the United States to those unimproved and unsold lands was recognized. Those lands belong to the United States, as part of their public domain, subject to the Indian right and title of occupancy, in all cases in which the same has not been lawfully extinguished. It is not to be concealed, however, that the title of the United States to the unappropriated lands lying within the limits of the separate states has been seriously questioned by some of them, as by Mississippi, Illinois, and Indiana. The latter state, in January, 1829, advanced a claim to the exclusive right to the soil and eminent domain of all the unappropriated lands within her acknowledgd boundaries; and in 1830, Mississippi put forth a similar claim. But the cessions of the territorial claims of the separate states to the western country were called for by the resolutions of Congress of the 6th September and 10th of October, 1780, and were made upon the basis that they were to be "disposed of for the common benefit of the United States." (*c*) It was stipulated by Congress, in the last resolution, that the lands to be ceded should be disposed of for the common benefit of the United States; be settled and formed into distinct republican states, with a suitable extent of territory; become members of the American Union, and have the same rights of sovereignty, freedom, and independence as the other states. It was likewise provided by * the ordi- * 260 nance of July 13, 1787, *for the government of the territory of the United States northwest of the river Ohio*, that the legislatures of the districts or new states to be erected therein should "never interfere with the primary disposal of the soil by the United States, in Congress assembled, nor with any regula-

in 1783, 1818, 1827, and with France, in 1803, and with Spain, in 1820, and with Mexico, in 1831. *Vide* Elliott's American Diplomatic Code, Washington, 1834, 2 vols., which is a most valuable compilation of all the treaties down to that date, in which the United States have any interest.

(*c*) Journals of the Confed. Congress, vi. 123, 147; viii. 256, 259; ix. 47; x. 92; xi. 160; xii. 92.

tions Congress may find necessary for securing the title in such soil to the *bona fide* purchaser. (*a*)

5. Effect of State Judgments. — By the Constitution of the United States, Congress were, by general laws, to prescribe the manner in which the public acts, records, and judicial proceedings of every state should be proved, and the effect thereof in every other state. (*x*) In pursuance of this power, Congress, by the act

(*a*) For disposing of the lands of the United States, numerous land offices have been established by acts of Congress in the states of Ohio, Indiana, Illinois, Missouri, Louisiana, Mississippi, Alabama, Michigan, and Arkansas, and in the territories of Wisconsin, Iowa, and Florida. See Gordon, Digest of the Laws of the United States, 1837, 321–389, in which all the statute provisions relative to the disposition of the public domain of the United States are collected, and clearly and neatly arranged and digested. By the act of Congress of September 4, 1841, c. 16, ten per cent of the net proceeds of the sales of the public lands, to be made subsequent to the 31st of December, 1841, within the limits of the states of Ohio, Indiana, Illinois, Alabama, Missouri, Mississippi, Louisiana, Arkansas, and Michigan, were to be paid to those states respectively; and the residue of those net proceeds, subject to certain provisos, should be divided, half-yearly, among the twenty-six states of the Union, and the District of Columbia, and the territories of Wisconsin, Iowa, and Florida, according to their respective federal representative population, as ascertained by the last census, to be applied by the legislatures of the said states to such purposes as they should direct.

(*x*) The constitutional provision applies equally to the State courts and to the courts of the several territories. Susenbach *v.* Wagner, 41 Minn. 108. The implication from this requirement is that the public acts of each State are to be given the same effect by the courts of other jurisdictions that they have by law and usage at home; and for this purpose the law of such State must be proved as a fact. Chicago & Alton Railroad *v.* Wiggins Ferry Co. 119 U. S. 615. But in the Federal courts, the Circuit Court, and the Supreme Court on appeal or error therefrom, take judicial notice of the laws of every State in the Union, as domestic laws. Hanley *v.* Donoghue, 116 U. S. 1, 6; Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747, 751; Liverpool Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 445. As to suits, the true view appears to be that a judgment in one State, entered according to its laws and valid there, may be enforced in another State, although an original judgment there entered in that form would be invalid. Renaud *v.* Abbott, 116 U. S. 277; Stewart *v.* Stewart, 27 W. Va. 167; Ritter *v.* Hoffman, 35 Kansas, 215; Simmons *v.* Clark, 56 Ill. 96; but see Wilbur *v.* Abbott, 60 N. H. 40. Such a judgment differs from a judgment recovered in a foreign country in no other respect than in not being re-examinable on its merits, not impeachable for fraud in obtaining it, if rendered by a court having jurisdiction of the cause and of the parties. Hanley *v.* Donoghue, 116 U. S. 1, 4; Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 292.

The decrees of State probate courts cannot, if they have jurisdiction, be collaterally attacked in the courts of other States or of the United States. Herron *v.* Dater, 120 U. S. 464; Veach *v.* Rice, 131 U. S. 293; Simmons *v.* Saul, 138 U. S. 439; Holmes *v.* Oregon & Cal. R. Co., 9 Fed. Rep. 229; Mooney *v.* Hinds, 160 Mass.

of May 26, 1790, provided the mode by which records and judicial proceedings should be authenticated, and then declared

469; Loring *v.* Arnold, 15 R. I. 428; Drake *v.* Curtis, 88 Mo. 644.

"The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between State courts and those of the United States it is something more. It is a principle of right and of law, and, therefore, of necessity." Covell *v.* Heyman, 111 U. S. 176, 182; *Ex parte* Royall, 117 U. S. 241, 252. A judgment rendered in one State can have elsewhere no greater credit than it has there, and if it can there be attacked for want of jurisdiction, it can be so attacked also in another State. First Nat. Bank *v.* Cunningham, 48 Fed. Rep. 510; Sharon *v.* Hill, 26 id. 337, 391; Van Cleaf *v.* Burns, 118 N. Y. 549. The judgments and decrees of a U. S. circuit court in one State are to be there accorded the same effect in all respects as, under like circumstances, would be accorded to a State tribunal of equal authority; and it is a Federal question whether the State court has thus allowed to them due effect. Crescent City L. S. Co. *v.* Butchers' Union, 120 U. S. 141; Dupasseur *v.* Rochereau, 21 Wall. 130. A judgment *in personam* rendered against a corporation in the Federal court of one State is conclusive on the merits, as a cause of action, in every other State. Chicago & A. Bridge Co. *v.* Anglo-American Packing Co., 46 Fed. Rep. 584. An action of replevin cannot be maintained in a State court to recover property attached under process of a Federal court. Krippendorf *v.* Hyde, 110 U. S. 276; Tua *v.* Carriere, 117 U. S. 201. By the U. S. Rev. Stats., § 720, the Federal courts are forbidden to enjoin proceedings in any court of a State, except in bankruptcy matters. See Chapman *v.* Brewer, 114 U. S. 158; Sargent *v.* Helton, 115 U. S. 348; Hemsley *v.* Myers, 45 Fed. Rep. 283; New York & N E. R. Co. *v.* Woodruff, 42 id. 468; Tuchman *v.* Welch, id. 548; Dillon *v.* Kansas City S. B. Ry. Co., 43 id. 109; Gilbert *v.* Quimby, 1 id. 111; Bridges *v.* Sheldon, 18 Blatch. 517. And as the cause of action is not changed by the judgment, the merger of the original demand in the judgment does not preclude the courts of another State, in which the judgment is sued on, from looking into the nature of the original claim to ascertain whether the court rendering the judgment was authorized to enforce the claim. Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265; Huntington *v.* Attrill, 146 U. S. 657. Such a judgment, so far as it assumes to decide a matter not covered by the pleadings, nor within the issue, is a nullity. Reynolds *v.* Stockton, 43 N. J. Eq. 211. The judgment of a State court may be collaterally attacked in the Federal courts for want of jurisdiction. Swift *v.* Meyers, 37 Fed. Rep. 37; Southern Ins. Co. *v.* Wolverton Hardware Co. (Texas), 19 S. W. Rep. 615. And it is now settled in those courts that want of jurisdiction to bind the person may be shown in an action upon the judgment against the person, notwithstanding the recitals of the record as to service or appearance. Thompson *v.* Whitman, 18 Wall. 457; Knowles *v.* Gaslight Co., 19 Wall. 58; Hall *v.* Lanning, 91 U. S. 160; Graham *v.* Spencer, 14 Fed. Rep. 603; Downs *v.* Allen, 22 id. 805; see also 74 Am. Dec. 652; Gibson *v.* Manufacturers' Fire Ins. Co., 144 Mass. 81; Rothrock *v.* Dwelling-House Ins. Co., 161 Mass. 423. The weight of authority in the State courts is now, and should be, to the same effect, as the decisions of the U. S. Supreme Court upon a provision of the Federal Constitution are binding upon

that they should have such faith and credit given to them in every court within the United States as they had by law or usage

them. Eliot *v.* McCormick, 144 Mass. 10; Hoffman *v.* Newell, 21 N. Y. S. 912; 20 id. 432; Teel *v.* Yost, 128 N. Y. 387; Martin *v.* Central Vermont R. Co., 50 Hun, 347; Renier *v.* Hurlbut, 81 Wis. 24; Webster *v.* Hunter, 50 Iowa, 215; Frothingham *v.* Barnes, 9 R. I. 474; Wood *v.* Wood, 78 Ky. 624; Crumlish *v.* Central Imp. Co., 38 W. Va. 390; Morgan *v.* Morgan, 1 Texas Civil App. 315; Henry *v.* Allen, 82 Texas, 35; Hall *v.* Mackay, 78 id. 248; Napton .*v* Leaton, 71 Mo. 358; Brown *v.* Eaton, 98 Ind. 591; Mitchell *v.* Ferris, 5 Houst. (Del.) 34; Price *v.* Shaeffer, 161 Penn. St. 530; Guthrie *v.* Lowry, 84 Penn. St. 533; Aultman *v.* Mills, 9 Wash. 68; Sammis *v.* Wightman, 31 Fla. 10; Semple *v.* Glenn, 91 Ala. 245; Jardine *v.* Reichert, 39 N. J. L. 165; Bowler *v.* Huston, 30 Gratt. 266; see also 74 Am. Dec. 652; Bigelow on Estoppel (4th ed.), ch. 6.

When the personal liability of the stockholders in a corporation has been adjudged and fixed by the courts of the State which created the corporation, and a suit is brought on such a judgment in another State, full faith and credit are to be given to the judgment of the domestic State, and the U. S. Supreme Court may review the judgment of the second court when that court refuses to enforce the first judgment on the ground that it was rendered without jurisdiction, or that it was founded on a penalty. Missouri *v.* Andriano, 138 U. S. 496; Huntington *v.* Attrill, 146 U. S. 657; Glenn *v.* Garth, 147 U. S. 360; see Bicknell *v.* Comstock, 113 U. S. 149; Chicago & Alton R. Co. *v.* Wiggins Ferry Co., 119 U. S. 615.

The presumption is in favor of the jurisdiction of a foreign court of record rendering judgment. Bailey *v.* Martin, 119 Ind. 103; Gunn *v.* Peakes, 36 Minn. 177. When the court has jurisdiction of the subject-matter and of the defendant, a judgment by default cannot be collaterally attacked. Pendexter *v.* Cole (N. H.), 20 Atl. Rep. 331. So an unreversed judgment or decree of a court of one State will not be reversed by the courts of another State for fraud, misrepresentation, or negligence and mistake on the defendant's part. Christmas *v.* Russell, 5 Wall. 290; Mooney *v.* Hinds, 160 Mass. 469; Ambler *v.* Whipple, 131 Ill. 311; see White *v.* Reid, 24 N. Y. S. 290. If an appeal from the judgment does not stay it in the domestic court, the pendency of an appeal does not bar a suit on the judgment in another State. Clark *v.* Child, 136 Mass. 344; Dow *v.* Blake, 148 Ill. 76; Gaines's Succession, 45 La. Ann. 1237. A personal judgment obtained in one State by publication and mailing does not bind the defendant personally, he being and remaining in another State. Freeman *v.* Alderson, 119 U. S. 185; New York Life Ins. Co. *v.* Aitkin, 125 N. Y. 660.

If property is seized by attachment, the court first acquiring jurisdiction over it may retain it in its custody until final judgment or even until the judgment is satisfied. Covel *v.* Heyman, 111 U. S. 176; Heidritter *v.* Elizabeth Oil-Cloth Co., 112 U. S. 294; Gates *v.* Bucki, 53 Fed. Rep. 961; Porter *v.* Davidson, 62 id. 626; Lockhart *v.* Locke, 42 Ark. 17; Whiting *v.* Burger, 78 Maine, 287.

The pendency of an action in one jurisdiction does not bar or abate another suit between the same parties, involving the same issues, in a court of co-ordinate jurisdiction, when its jurisdiction is exercised by personal service and not by a seizure of property. Stanton *v.* Embrey, 93 U. S. 548, 554; Loring *v.* Marsh, 2 Cliff. 311, 322; Brooks *v.* Mills County, 4 Dillon, 524; Pierce *v.* Feagans, 39 Fed. Rep. 587; Liggett *v.* Glenn, 51 id. 381; Dwight *v.* Central Vermont R. Co., 20

in the courts of the state from whence the records were taken. Under this act it was decided, in the case of *Mills* v. *Duryee*, (*b*) that if a judgment, duly authenticated, had, in the state court from whence it was taken, the faith and credit of the highest nature, viz., record evidence, it must have the same faith and credit in every other court. It was declaring the effect of the record, to declare the faith and credit that were to be given to it. The Constitution intended something more than to make the judgments of state courts *prima facie* evidence only. It contemplated a power in Congress to give a conclusive effect to such judgments. A judgment is, therefore, conclusive in every other state, if a court of the particular state where it was rendered would hold it conclusive. *Nil debet* is not a good plea in a suit on a judgment in another state, because not a good plea in such state. *Nul tiel record* is the proper plea in such a case. The same decision was followed in *Hampton* v. *M'Connel*, (*c*) and the doctrine contained * in it may now be considered * 261 as the settled law of the land. It is not, however, to be understood that *nul tiel record*, is, in all cases, the necessary plea; but any special plea may be pleaded which would be good to avoid the judgment in the state where it was pronounced. (*a*) And in *Mayhew* v. *Thatcher*, (*b*) the court would seem to imply

(*b*) 7 Cranch, 481.

(*c*) 3 Wheaton, 234; and in Wernwag *v.* Pawling, 5 Gill & Johns. 500.

(*a*) Shumway *v.* Stillman, 4 Cowen, 292.

(*b*) 6 Wheaton, 129. — In Thurber *v.* Blackbourne, 1 N. H. 242, it was held that *nil debet* was a good plea to debt on a judgment of another state when it did not appear by the record that the defendant had notice of the suit. And in Spencer *v.* Brockway, 1 Ohio, 259; Holt *v.* Alloway, 2 Blackf. (Ind.) 108, and Hoxie *v.* Wright, 2 Vermont, 263, the judgment of another state, regularly obtained, when the defendant had been served with process, or had otherwise appeared, was held to be conclusive evidence of the debt. But the defendant must have had due notice to appear, and be subject to the jurisdiction of the court, or if a foreigner or non-resident, he must have actually appeared to the suit, or the judgment of another state will not be deemed of any validity. This is a plain principle of justice, which pervades the jurisprudence of this and of all other countries. Killburn *v.* Woodworth, 5 Johns. 37; Aldrich *v.* Kinney, 4 Conn. 380; Bissell *v.* Briggs, 9 Mass. 462; Fisher *v.* Lane, 3 Wils. 297; Buchanan *v.* Rucker, 9 East, 192; Douglas *v.* Forrest, 4 Bing. 686, 702; Becquet *v.* MacCarthy, 2 Barn. & Adol. 951; Bruce *v.* Wait, 1 Mann. & Gr. 1; Pawling *v.* Bird, 13 Johns. 192; Earthman *v.* Jones, 2 Yerger, 484; Miller *v.* Miller, 1 Bailey (S. C.), 242; Benton *v.* Burgot, 10 Serg. & Rawle, 240; Rogers *v.* Coleman,

Blatch. 200; Gay *v.* Brierfield Coal Co., 94 Ala. 303; Ruegger *v.* Indianapolis R. Co., 103 Ill. 449; Hollister *v.* Stewart, 111 N. Y. 644.

that a judgment in one state, founded on an attachment *in rem*, would not be conclusive evidence of the debt in other
*262 states, if the defendant *had not personal notice of the suit, so as to have enabled him to defend it.[1]

Hardin, 413 ; Borden *v.* Fitch, 15 Johns. 121 ; Hall *v.* Williams, 6 Pick. 232 : Bates *v.* Delavan, 5 Paige, 305 ; Bradshaw *v.* Heath, 13 Wendell, 407. See also *infra*, ii. 120. The doctrine in Mills *v.* Duryee is to be taken with the qualification that in all instances the jurisdiction of the court rendering the judgment may be inquired into, and the plea of *nil debet* will allow the defendant to show that the court had no jurisdiction over his person. It is only when the jurisdiction of the court in another state is not impeached, either as to the subject-matter or the person, that the record of the judgment is entitled to full faith and credit. The court must have had jurisdiction, not only of *the cause*, but of *the parties*, and in that case the judgment is final and conclusive. If the suit in another state was commenced by the attachment of property, the defendant may plead in bar, that no process was served on him, and that he never appeared, either in person or by attorney. Starbuck *v.* Murray, 5 Wendell, 148 ; Shumway *v.* Stillman, 6 Wendell, 447 ; Wilson *v.* Niles, 2 Hall (N. Y.), 358 ; Gleason *v.* Dodd, 4 Metcalf, 333 ; Story, Comm. on the Conflict of Laws, §§ 586–590 ; Rangely *v.* Webster, 11 N. H. 299. But an important distinction is here to be observed, that a proceeding by foreign attachment, and against garnishees to judgment and execution, if binding in the state, is conclusive everywhere as a proceeding *in rem* against movable property and debts attached or garnished ; but the judgment is of no force against *the person* of the debtor who had not been served with process, or appeared in the foreign attachment, nor against his property in another jurisdiction. Cochran *v.* Fitch, 1 Sandf. Ch. 142. The process by attachment of property of, and of debts due to non-residents, or of persons absent from the jurisdiction, will subject the property attached to execution upon the judgment or decree founded on the process ; but it is considered as a mere proceeding *in rem*, and not personally binding, or having any extra-territorial force or obligation. Story, Comm. on the Conflict of Laws, § 568 ; Chew *v.* Randolph, Walker (Miss.), 1 ; Overstreet *v.* Shannon, 1 Mo. 529 [375 of republication]. A special plea in bar of a suit on a judgment in another state, to be valid, must deny, by positive averments, every fact which would go to show that the court in another state had jurisdiction of the person, or of the subject-matter. Harrod *v.* Barretto, 1 Hall (N. Y.), 155. [A judgment of another state may be claimed to be used in one of the following ways : (1.) As evidence. (2.) As the foundation of a right giving a cause of action. (3.) As a bar to an action. (4.) As a judgment on which execution is claimed. It may, in fact, be used in any of the first three ways, but not in the fourth. (See notes, *supra*.) Burnley *v.* Stevenson, 24 Ohio St. 474 ; Turley *v.* Dreyfus, 33 La. Ann. 885. — B.]

[1] *Judgments of other States.* — As to the necessity of notice mentioned in the note (*b*) of the last page, see D'Arcy *v.* Ketchum, 11 How. 165 ; Christmas *v.* Russell, 5 Wall. 290, 305. As to appellate proceedings, see Nations *v.* Johnson, 24 How. 195.

If the record does not recite the facts on which the court of the other state founded its jurisdiction, the parties are said to be at liberty to show that jurisdiction had not been acquired. Wilcox *v.* Kassick, 2 Mich. 165 ; Coit *v.* Haven, 30 Conn. 190, 198. Although if the court is one of general jurisdiction, the presumption is in favor of the validity of its proceedings. Dunbar *v.* Hallowell, 34 Ill. 168; Folger *v.* Columbian Ins. Co., 99 Mass.

6. **Power of Congress over the Militia.** — Congress have authority to provide for calling forth the militia, to execute the laws of the

267, 273; Buffum *v.* Stimpson, 5 Allen, 591; Jarvis *v.* Robinson, 21 Wis. 523. See Miller *v.* United States, 11 Wall. 268, 299. But see Warren *v.* McCarthy, 25 Ill. 95, 103; Smith *v.* Mulliken, 2 Minn. 319. Except in case of a special statutory authority, with regard to which such courts stand on the same footing with courts of limited jurisdiction. Wyatt *v.* Rambo, 29 Ala. 510, 521, 522; Commonwealth *v.* Blood, 97 Mass. 538; Folger *v.* Columbian Ins. Co., 99 Mass. 267; Allen *v.* Blunt, 1 Blatchf. 480; [Galpin *v.* Page, 18 Wall. 35.] So, if the record recites an appearance by attorney, these cases generally allow the attorney's authority to be disproved. Shelton *v.* Tiffin, 6 How. 163, 186; Harshey *v.* Blackmarr, 20 Iowa, 161, 173; Kerr *v.* Kerr, 41 N. Y. 272, 275; Lawrence *v.* Jarvis, 32 Ill. 304. *Contra*, Warren *v.* Lusk, 16 Mo. 102; Baker *v.* Stonebreaker, 34 Mo. 172.

But when the record recites facts sufficient to give the court jurisdiction, including such matters as service of process on the defendant or his personal appearance, the better opinion seems to be that those facts cannot be controverted by the parties in another state. Field *v.* Gibbs, Peters, C. C. 155; Wilcox *v.* Kassick, 2 Mich. 165; Lincoln *v.* Tower, 2 McLean, 473; Thompson *v.* Emmert, 4 McL. 96; Pritchett *v.* Clark, 4 Har. (Del.) 280; Wescott *v.* Brown, 13 Ind. 83; Lawrence *v.* Jarvis, 32 Ill. 304; Lapham *v.* Briggs, 27 Vt. 26; Wilson *v.* Jackson, 10 Mo. 329, 334; Shelton *v.* Tiffin, 6 How. 163, 186. [Just as similar recitals in the record of a domestic court of limited jurisdiction would be conclusive. Sheldon *v.* Wright, 1 Seld. (5 N. Y.) 497, 516; Wyatt *v.* Rambo, 29 Ala. 510. *Contra*, Sears *v.* Terry, 26 Conn. 272. Although there are weighty decisions and dicta that the jurisdiction of the court of another state may be inquired into in all cases. Starbuck *v.* Murray, 5 Wend. 148; Carleton *v.* Bickford, 13 Gray, 591; Folger *v.* Columbian Ins. Co., 99 Mass. 267, 273; Kerr *v.* Kerr, 41 N. Y. 272, 275; Noyes *v.* Butler, 6 Barb. 613; Hoffman *v.* Hoffman, 46 N. Y. 30; Norwood *v.* Cobb, Texas, 551; Coit *v.* Haven, 30 Conn. 190, 198; [Christmas *v.* Russell, 5 Wall. 290, 305; but see Cheever *v.* Wilson, 9 Wall. 108, 123;] Rape *v.* Heaton, 9 Wis. 328. In Hendrick *v.* Whittemore, 105 Mass. 23, 28, Carleton *v.* Bickford is cited, and it is there said that the reason domestic judgments cannot be thus impeached collaterally by the parties thereto, is because the remedy by review or writ of error is held to be more appropriate.

Other cases to the point that judgments obtained after an attachment of a non-resident defendant's property, but without personal service or appearance by him, are not binding *in personam* in other states, are Easterly *v.* Goodwin, 35 Conn. 273; McVicker *v.* Beedy, 31 Me. 314. See Wright *v.* Boynton, 37 N. H. 9; Cooper *v.* Reynolds, 10 Wall. 308, 318; [Eastman *v.* Wadleigh, 65 Me. 251.] The statement in these cases, and *supra*, 261, n. (*b*), that the attachment operates as a proceeding *in rem*, must be taken with great caution. Bold Buccleugh, 7 Moore, P. C. 267, 282; Megee *v.* Beirne, 39 Penn. St. 50. [In Windsor *v.* McVeigh, 93 U. S. 274, it was held that the jurisdiction gained by a simple seizure of property for condemnation is only sufficient to hold the same until the owner is notified and allowed to appear and defend, and that a final judgment without such notification and allowance is void. — B.]

But in a suit on a judgment obtained in another state, although the jurisdiction and notice to the defendant may be inquired into, it cannot be set up that the judgment was obtained by fraud. Christmas *v.* Russell, *supra*. In this case, also,

Union, suppress insurrections and repel invasions; and to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States; reserving to the States, respectively, the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by Congress. (*a*) The President of the United States is to be the commander of the militia, when called into actual service. The act of 28th of February, 1795, authorized the President, in case of invasion, or of imminent danger of it, to call forth such number of militia most convenient to the scene of action as he might judge necessary. The militia so called out are made subject to the rules of war; and the law imposes a fine upon every delinquent, to be adjudged by a court-martial composed of militia officers only. These militia courts-martial are to be held and conducted in the manner prescribed by the articles of war; and the act of 18th of April, 1814, prescribes the manner of holding them.

During the war of 1812, the authority of the President of the United States over the militia became a subject of doubt and difficulty, and of a collision of opinion between the general government and the governments of some of the states. It was the opinion of the government of Connecticut that the militia could not be called out, upon the requisition of the general government, except in a case declared and founded upon the existence of one

(*a*) Const. art. 1, sec. 8.

a state law which in substance provided that judgments recovered in other states against citizens of that state should not be enforced in the courts of the latter, if the cause of action which was the foundation of the judgment would have been barred in her courts by her statutes of limitations, was held unconstitutional for like reasons. But states may prescribe reasonable periods of limitation to actions on judgments obtained in other states. Ib. 300; Bank of Alabama *v.* Dalton, 9 How. 522; *post*, 419, n. 1.

It results from the general doctrine that a judgment recovered in another state is a bar to an action for the same cause and between the same parties.

McGilvray *v.* Avery, 30 Vt. 538; Child *v.* Eureka Powder Works, 45 N. H. 547; North Bank *v.* Brown, 50 Me. 214; [Harryman *v.* Roberts, 52 Md. 64. As to the effect given to state judgments by the United States courts, see St. Clair *v.* Cox, 106 U. S. 350; Pennoyer *v.* Neff, 95 U. S. 714; Mohr *v.* Manierre, 101 U. S. 417. — B.] Although an appeal is pending. Bank of North America *v.* Wheeler, 28 Conn. 433. The constitutional provision applies to a decree of divorce which is valid and effectual by the laws of the state where it was obtained. Cheever *v.* Wilson, 9 Wall. 108; *post*, ii. 117, n. 1. As to foreign judgments, see ii. 120, n. 1.

of the specified exigencies; that, when called out, they could not be taken from under the command of the officers duly appointed by the states, or placed under the immediate command of an officer of the army of the United States. Nor could the United States lawfully detach a portion of the privates from the body of the company to which they belonged, and which *was organized with proper officers. This would, in the *263 opinion of the government of Connecticut, impair, and eventually destroy, the state militia. When the militia are duly called into the service of the United States, they must be called as militia, furnished with proper officers by the state.

Similar difficulties arose between the government of the United States and the State of Massachusetts, on the power of the national government over the militia. Both those states refused to furnish detachments of militia for the maritime frontier, on an exposition of the Constitution, which they deemed sound and just.

In Connecticut, the claim of the governor, to judge whether the exigency existed, authorizing a call of the militia of that state, or any portion of it, into the service of the Union, and the claim on the part of that state to retain the command of the militia, when duly ordered out, as against any subordinate officer of the army of the United States, were submitted to, and received the strong and decided sanction, not only of the governor and council of that state, but of the legislature itself. (*a*) In Massachusetts, the governor consulted the judges of the Supreme Judicial Court as to the true construction of the Constitution on these very interesting points. The judges of the Supreme Court were of opinion that it belonged to the governors of the several states to determine when any of the exigencies contemplated by the Constitution of the United States existed, so as to require them to place the militia, or any part *of it, in the service of the Union, and *264 under the command of the President. It was observed, that the Constitution of the United States did not give that right, by any express term, to the President or Congress, and that the

(*a*) See Official Documents of the State of Connecticut, August, 1812. The jealousy of the exercise of any power (other than that of the local governments) over the militia was very strongly manifested by the legislature and people of Connecticut, as early as 1693, when they fearlessly and successfully resisted the claim of Governor Fletcher, of New York, resting on a commission for that purpose, from the king, to the exclusive command of the militia of Connecticut. 1 Trumbull's Hist. 410-414.

power to determine when the exigency existed was not prohibited to the states, and that it was, therefore, as of course, reserved to the states. A different construction would place all the militia in effect at the will of Congress, and produce a military consolidation of these states. The act of 28th of February, 1795, vested in the President the power of calling forth the militia when any one of the exigencies existed, and if to that be superadded the power of determining when the *casus fœderis* occurred, the militia would, in fact, be under the President's control.

As to the question how the militia were to be commanded, when duly called out, the judges were of opinion that the President alone, of all the officers acting under the United States, was authorized to command them, and that he must command them, as they were organized under officers appointed by the states. (*x*) The militia could not be placed under the command of any officer not of the militia, except that officer be the President of the United States. But the judges did not determine how the militia were to be commanded, in case of the absence of the President,

(*x*) Congress, under its constitutional power "to make rules for the government and regulation of the land and naval forces" cannot impair the constitutional authority of the President as Commander-in-chief, nor can the President evade the legislative regulations by military orders. Swaim *v.* United States, 28 Ct. Cl. 173. The President may place the militia under the command of an officer and require its service in any part of the country. Highsmith *v.* Ussery, 25 Texas, Sup. 108; see 2 Story on Const. § 1197; Dwight's History of the Hartford Convention, p. 249 *et seq.* By the U. S. Rev. Stats. §§ 5298, 5299, it is made lawful for the President, and also his duty, to secure the enforcement of Federal laws, when obstructed by insurrections or unlawful combinations, to employ the militia or the land and naval forces of the United States.

A State cannot prohibit its people from so keeping and bearing arms as to deprive the United States of their rightful resources, for maintaining public security; but when not restrained by its own Constitution, a State may, by its laws, control and regulate all military organizations other than those authorized by the Federal militia laws (U. S. Rev. Stats. Title 16). Presser *v.* Illinois, 116 Ill. 252. A State law providing that the governor shall, before suppressing a riot, request the local authorities so to do, does not limit power conferred upon him by the State Constitution to call out the militia to at once execute the laws when the danger of riot is imminent. Chapin *v.* Ferry, 3 Wash. St. 386; see Lewis *v.* Lewelling, 53 Kansas, 201.

Under the U. S. Constitution, Art. 1, § 8, and U. S. Rev. Stats. § 1630, a State legislature or governor may provide for disbanding organized militia companies while in the service of the United States. People *v.* Hill, 126 N. Y. 497; 13 N. Y. S. 186, 637; see Proctor *v.* Stone, 1 Allen, 193. In the Fifth Amendment the words "when in actual service in time of war or public danger" apply to the militia only. Johnson *v.* Sayre, 158 U. S. 109.

and of a union of militia with troops of the United States; and whether they were to act under their separate officers, and in concert as allied forces, or whether the officer present who was highest in rank, be he of the militia or of the federal troops, was to command the whole, was a difficult and perplexing question, which the judges did not undertake to decide. (*a*)

The President of the United States declared that these constructions of the constitutional powers of the general government over the militia were novel and unfortunate, *and he was evidently and decidedly of a different *265 opinion. He observed, in his message to Congress on the 4th November, 1812, that if the authority of the United States to call into service and to command the militia could be thus frustrated, we were not one nation, for the purpose most of all requiring it. These embarrassing questions, and the high authority by which each side of the argument was supported, remained unsettled by the proper and final decision of the tribunal that is competent to put them to rest, until the case of *Martin* v. *Mott*, (*a*) in 1827. In that case it was decided and settled by the Supreme Court of the United States, that it belonged exclusively to the President to judge when the exigency arises, in which he had authority under the Constitution to call forth the militia, and that his decision was conclusive upon all other persons.

The case of *Houston* v. *Moore* (*b*) settled some important questions arising upon the national authority over the militia. The acts of Congress already referred to, and the act of 8th March, 1792, for establishing a uniform militia, were considered as covering the whole ground of congressional legislation over the subject. The manner in which the militia were to be organized, armed, disciplined, and governed was fully prescribed; provision was made for drafting, detaching, and calling forth the state quotas, when requested by the President. His orders were to be given to the chief executive magistrate, or to any militia officer he might think proper. Neglect or refusal to obey his orders was declared to be a public offence, and subjected the offender to trial and punishment, to be adjudged by a court-martial, and the mode of proceeding was perspicuously detailed.

(*a*) 8 Mass. 548. (*a*) 12 Wheaton, 19. (*b*) 5 Wheaton, 1. (*x*)

(*x*) Upon this decision see Claflin *v.* Houseman, 93 U. S. 130, 141.

The question before the Supreme Court of the United States was, whether it was competent for a court-martial, deriving its jurisdiction under state authority, to try and punish militia-men, drafted, detached, and called forth by the Presi-
* 266 dent * into the service of the United States, and who had refused or neglected to obey the call. The court decided that the militia, when called into the service of the United States, were not to be considered as being in that service, or in the character of national militia, until they were mustered at the place of rendezvous, and that until then the state retained a right, concurrent with the government of the United States, to punish their delinquency. But after the militia had been called forth, and had entered into the service of the United States, their character changed from state to national militia, and the authority of the general government over such detachments was exclusive. Actual service was considered by Congress as the criterion of national militia, and the place of rendezvous was the *terminus a quo* the service, the pay, and subjection to the articles of war were to commence. And if the militia, when called into the service of the United States, refuse to obey the order, they remain within the military jurisdiction of the state, and it is competent for the state to provide for trying and punishing them by a state court-martial, to the extent and in the manner prescribed by the act of Congress. The act of Pennsylvania, of 1814, provided for punishing, by a state court-martial, delinquent militia-men, who were called into the service of the United States, and neglected or refused to serve; and they were to be punished by the infliction of the penalties prescribed by the act of Congress, and such an act was held not to be repugnant to the Constitution and laws of the United States. It was the lawful exercise of concurrent power, and could be concurrently exercised by the national and state courts-martial, as it was authorized by the laws of the State, and not prohibited by those of the United States. It would remain to be so exercised, until Congress should vest the power exclusively elsewhere, or until the states should devest their courts-martial of such a jurisdiction.

This was the decision, in the first instance, of the Supreme
* 267 * Court of Pennsylvania; (*a*) and it was affirmed, on appeal, by the majority of the Supreme Court of the United States.

(*a*) Moore *v.* Houston, 3 Serg. & Rawle, 169.

7. Power of Congress as to Internal Improvements. — The authority of Congress to appropriate public moneys for internal improvements has been much discussed on public occasions, and between the legislative and executive branches of the government; but the point has never been brought under judicial consideration.

It has been contended, that, under the power to establish post-offices and post-roads, and to regulate commerce among the states, and to raise moneys to provide for the general welfare, and as incident thereto, Congress have the power to set apart funds for internal improvements in the states, with their assent, by means of roads and canals. Such a power has been exercised to a certain extent. It has been the constant practice to allow to the new states a certain proportion of the proceeds arising from the sale of public lands, to be laid out in the construction of roads and canals within those states, or leading thereto. In 1806, Congress authorized a road to be opened from Nashville, in Tennessee, to Natchez; and in 1809, they authorized the canal of Carondelet, leading from Lake Pontchartrain, to be extended to the river Mississippi. So late as the 8th of August, 1846, Congress granted lands to aid in the improvement of the Fox and Wisconsin rivers, and to *connect the same by a canal*, in the State of Wisconsin. The Cumberland road was constructed under the act of March 29, 1806, and this road had been made under a covenant with the State of Ohio, by the act of April 30, 1802, that a portion of the proceeds of lands lying within that state should be applied to the opening of the roads leading to that state, with the consent of the states through which the road might pass. But the expenditures on that road far exceeded the proceeds of sales of public lands in Ohio, and, in 1817, the President of the United States objected to a bill, on the ground that the Constitution did not extend to making roads and canals, and improving watercourses through the different states; nor could the assent of those states confer the power. Afterwards, in 1822, the President objected to a bill appropriating money for repairing the Cumberland road, and establishing gates and tolls on it.

On these and other occasions there has been a great *and decided difference of opinion between Congress and *268 the President on the constitutional question. President

Jefferson, in his message of December 2, 1806, and President Madison, in his message of December 3, 1816, equally denied any such power in Congress. On the other hand, it appears that Congress claim the power to lay out, construct, and improve post-roads, with the assent of the states through which they pass. They also claim the power to open, construct, and improve military roads on the like terms, and the right to cut canals through the several states, with their assent, for promoting and securing internal commerce, and for the more safe and economical transportation of military stores in time of war; and leaving, in all these cases, the jurisdictional right over the soil in the respective states. (*a*)

(*a*) In the case of Dickey *v.* Turnpike Road Co., 7 Dana, 113, the Kentucky Court of Appeals decided that the power given to Congress by the Constitution to *establish post-roads*, enabled them to *make, repair, keep open, and improve* post-roads, when they should deem the exercise of the power expedient. But in the exercise of the right of eminent domain on this subject, the United States have no right to adopt and use roads, bridges, and ferries, constructed and owned by states, corporations, or individuals, without their consent, or without making to the parties concerned just compensation. If the United States elect to use such accommodations, without the performance of such a previous condition, they stand upon the same footing, and are subject to the same tolls and regulations as private individuals. This important decision was well supported by sound reasoning. (*x*)

(*x*) Railroads and the streets used by letter-carriers are both "post-roads." Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1; Blackham *v.* Gresham, 16 Fed. Rep. 609; United States *v.* Easson, 18 id. 590. Such roads cannot be constructed by the general government without the State's consent, but it may establish such a road on a highway constructed by the State. Cleveland R. Co. *v.* Franklin Canal Co., 1 Pitts, L. Journ. 142. Under its constitutional power to establish post-offices and post-roads, Congress may regulate the entire postal service of the country. *Ex parte* Jackson, 96 U. S. 727. Such power carries with it as incident the power, to be exercised at the discretion of Congress, to prohibit the use of the mails for matter used in disseminating crime, immorality, or lotteries: *In re* Rapier, 143 U. S. 110; Horner *v.* United States, id. 207; but it does not enable the postmaster general to bind the government by leasing a post-office for twenty years when there is no appropriation therefor. Chase *v.* United States, 155 U. S. 489; 44 Fed. Rep. 732. The general government may sue to enjoin obstructions to highways used in interstate commerce and in transporting the mails. *In re* Debs, 158 U. S. 564. The U. S. Rev. Stats. § 3964, making railroads post-roads, and § 5264, allowing telegraph companies to use materials from public lands, do not appropriate, for the promotion of commerce, submerged tidelands over which the railroad or telegraph is constructed. Rumsey *v.* New York & N. E. R. Co., 63 Hun, 200; 137 N. Y. 563.

Under the power to regulate commerce among the States, Congress can construct, or empower individuals or corporations to construct, railroads across the States and Territories of the United States. Califor-

In the inaugural address of President Adams, on the 4th of March, 1825, he alluded to this question, and his opinion seemed to be in favor of the constitutional right, and of the policy and

nia *v.* Central Pacific R. Co., 127 U. S. 1. It may likewise create a corporation to build a bridge across navigable water between two States, and to take private lands therefor, making just compensation. Luxton *v.* North River Bridge Co., 153 U. S. 525.

In order to regulate commerce, Congress may employ, as instruments, corporations created by itself or by the States, and it can grant a right of way to a railroad corporation for a railroad, telegraph, and telephone line. Cherokee Nation *v.* Southern Kansas Ry. Co., 135 U. S. 641. A lock and dam belonging to a corporation chartered by a State can be condemned by the United States only under the power to regulate foreign and interstate commerce. Monongahela Nav. Co. *v.* United States, 148 U. S. 312.

If just compensation is provided for, it may thus authorize the property of a riparian proprietor to be taken in order to facilitate navigation and commerce between the States, and for this purpose proceedings may be had in either the State or Federal courts. *Re* United States Petition, 96 N. Y. 227; Great Falls Manuf. Co. *v.* United States, 16 Ct. Cl. 160; 112 U. S. 645; Fort Leavenworth R. Co. *v.* Lowe, 114 U. S. 525; United States *v.* Irwin, 127 U. S. 125; *In re* Montgomery, 48 Fed. Rep. 896; 17 A. G. Op. 109, 137, 279, 453, 455; 18 id. 64, 66, 431, 481; see 25 U. S. at L. 357; Kimberly & Clark Co. *v.* Hewitt, 79 Wis. 334; Dunnington *v.* United States, 17 Wash. L. R. 344.

The United States, upon making just compensation, may by eminent domain take real estate in any State, with or without a concurrent act of such State, whenever needed for its use in the execution of any of its powers, as for arsenals, fortifications, light-houses, custom-houses, court-houses, barracks, hospitals, post-offices, etc. Van Brocklin *v.* Tennessee, 117 U. S. 151, 154; Decker *v.* Baltimore & N. Y. R. Co., 30 Fed. Rep. 723; Hawkins Point Light-house, 39 id. 77; *In re* Secretary of the Treasury, 45 id. 396. If the general government acquires such land by purchase with the consent of the State legislature, it has exclusive jurisdiction there; if otherwise acquired, it is subject to exclusive Federal jurisdiction only with respect to the part used for public purposes. Fort Leavenworth R. Co. *v.* Lowe, 114 U. S. 525; Chicago & Pac. Ry. Co. *v.* McGlinn, id. 542; Benson *v.* United States, 146 U. S. 325; United States *v.* Bateman, 34 Fed. Rep. 86; 16 A. G. Op. 592. When land is thus acquired from a State by an Act of cession, the United States holds it only as prescribed in such Act; hence at Fortress Monroe, which was thus ceded by the State of Virginia, the civil laws of that State are in force, so far as they do not conflict with the Federal laws or military occupation. Ibid.; Crook *v.* Old Point Comfort Hotel Co., 54 Fed. Rep. 604. The provisions of the Fifth and Fourteenth Amendments that private property shall not be taken for public use without just compensation, or without due process of law, apply to eminent domain proceedings by the United States, but not to those taken by a State. *In re* Sawyer, 124 U. S. 200, 219; Wilson *v.* Baltimore & P. R. Co., 5 Del. Ch. 424.

The claim for compensation arises out of an implied contract, so as to be also with the jurisdiction of the Court of Claims. United States *v.* Great Falls Manuf. Co., 112 U. S. 645. The Act of Congress of July 15, 1882, authorizing such compensation to be determined by the Court of Claims without a jury is constitutional, although not requiring pay-

wisdom of the liberal application of the national resources to the internal improvement of the country. He intimated that speculative scruples on this subject would probably be solved by the practical blessings resulting from the application of the power, and the extent and limitations of the general government, in relation to this important interest, settled and acknowledged to the satisfaction of all. This declaration may be considered as withdrawing the influence of the official authority of the President from the side on which it has hitherto pressed, and adding

ment before the taking. Great Falls Manuf. Co. *v.* Garland, 25 Fed. Rep. 521; 124 U. S. 581. The United States cannot be sued, as upon an implied contract, for land devoted to the public use when the plaintiff's title has never been acknowledged; it has not, by statute, made itself liable for torts committed by its officers; and the settled rule that it is not so liable cannot be evaded by claiming upon an implied contract. Hill *v.* United States, 149 U. S. 593; German Bank *v.* United States, 148 U. S. 573; see United States *v.* Schwalby, 87 Texas 604; Merriam *v.* United States, 29 Ct. Cl. 250; Schillinger *v.* United States, 155 U. S. 163. Improvements in navigable waters which lessen the navigable character of a river but do not take private property, though impairing the usefulness of a wharf, constitute a tort for which damages cannot be recovered in the Court of Claims. Gibson *v.* United States, 29 Ct. Cl. 18.

The national government may also delegate to a State tribunal the power to fix the compensation that should be paid. United States *v.* Jones, 109 U. S. 513. A State statute, which is defective as to providing compensation for a national improvement, may be cured by Congress. Green Bay Canal Co. *v.* Kaukauna W. R. Co., 70 Wis. 635.

As Congress has both political and municipal authority over the District of Columbia, it can there condemn land for a public park. Shoemaker *v.* United States, 147 U. S. 282; United States *v.* Cooper, 20 D. C. 104.

The power of the respective States to engage in works of internal improvement is also limited. Thus a State legislature cannot empower a municipal corporation to buy and sell to its inhabitants wood and coal for fuel. Justices' Opinion, 155 Mass. 598. So a law authorizing the construction of an elevator, and the carrying on, by means thereof, of the business of storing and selling grain is in conflict with the Constitution of Minnesota, which prohibits the State from ever contracting debts for works of internal improvement, or being a party in carrying out such works. Rippe *v.* Becker, 56 Minn. 100. The police power of a State includes the licensing of intoxicating liquors: Rock County *v.* Edgerton (Wis.), 63 N. W. Rep. 291; and under the police power the State can assume the entire management of the sale of intoxicating liquors within its limits, as being dangerous to the peace, order, morals, health, and welfare of its citizens, though it provides for purchases and sales only through public agents. State *v.* Aiken, 42 S. C. 222; overruling McCullough *v.* Brown, 41 S. C. 220; see Donald *v.* Scott, 67 Fed. Rep. 854. A telegraph corporation, which a municipal corporation permits to use its streets, is still, under the police power, subject to later State laws regulating but not substantially impairing its rights. People *v.* Squire, 145 U. S. 175.

it to the support of the preponderating opinion in favor of the competency of the power claimed by Congress. (*b*)

(*b*) In February, 1827, after an animated debate, the House of Representatives, by a vote of 101 to 67, voted to appropriate $30,000 for the continuation of surveys of routes for roads and canals. In April, 1830, on the bill, in the House of Representatives, to construct a road from Buffalo, in New York, through Washington to New Orleans, great objection was made to the constitutionality of the power, and the House, by a vote of 105 to 88, rejected the bill, though probably the vote was governed, in part, by other considerations; for other bills, for aiding the making roads and canals, passed into laws during that session, and their avowed purpose was the great object of internal improvement. President Jackson, in 1830, declared himself to be of opinion, that Congress did not possess the constitutional power to construct roads and canals, or appropriate money for improvements *of a local character;* but he admitted that the right to make appropriations for such as were of *a national character* had been so generally acted upon, and so long acquiesced in, as to justify the exercise of it on the ground of continued usage. He objected, upon that distinction, to the bills authorizing subscriptions to the Maysville and Rockville Road Companies, as not being within the legitimate powers of Congress. The great question concerning the power of Congress to appropriate moneys for internal improvements within the states remained still as unsettled as ever, as late as the 3d of August, 1846; for on that day President Polk objected to and defeated the bill, which had passed both houses of Congress, for appropriating $1,378,450, for separate and distinct objects of internal improvement, in certain harbors, rivers, and lakes in various parts of the United States. The President denied the existence of a constitutional power in the federal government to construct works of internal improvement within the states, or to appropriate moneys from the treasury for that purpose. He considered the absence of such a power to be a principle of construction well settled, and that the inexpediency of the power was demonstrated in the exercise of it in that case; for the bill contained appropriations of moneys for more than twenty objects of internal improvement, called, in the bill, harbors, at places which have never been declared by law either ports of entry or delivery, and at which there has never been an arrival of foreign merchandise, and from which there has never been a vessel cleared for a foreign country. The constitutional scruples of the President went, in their application in this case, to interdict the necessary, and, in my opinion, the clearly constitutional jurisdiction and discretion of Congress, "to regulate commerce with foreign nations and among the several states," as to the improvement of the navigation of the many rivers, harbors, and great lakes within the United States, and on which waters is carried an immensely valuable commerce. This strict construction of the Constitution is in striking contrast to that large construction which has been given to the Constitution, in authorizing Congress to admit new states into the Union, and to which we have already alluded in a preceding note. See *ante*, 259. The rightful power of the general government to direct the improvement of the navigation of the internal waters of the United States for the commercial use of the Union, and to apply the revenues thereof for that purpose, appears to me to result from a sound construction of the Constitution. It is one of its great and essential objects. The Mississippi, for instance, with its millions of inhabitants, and great cities and towns on its banks, calls loudly for means to clear and remove obstructions to a safe navigation. The states cannot do it, and the improvement must come, if it comes at all, from the general government. The whole Union is deeply interested in the

safe and easy navigation of the great rivers and lakes within the limits of the United States, and bordering on two or more states. It makes no difference in reason or policy in the necessary application of the power, whether the rivers or lakes are divided by two or more states. It is sufficient for the power, if the improvement to be called for be general in its object, and for national purposes, and for the regulation, safety, and facility of commerce. All navigable waters, not land-locked within a state, whether they be rivers, harbors, gulfs, bays, lakes, or coasts of the ocean, are, and were intended to be, and ought to be, subservient to the power to regulate commerce with foreign nations, and among the several states. They fall within the congressional power, and are subject to the regulation of the United States, and they are entitled to the patronage, protection, and pecuniary support of the general government. This power is justly to be applied to the erection of light-houses, buoys, piers, breakwaters, harbors, and for clearing obstructions, and deepening and widening navigable waters. The United States have the exclusive command of the revenues derived from commerce and navigation, and the reason, justice, and policy of holding this power to exist in Congress, and that it should be liberally and largely applied, strike me with obvious and decisive force. The grant of commercial power to Congress is general, and must v[r]est essentially in its application in the discretion of Congress, and in its judgment as to the importance of this exercise of the power to the promotion and security of commerce among the states and with foreign nations. There does not appear to be any just ground for construing the power strictly and within straight and narrow lines. A grant of general power for great national objects ought to be liberally construed to be made adequate to all future exigencies within the scope of this power. There does not appear to be any color in the Constitution for prescribing arbitrary lines and limits to the power to regulate commerce.

Mr. Justice Story, in his Commentaries on the Constitution of the United States, ii. pp. 429–440, and again, pp. 519–538, has stated, at large, the arguments for and against the proposition, that Congress have a constitutional authority to lay taxes and to apply the power to regulate commerce, as a means directly to encourage and protect domestic manufactures; and, without giving any opinion of his own on that contested doctrine, he has left the reader to draw his own conclusions. I should think, however, from a view of the arguments as stated, that every mind which has taken no part in the discussions, and felt no prejudice or territorial or party bias on either side of the question, would deem the arguments in favor of the congressional power vastly superior. The learned commentator I should apprehend to be decidedly of that way of thinking. He says, "that the commercial system of the United States has been employed sometimes for the purpose of revenue; sometimes for the purpose of prohibition; sometimes for the purpose of retaliation and commercial reciprocity; sometimes to lay embargoes; sometimes to encourage domestic navigation, and the shipping and mercantile interest, by bounties, by discriminating duties, and by special preferences and privileges; and sometimes to regulate intercourse, with a view to mere political objects, such as to repel aggressions, increase the pressure of war, or vindicate the rights of neutral sovereignty. In all these cases, the right and duty have been conceded to the national government by the unequivocal voice of the people." Mr. Hamilton, in his argument in the cabinet in February, 1791, on the national bank, considered the regulation of policies of insurance, of salvage upon goods found at sea, the regulation of pilots and of foreign bills of exchange, as coming within the power to regulate commerce. Ib. 519, note. [*Post*, 439, n. 1.]

LECTURE XIII.

OF THE PRESIDENT.

THE title of the p::esent lecture may conveniently be examined in the following order: 1. The unity of this department. 2. The qualifications required by the Constitution for the office of President. 3. The mode of his appointment. 4. His duration. 5. His support. 6. His powers.

By the Constitution, it is ordained that the executive power shall be vested in a President. (*a*)

1. Unity of the Office. — The object of this department is the execution of the law; and good policy dictates that it should be organized in the mode best calculated to attain that end with precision and fidelity. Consultation is necessary in the making of laws. The defect or grievance they are intended to remove must be distinctly perceived, and the operation of the remedy upon the interests, the morals, and the opinion of the community profoundly considered. A comprehensive knowledge of the great interests of the nation, in all their complicated relations and practical details, seems to be required in sound legislation; and it shows the necessity of a free, full, and perfect representation of the people, in the body intrusted with the legislative power. But when laws are duly made and promulgated, they only remain to be executed. No discretion is submitted to the executive officer. It is not for him to deliberate and decide upon the wisdom or expediency of the law. What has been once declared to be law, under all the cautious forms of deliberation prescribed by the Constitution, ought to receive prompt obedience. The characteristical qualities required in the * executive department are promptitude, decision, and * 272 force; and these qualities are most likely to exist when the executive authority is limited to a single person, moving by

(*a*) Art. 2, sec. 1.

the unity of a single will. Division, indecision, and delay are exceedingly unfavorable to that steady and vigorous administration of the law which is necessary to secure tranquillity at home, and command the confidence of foreign nations. Every government, ancient and modern, which has been constituted on different principles, and adopted a compound executive, has suffered the evils of it; and the public interest has been sacrificed, or it has languished under the inconveniences of an imbecile or irregular administration. In those states which have tried the project of executive councils, the weakness of them has been strongly felt and strikingly displayed; and in some instances in which they have been tried (as in Pennsylvania and Georgia), they were soon abandoned, and a single executive magistrate created, in accordance with the light afforded by their own experience, as well as by the institutions of their neighbors.[1]

Unity increases not only the efficacy, but the responsibility, of the executive power. Every act can be immediately traced and brought home to the proper agent. There can be no concealment of the real author, nor, generally, of the motives of public measures, when there are no associates to divide or to mask responsibility. There will be much less temptation to depart from duty, and much greater solicitude for reputation, when there are no partners to share the odium, or to communicate confidence by their example. The eyes of the people will be constantly directed to a single conspicuous object; and, for these reasons, De Lolme (*a*) considered it to be a sound axiom of policy, that the executive power was more easily confined when it was one. "If the execution of the laws," he observes, "be intrusted to a number of hands, the true cause of public evils is hidden.

* 273 * Tyranny, in such states, does not always beat down the fences that are set around it, but it leaps over them. It mocks the efforts of the people, not because it is invincible, but because it is unknown." The justness of these reflections might be illustrated and confirmed by a review of the proceedings of the former council of appointment in New York, under the Constitution of 1777. All efficient responsibility was there lost, by reason of the constant change of the members, and the difficulty

(*a*) Const. of England, 111. [Book 2, c. 2.]

[1] *Ante*, 221, n. 1.

of ascertaining the individual to whom the origin of a bad appointment was to be attributed.

2. Qualifications. — The Constitution requires (*a*) that the President shall be a natural-born citizen, or a citizen of the United States at the time of the adoption of the Constitution, and that he shall have attained to the age of thirty-five years, and shall have been fourteen years a resident within the United States. Considering the greatness of the trust, and that this department is the ultimately efficient executive power in government, these restrictions will not appear altogether useless or unimportant. As the President is required to be a native citizen of the United States, ambitious foreigners cannot intrigue for the office, and the qualification of birth shuts off all those inducements from abroad to corruption, negotiation, and war, which have frequently and fatally harassed the elective monarchies of Germany and Poland, as well as the pontificate at Rome. The age of the President is sufficient to have formed his public and private character; and his previous domestic residence is intended to afford to his fellow-citizens the opportunity to attain a correct knowledge of his principles and capacity, and to have enabled him to acquire habits of attachment and obedience to the laws, and of devotion to the public welfare.

3. Mode of Election. — The mode of his appointment presented one of the most difficult and momentous questions that occupied the deliberations of the assembly which framed the Constitution; and if ever the tranquillity of this nation is to be disturbed, * and its liberties endangered by a struggle for * 274 power, it will be upon this very subject of the choice of a President. This is the question that is eventually to test the goodness and try the strength of the Constitution; and if we shall be able, for half a century hereafter, to continue to elect the chief magistrate of the Union with discretion, moderation, and integrity, we shall undoubtedly stamp the highest value on our national character, and recommend our republican institutions, if not to the imitation, yet certainly to the esteem and admiration, of the more enlightened part of mankind. The experience of ancient and modern Europe has been unfavorable to the practicability of a fair and peaceable popular election of the executive head of a great nation. It has been found impossible to guard

(*a*) Art. 2, sec. 1.

the election from the mischiefs of foreign intrigue and domestic turbulence, from violence or corruption; and mankind have generally taken refuge from the evils of popular elections in hereditary executives, as being the least evil of the two. The most recent and remarkable change of this kind occurred in France, in 1804, when the legislative body changed their elective into an hereditary monarchy, on the avowed ground that the competition of popular elections led to corruption and violence. And it is a curious fact in European history, that on the first partition of Poland, in 1773, when the partitioning powers thought it expedient to foster and confirm all the defects of its wretched government, they sagaciously demanded of the Polish diet that the crown should continue elective. (*a*) This was done for the very purpose of keeping the door open for foreign intrigue and influence. Mr. Paley (*b*) condemns all elective monarchies, and he thinks nothing is gained by a popular choice, worth the dissensions, tumults, and interruptions of regular industry, with

which it is inseparably attended. I am not called upon to
* 275 question the wisdom * or policy of preferring hereditary

to elective monarchies among the great nations of Europe, where different orders and ranks of society are established, and large masses of property accumulated in the hands of single individuals, and where ignorance and poverty are widely diffused, and standing armies are necessary to preserve the stability of the government. The state of society and of property in this country, and our moral and political habits, have enabled us to adopt the republican principle, and to maintain it hitherto with illustrious success. It remains to be seen whether the checks which the Constitution has provided against the dangerous propensities of our system will ultimately prove effectual. The election of a supreme executive magistrate for a whole nation affects so many interests, addresses itself so strongly to popular passions, and holds out such powerful temptations to ambition, that it necessarily becomes a strong trial to public virtue, and even hazardous to the public tranquillity. The Constitution, from an enlightened view of all the difficulties that attend the subject, has not thought it safe or prudent to refer the election of a President directly and immediately to the people; but it has confided the

(*a*) Cox's Travels in Poland, Russia, &c., i.
(*b*) Principles of Moral and Political Philosophy, 345.

power to a small body of electors, appointed in each state, under the direction of the legislature; and to close the opportunity as much as possible against negotiation, intrigue, and corruption, it has declared that Congress may determine the time of choosing the electors, and the day on which they shall vote, and that the day of election shall be the same in every state. (*a*) This security has been still further extended by the act of Congress (*b*) directing the electors to be appointed in each state within thirty-four days of the day of election. (*x*)

The Constitution (*c*) directs that the number of electors in each state shall be equal to the whole number of senators and representatives which the state is entitled to send to Congress; and, according to the apportionment of Congress *in 1832, the President was to be elected by a majority *276 of 294 electors; and in 1844 the number of electors was reduced to 275. (*a*) And to prevent the person in office, at the time of the election, from having any improper influence on his re-election, by his ordinary agency in the government, it is provided, that no member of Congress, nor any person holding an office of trust or profit under the United States, shall be an elector; and the Constitution has in no other respects defined the qualifications of the electors. (*b*) These electors meet in their respective states, at a place appointed by the legislature thereof,

(*a*) Art. 2, sec. 1. By the act of Congress of January 23, 1845, c. 1, a uniform time for holding elections for electors of President and Vice-President in all the states was prescribed. It was to be on the Tuesday next after the first Monday in the month of November of the year in which they are to be appointed.

(*b*) Act of 1st March, 1792. (*c*) Art. 2, sec. 1.

(*a*) This arose from the enlargement of the ratio of representation from 47,700 to 70,680 persons, for a member of the House of Representatives; by which provision the number of the House was reduced from 242 to 223 members. Act of Congress of June 25, 1842, c. 47. (*b*) Art 2, sec. 1.

(*x*) The second clause of Art. II. of the Constitution was not amended by the fourteenth and fifteenth amendments, and under it the State legislatures have exclusive power to direct the manner in which the electors of President and Vice-President shall be appointed. McPherson *v.* Blacker, 146 U. S. 1, affirming s. c. 92 Mich. 377. As Presidential electors are state officers, the respective states can alone punish fraudulent voting in their election. *In re* Green, 134 U. S. 377. The power of a State to change its mode of choosing presidential electors has not been taken away by the fourteenth and fifteenth amendments, or by the custom which has gradually been adopted of electing them popularly by general ticket, although the expectation of the framers of the Constitution as to the independence of the electors may thereby have been frustrated. McPherson *v.* Blacker, *supra*.

on the first Wednesday in December in every fourth year succeeding the last election, and vote by ballot for President and Vice-President (for this last officer is elected in the same manner and for the same period as the President), and one of whom, at least, shall not be an inhabitant of the same state with the electors. They name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President; and they make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they sign and certify, and transmit, sealed, to the seat of the government of the United States, directed to the President of the Senate. The act of Congress of 1st of March, 1792, sec. 2, directs, that the certificate of the votes shall be delivered to the President of the Senate before the first Wednesday of January next ensuing the election. The President of the Senate, on the second Wednesday in February succeeding every meeting of the electors, in the presence of both houses of Congress, opens all the certificates, and the votes are then to be counted. The Constitution does not expressly declare *by whom* the votes are to be counted and the result declared. In the case of questionable votes, and a closely contested election, this power may be all-important; and I presume, in the absence of all legislative provision on the subject, that the Presi-
* 277 dent of the Senate counts the votes, and * determines the result, and that the two houses are present only as spectators, to witness the fairness and accuracy of the transaction, and to act only if no choice be made by the electors. (*a*) The

(*a*) In determining the result of the election for President, in 1841, it was declared, by joint resolution of the two houses of Congress, that one person be appointed teller on the part of the Senate, and two on the part of the House of Representatives, who were, in the presence of the two houses, to make a list of the votes as they should be declared, and the result declared to the President of the Senate, who was to be the presiding officer, and to announce to the two houses the state of the vote and the persons elected. The Vice-President, in that case, broke the seals of the envelopes of the votes, and delivered the same over to the tellers to be counted. The tellers having read, counted, and made duplicate lists of the votes, they were delivered over to the Vice-President, and read, and he then declared the result, and dissolved the joint meeting of the two houses.

[*Counting the Votes for President.* (*x*) — The weakness of this part of the Consti-

(*x*) The counting of votes for President and Vice-President, and the decision of questions arising thereon, are now regulated by the Act of Feb. 3, 1887 (24 St. at L. 373), as amended by the Act of Oct. 19, 1888 (25 St. at L. 613).

House of Representatives, in such case, are to choose *immediately*, though the Constitution holds their choice to be valid, if made before the fourth day of March following. And in the cases of the elections in 1801 and 1825, as no choice was made, the House of Representatives retired and voted, and the Senate were admitted to be present as spectators. The person having the greatest number of votes of the electors for President, is President, if such number be a majority of the whole number of electors appointed; but if no person have such a majority, then, from the persons having the highest number, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote. A quorum for this purpose shall consist of a member or members from two thirds of the states, and a majority of all the states shall be necessary to a choice. If the House of Rep-

tution was forcibly illustrated by the election of 1877. The vote at the polls had been close, and the result turned upon the votes of Florida, Louisiana, and South Carolina. The regularly appointed returning boards had given these states to the Republicans, but it was claimed by the Democrats that these returns were fraudulent, and they demanded an investigation. The Republicans claimed that the returns, having been duly made, were conclusive. The President of the Senate was Republican, but the Democrats had a majority on a joint ballot of the two houses. The question by whom the votes were to be counted was therefore vital, and the difficulty of solving it bade fair for a time to strain the Constitution. The difficulty was finally avoided by the passage of the Electoral Commission Bill. This act was made to apply only to the election in controversy. Under it the returns were to be opened by the President of the Senate, and handed to tellers previously appointed by the Senate and House respectively, who were to read the same. If there was only one return or purported return from a state, the President was to call for objections, if any. If any objections were made in the form prescribed, they were to be submitted to the houses of Congress separately, and no return was to be rejected without the concurrence of both houses. If more than one return from a state had been received, they were to be opened and read as in case of a single return, and objections in writing to each return received; and then the question of which was the correct and legal return was to be referred to a commission composed of five representatives to be chosen by the House of Representatives, five senators to be chosen by the Senate, and five judges of the United States Supreme Court, four of whom were designated, and power conferred upon them to choose the fifth. 19 Stat. at Large, 227. More than one purported return had been received from each of the three states mentioned above, and these were all referred to the commission. The commission decided, by a vote of eight to seven, that they could not go behind the regular returns, and the votes of those states were accordingly counted for the Republicans. Since that time efforts have been made to provide a more satisfactory mode of counting the votes, but as yet without success. — B.]

resentatives shall not choose a President, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. (*b*)

The person having the greatest number of votes as Vice-President, is Vice-President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two thirds of the whole number of senators, and a majority

of the whole number is necessary to a choice; and no
*278 person constitutionally ineligible *to the office of Presi-

dent shall be eligible to that of Vice-President of the United States. (*a*) The Constitution does not specifically prescribe when or where the Senate is to choose a Vice-President, if no choice be made by the electors; and, I presume, the Senate may elect by themselves, at any time before the fourth day of March following.

The President and Vice-President are equally to be chosen for the same term of four years; (*b*) and it is provided by law, (*c*) that the term shall, in all cases, commence on the fourth day of March next succeeding the day on which the votes of the electors shall have been given.

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 office, the same devolve on the Vice-President; and except in cases in which the President is enabled to reassume the office, the Vice-President acts as President during the remainder of the term for which the President was elected. Congress are authorized to provide by law for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer should then act as President; (*x*) and the officer so designated is to act until the disability be removed, or a Presi-

(*b*) Amendments to the Constitution, art. 12.

(*a*) Ibid.

(*b*) Constitution, art. 2, sec. 1.

(*c*) Act of Congress, March 1, 1792.

(*x*) The act of Congress of Jan. 19, 1886 (24 St. at L. 1), provided that, in case of the removal, death, resignation, or inability of both the President and Vice-President, the Secretary of State, or other member of the Cabinet, shall act temporarily as President.

dent shall be elected, and who is in that case to be elected on the first Wednesday of the ensuing December, if time will admit of it, and if not, then on the same day in the ensuing year. (*d*) In pursuance of this constitutional provision, the act of Congress of March 1, 1792, sec. 9, declared, that in case of a vacancy in the office, both of President and Vice-President, the President of the Senate *pro tempore*, and in case there should be no President of the Senate, then the Speaker of the House of Representatives for the time being, should act as President until the vacancy was supplied. The evidence of a refusal to accept, or of a resignation of the office of President and Vice-President is declared, by the same act of Congress, sec. 11, to be a declaration in writing, filed in the office of the Secretary of State. And if the office should, by the course of events, devolve on the Speaker, after the Congress for which the last Speaker was chosen had expired, and before the next meeting of Congress, it might be a question who is to serve, *and whether the Speaker *279 of the House of Representatives, then extinct, could be deemed the person intended.

The mode of electing the President appears to be well calculated to secure a discreet choice, and to avoid all those evils which the partisans of monarchy have described, and the experience of other nations and past ages have too clearly shown to be the consequence of popular elections. Had the choice of President been referred at once, and directly, to the people at large, as one single community, there might have been reason to apprehend, and such no doubt was the sense of the convention, that it would have produced too violent a contest, and have been trying the experiment on too extended a scale for the public virtue, tranquillity, and happiness. Had we imitated the practice of most of the southern states, in respect to their state executives, and referred the choice of the President to Congress, this would have rendered him too dependent upon the immediate authors of his elevation to comport with the requisite energy of his own department; and it would have laid him under temptation to indulge in improper intrigue, or to form a dangerous coalition with the legislative body, in order to secure his continuance in office. All elections by the representative body are peculiarly liable to produce combinations for sinister purposes. The Con-

(*d*) Constitution, art. 2, sec. 1 ; act of Congress, March 1, 1792.

stitution has avoided all these objections, by confiding the power of election to a small number of select individuals in each state, chosen only a few days before the election, and solely for that purpose. This would seem, *prima facie*, to be as wise a * 280 provision as the wisdom of man could have * devised, to avoid all opportunity for foreign or domestic intrigue. These electors assemble in separate and distantly detached bodies, and they are constituted in a manner best calculated to preserve them free from all inducements to disorder, bias, or corruption. There is no other mode of appointing the chief magistrate, under all the circumstances peculiar to our political condition, which appears to unite in itself so many unalloyed advantages. It must not be pronounced to be a perfect scheme of election, for it has not been sufficiently tried. The election of 1801 threatened the tranquillity of the Union; and the difficulty that occurred in that case, in producing a constitutional choice, led to the amendment of the Constitution on this very subject; but whether the amendment be for the better or for the worse may be well doubted, and remains yet to be settled by the lights of experience. The Constitution says, that each state is to appoint electors in such a manner as the legislature may direct; and in some of the states the electors have been chosen by the legislature itself, in the mode prescribed by law. But it is to be presumed that there would be less opportunity for dangerous coalitions and combinations for party, or ambitious or selfish purposes, if the choice of electors was referred to the people at large; and this seems now to be the sense and expression of public opinion and the general practice.

4. Duration of Office. — The President, thus elected, holds his office for the term of four years, (*a*) a period, perhaps, reasonably long for the purpose of making him feel firm and independent in the discharge of his trust, and to give stability and some degree of maturity to his system of administration. It is certainly short enough to place him under a due sense of dependence on the public approbation. The President is re-eligible for successive terms, but in practice he has never consented to be a candidate for a third election, and this usage has indirectly established, by the force of public opinion, a salutary limitation to his capacity of continuance in office.

(*a*) Constitution, art. 2, sec. 1.

5. Support. — The support of the President is secured by a provision *in the Constitution, which declares, (*a*) *281 that he shall, at stated times, receive for his services a compensation that shall neither be increased nor diminished during the period for which he shall have been elected; and that he shall not receive, within that time, any other emolument from the United States, or any of them. This provision is intended to preserve the due independence and energy of the executive department. It would be in vain to declare that the different departments of government should be kept separate and distinct, while the legislature possessed a discretionary control over the salaries of the executive and judicial officers. This would be to disregard the voice of experience and the operation of invariable principles of human conduct. A control over a man's living is, in most cases, a control over his actions. The Constitution of Virginia considered it as a fundamental axiom of government, that the three great and primary departments should be kept separate and distinct, so that neither of them exercised the powers properly belonging to the other. But without taking any precautions to preserve this principle in practice, it made the governor dependent on the legislature for his annual existence and his annual support. The result was, as Mr. Jefferson has told us, (*b*) that during the whole session of the legislature, the direction of the executive was habitual and familiar. The Constitution of Massachusetts discovered more wisdom, and it set the first example in this country, of a constitutional provision for the support of the executive magistrate, by declaring that the governor should have a salary of a fixed and permanent value, amply sufficient, and established by standing laws. Those state constitutions which have been made or amended since the establishment of the Constitution of the United States have generally followed the example which it has happily set them, in this and in many other instances; and we may consider it as one of the most signal blessings bestowed on *this country, that *282 we have such a wise fabric of government as the Constitution of the United States constantly before our eyes, not only for our national protection and obedience, but for our local imitation and example.

6. Powers. — Having thus considered the manner in which the

(*a*) Art. 2, sec. 1.

(*b*) Notes on Virginia, 127.

President is constituted, it only remains for us to review the powers with which he is invested.

He is commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the service of the Union. (*a*) The command and application of the public force to execute law, maintain peace, and resist foreign invasion, are powers so obviously of an executive nature, and require the exercise of qualities so characteristic of this department, that they have always been exclusively appropriated to it, in every well-organized government upon earth. (*b*) In no instance, perhaps, did the enlightened understanding of Hume discover less acquaintance with the practical science of government, than when he gave the direction of the army and navy, as well as all the other executive powers, to one hundred senators, in his plan of a perfect commonwealth. (*c*) That of Milton was equally chimerical and absurd, when, in his "Ready and Easy Way to establish a Free Commonwealth," he deposited the whole executive, as well as legislative power, in a single and permanent council of senators. That of Locke was equally unwise, for, in his plan of legislation for Carolina, he gave the whole authority,

legislative and executive, to a small oligarchical assem-
* 283 bly. (*d*) Such specimens * as these well justify the obser-

vation of President Adams, (*a*) "that a philosopher may be perfect master of Descartes and Leibnitz, may pursue his own inquiries into metaphysics to any length he pleases, may enter into the inmost recesses of the human mind, and make the noblest discoveries for the benefit of his species; nay, he may defend the principles of liberty, and the rights of mankind, with great abilities and success, and, after all, when called upon to produce a plan of legislation, he may astonish the world with a signal absurdity."

(*a*) Art. 2, sec. 2.

(*b*) Mr. Duer, in his Treatise on Insurance, i. 356, intimates that, in time of war, a special embargo for a definite period might be declared by the sole authority of the President. I do not perceive any sufficient ground for that opinion in respect to the legal exercise of such a power.

(*c*) Hume's Essays, i. 526.

(*d*) Mr. Locke's very complicated scheme of government, under the title of Fundamental Constitutions of Carolina, is inserted at large in Locke's Works, iii. 665–678. Those legislative labors of that great and excellent man perished unheeded and unregretted by all parties, after an experience of twenty-three years had proved them to be, in the words of Mr. Grahame, the historian, "utterly worthless and impracticable."

(*a*) Defence of the American Constitutions, i. Letter 54.

The President has also the power to grant reprieves and pardons for offences against the United States, except in cases of impeachment. (*x*) The Marquis Beccaria has contended that the

(*x*) The President's constitutional power of pardon is not invaded by the established practice whereby other officers may remit pecuniary penalties and forfeitures. The Laura, 114 U. S. 411.

A pardon may be constructive; as when the President issues a new commission to a military officer condemned by court-martial. See 6 A. G. Op. 123. So the governor's signature to a State statute which remits the sentence in a criminal case, amounts to a pardon. People *v.* Stewart, 1 Idaho N. S. 546.

Additional punishment for a second offence cannot be inflicted after pardon for the first offence. Edwards *v.* Com'th, 78 Va. 39. But the distinct recital in a pardon of one offence, such as conspiracy to defraud the revenue, does not affect a judgment of forfeiture for fraud upon the revenue. *Ex parte* Weimer, 8 Biss. 321; United States *v.* Cullerton, id. 166. A pardon does not, it seems, remit forfeitures if the rights of third persons have intervened. Kirk *v.* Lewis, 4 Woods, 100; see Fischel *v.* Mills, 55 Ark., 344; 15 L. R. A. 395, and note. An unconditional pardon does away with a statutory right to disbar an attorney upon conviction of a felony. Scott *v.* State (Texas), 25 S. W. Rep. 337. A *qui tam* action brought by a private prosecutor to recover the damages and forfeiture allowed by law is under his control and cannot be compromised or released by the government to his injury. United States *v.* Griswold, 24 Fed. Rep. 361.

A contract for legal services to secure a pardon is lawful. Moyer *v.* Cantieny, 41 Minn. 242.

A constitutional grant to the governor of the State of exclusive power to reprieve and pardon does not invalidate a statute enabling the courts to suspend sentence during the convict's good behavior. People *v.* Court of Sessions, 141 N. Y. 288; see People *v.* Cummings, (Mich.) 14 L. R. A. 285, and note. A convict who is released upon a conditional pardon cannot be remanded to suffer his original imprisonment on the mere order of the governor who pardoned him, but is entitled to a hearing in court upon the question of performance or legal excuse, and also to a jury trial, limited, however, to the issue of his identity. State *v.* Wolfer, 53 Minn. 135; see Huff *v.* Dyer, 4 Ohio Cir. Ct. 595. As to conditional pardons, see also People *v.* Moore, 62 Mich. 496; *Ex parte* Kennedy, 135 Mass. 48; *Ex parte* Marks, 64 Cal. 29; United States *v.* Hinz, 35 Fed. Rep. 272; People *v.* Burns, 28 N. Y. Sup. 300; *In re* Whalen, 19 id. 915; State *v.* Barnes, 32 S. C. 14. The Secretary of the Treasury may remit pecuniary forfeitures. The Laura, 114 U. S. 411; 19 Blatch. 562. An unconditional pardon remits all penalties and forfeitures; it restores the convict's competency as a witness. Boyd *v.* United States, 142 U. S. 450; Logan *v.* United States, 144 U. S. 263; State *v.* Dodson, 16 S. C. 453; Hester *v.* Com'th, 85 Penn. St. 139; see State *v.* Kirshner, 20 Mo. App. 349; 25 L. J. 123; Martin *v.* State, 21 Tex. App. 1; or as a juror, Puryear *v.* Com'th, 83 Va. 51; the right of suffrage, Cowan *v.* Prowse, 93 Ky. 156; or disqualification to carry on certain kinds of business. Hay *v.* Justices, 24 Q. B. D. 561. So a fine paid to the sheriff, but not paid into the county treasury, should be refunded. Fischel *v.* Mills, 55 Ark. 344. See McKay *v.* Woodruff, 77 Iowa, 413. So the removal of disabilities by pardon or amnesty may revest the power to dispose of the reversion of a confiscated estate, if suspended during the

power of pardon does not exist under a perfect administration of law, and that the admission of the power is a tacit acknowledgment of the infirmity of the courts of justice. And where is the administration of justice, it may be asked, that is free from infirmity? Were it possible, in every instance, to maintain a just proportion between the crime and the penalty, and were the rules of testimony and the mode of trial so perfect as to preclude every possibility of mistake or injustice, there would be some color for the admission of this plausible theory. But, even in that case, policy would sometimes require a remission of a punishment strictly due, for a crime certainly ascertained. The very notion of mercy implies the accuracy of the claims of justice. An inexorable government, says Mr. Yorke, in his Considerations on the Law of Forfeiture, (*b*) will not only carry justice in some instances to the height of injury, but with respect to itself it will be dangerously just. The clemency of Massachusetts, in 1786, after an unprovoked and wanton rebellion, in not inflicting a single capital punishment, contributed, by the judicious manner in which its clemency was applied, to the more firm
* 284 * establishment of their government. And this power of pardon will appear to be more essential when we consider

(*b*) Yorke on Forfeiture, 101.

disability. Illinois Central R. Co. *v.* Bosworth, 133 U. S. 92. But an office forfeited or a fine paid into the government treasury will not be restored. Osborn *v.* United States, 91 U. S. 474; Knote *v.* United States, 95 U. S. 149; 10 Ct. Cl. 397; 8 A. G. Op. 281. Thus, after a sentence of dismissal from the service against a military officer is carried into effect, the President cannot reinstate him, though he may remit the penalties inflicted by court-martial. Vanderslice *v.* United States, 19 Ct. Cl. 480. The President's proclamation of general amnesty in 1868 did not do away with the necessity of proof of loyalty in fact during the war of the Rebellion, when such loyalty is made a necessary element of proof in a special Act. Austin *v.* United States, 25 Ct. Cl. 437. A pardon for participation in the Rebellion does not, under U. S. Rev. Stats., § 3480, confer upon the Court of Claims jurisdiction of the pardoned's ante-bellum claim against the government. Hart *v.* United States, 118 U. S. 62. The governor cannot revoke a pardon after its delivery and acceptance, but a pardon procured by fraud or imposition practised upon the executive will, it seems, be held totally void by the courts. Rosson *v.* State, 23 Tex. App. 287; *Ex parte* Rosson, 24 id. 226; Hunnicutt *v.* State, 18 id. 498; Knapp *v.* Thomas, 39 Ohio St. 377; *Ex parte* Powell, 73 Ala. 517. The person pardoned may be re-arrested for the costs. *Ex parte* Boyd, 34 Kansas, 570; see Smith *v.* State, 6 Lea (Tenn.) 637. The disability of a person who has served his full term of imprisonment may be removed by a pardon. Easterwood *v.* State (Texas), 31 S. W. Rep. 294.

that, under the most correct administration of the law, men will sometimes fall a prey to the vindictiveness of accusers, the inaccuracy of testimony, and the fallibility of jurors. Notwithstanding this power is clearly supported on principles of policy, if not of justice, English lawyers, of the first class and highest reputation, (*a*) have strangely concluded that it cannot exist in a republic, because nothing higher is acknowledged than the magistrate. Instead of falling into such an erroneous conclusion, it might fairly be insisted, that the power may exist with greater safety in free states than in any other forms of government; because abuses of the discretion unavoidably confided to the magistrate in granting pardons are much better guarded against by the sense of responsibility under which he acts. The power of pardon vested in the President is without any limitation except in the single case of impeachments. (*b*) [1] He is checked in that case

(*a*) Yorke on Forfeiture, 100; Blackst. Comm. iv. 397.

(*b*) There is no doubt that the power of pardon conferred on the President includes the power to pardon absolutely or conditionally. Op. Att.-Gen. i. 250; ii. 1034. The President may annex a *condition* to the pardon — as, for instance, that the guilty person should quit the United States, or join the navy — and if he does not comply with the condition, or breaks it, the pardon becomes null and void. If the culprit has not complied with the condition on which it was granted and accepted, he may be subjected to the operation of the original conviction and judgment. In England the king has the power, by the common law, to grant conditional pardons. The power of the Governor of New York to grant a conditional pardon, and the power of a criminal jurisdiction of the same, or of a higher degree, to arrest the party who has broken the condition wilfully, and to sentence and remand him to execution and punishment, on duly ascertaining his identity, was largely discussed in the case of the People *v.* Potter, in the First Circuit of New York. The New York Legal Observer for May, 1846, 177 [1 Parker Cr. R. 47]. The Revised Constitution of New York, of 1846, art. 4, sec. 5, grants this conditional power of pardon to the governor.

[1] *Pardons.* — To the same effect as note (*b*) are *Ex parte* Wells, 18 How. 307, and opinions of Sir A. Cockburn, Sir R. Bethell, and others, Forsyth's Cases & Op. on Const. Law, c. 3, pp. 75, 76; c. 17, p. 459; Greathouse's Case, 2 Abbott, U. S. 382; [Osborn *v.* United States, 91 U. S. 474; United States *v.* Six Lots of Ground, 1 Woods, 234; Arthur *v.* Craig, 48 Iowa, 264.] A partial pardon is authorized, in case of sentences to two kinds of punishment, the one pecuniary and the other corporal, by act of Feb. 20, 1863, § 1, (U. S. Rev. Stats. § 5330). 11 Op. Att.-Gen. 35.

The power to pardon may, it seems, be exercised at any time after the commission of an offence, as well before legal proceedings are taken, or while they are pending, as after conviction and judgment. *Ex parte* Garland, 4 Wall. 333, 380.

A pardon is not complete without delivery; and if not complete may be revoked by the successor of the President by whom it was granted. It has been held that a pardon was still revocable

from screening public officers, with whom he might possibly have formed a dangerous or corrupt coalition, or who might be his particular favorites and dependants.

The President has also the power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur. (*c*)

Writers on government have differed in opinion as to the nature of this power, and whether it be properly, in the natural distribution of power, of legislative or executive cognizance. (*x*) As

(*c*) Art. 2, sec. 2.

when in the hands of the marshal. *In re* De Puy, 3 Benedict, 307, 10 Int. R. Rec. 34; 4 Am. Law Rev. 188. See Comm. *v.* Halloway, 44 Penn. St. 210; 11 Op. Att.-Gen. 35. [Lapeyre *v.* United States, 17 Wall. 191, held that a proclamation by the President relieving from certain penalties took effect from time of signing and sealing, and not from the time of publication. Four of the justices dissented. — B.]

The pardoning power is said to be coextensive with the punishing power, and to be applicable to the remission of fines, penalties, and forfeitures, which are imposed by law as punishment for offences, 12 Op. Att.-Gen. 81; but not to embrace forfeitures not imposed as such punishment, 11 Op. Att.-Gen. 122. The President cannot remit a judgment against an individual not as a criminal, but as a public debtor. 11 Op. Att.-Gen. 122, 124. Neither can he, after prize has been condemned for breach of blockade, remit the forfeiture. 10 Op. Att.-Gen. 452; 11 id. 445.

As to the *effect* of a pardon, it was said in *Ex parte* Garland, *supra*, to release the petitioner from exclusion from office for the acts covered by it, and so to render it unnecessary for him to take a test oath that he had not committed those offences. A pardon has been further held to relieve from forfeiture under the confiscation act of Aug. 6, 1861, so much of the property as would have accrued to the United States. Armstrong's Foundry, 6 Wall. 766; United States *v.* Padelford, 9 Wall. 531. See United States *v.* Athens Armory, 35 Ga. 344; St. Louis Street Foundry, 6 Wall. 770, a case arising un-

(*x*) Under the U. S. Constitution, treaties as well as statutes are the law of the land, and abrogate earlier State or Federal laws inconsistent therewith. 6 A. G. Op. 291; 13 id. 354; The Cherokee Tobacco Case, 11 Wall. 616; Kull *v.* Kull, 37 Hun, 476. Even an Indian treaty is part of the law of the land. Leighton *v.* United States, 29 Ct. Cl. 288. An act of Congress prevails over a prior treaty, if it conflicts therewith. Edye *v.* Robertson, 112 U. S. 580; Whitney *v.* Robertson, 124 U. S. 190; Kelly *v.* Hedden, id. 196; Horner *v.* United States, 143 U. S. 570; Fong Yue Ting *v.* United States, 149 U. S. 698; Williams *v.* The Wellhaven, 55 Fed. Rep. 80; North German Lloyd S. Co. *v.* Hedden, 43 id. 17. To have such an effect, the statute must admit of no other reasonable construction. *In re* Chin A On, 18 Fed. Rep. 506. But if the government sees fit to disregard a treaty, it cannot be enforced as a judicial question by the Federal Courts. Botiller *v.* Dominguez, 130 U. S. 238; Chae Chan Ping *v.* United States, 130 U. S. 581. Nor can the courts inquire whether a treaty was duly executed or procured by undue influence. Leighton *v.* United States, 29 Ct. Cl. 288.

In England, Orders in Council must be

treaties are declared by the Constitution to be a part of the supreme law of the land, and as by means of them new relations are formed and obligations contracted, it might seem to be more con-

der the President's amnesty of Dec. 8, 1863. Also United States *v.* Klein, 13 Wall. 128; 5 Am. L. T. 216. [But a pardon does not give any right to reclaim money which has been paid into the treasury or to third persons. Knote *v.* United States, 95 U. S. 149; Bragg *v.* Lorio, 1 Woods, 209. Comp. United States *v.* Thomasson, 4 Biss. 336. See generally, as to pardons, Blair *v.* The Commonwealth, 25 Grat. 850; Commonwealth *v.* Lockwood, 109 Mass. 323; State *v.* Foley, 15 Nev. 64. As to reprieve, see Sterling *v.* Drake, 29 Ohio St. 457. — B.] On the other hand, when one who has committed certain offences against the United States is forbidden to vote by the state constitution, his pardon by the President will not restore him to the franchise. Ridley *v.* Sherbrook, 3 Coldw. (Tenn.) 569. But see 9 Op. Att.-Gen. 478.

The policy of allowing such a power to be exercised in the present manner is still a subject of discussion. Stephen, Crim. Law, c. 6, 224, 230; Lord Penzance's speech, and articles thereon, Times, April 5, 1870; Spectator, 1870, p. 459; Hansard, cc. 1147.

co-extensive with, and limited by the treaty, so that the municipal legislature may not be at variance with the terms upon which the two countries have agreed. Queen *v.* Wilson, 3 Q. B. D. 42.

A treaty is evidence of amity, but not conclusive. Valk *v.* United States, 29 Ct. Cl. 62; Leighton *v.* Same, id. 288.

The construction of a treaty by the executive is followed by the courts when consistent with the treaty itself. Castro *v.* De Uriarte, 16 Fed. Rep. 93.

If negotiations between the same parties result in two treaties concluded on the same day, they are in effect one instrument. Gray *v.* United States, 21 Ct. Cl. 340; Cushing *v.* United States, 22 id. 1.

Upon ratification a treaty takes effect by relation from the date of signing as to the nation's rights. United States *v.* Bridleman, 7 Fed. Rep. 894, 902; United States *v.* Martin, 14 id. 817, 820. *Contra*, as to individual rights. Bush *v.* United States, 29 Ct. Cl. 144. A treaty made by the President, but not ratified by a two-thirds vote of the Senate has no effect. United States *v.* Frelinghuysen, 2 Mackey, 299. An Indian treaty which is to be effective when ratified by the President and Senate, does not take effect until signed by the President, though previously ratified by the Senate and accepted by the Indians. Shepard *v.* Northwestern Life Ins. Co., 40 Fed. Rep. 341.

A treaty is not wholly revoked by a later and narrower one which states that it is revoked "as all its provisions are incorporated" in the latter. *In re* Ross, 140 U. S. 453, 466; 44 Fed. Rep. 185. But a new treaty which covers the entire subject-matter of an earlier treaty, impliedly repeals the latter. La Republique Francaise *v.* Schultz, 57 Fed. Rep. 37. The Creek nation, by entering into a treaty with the Confederate government and engaging in war with the United States, abrogated its treaty with that nation made in 1856, and the obligation of the United States to individual Creeks was thereby terminated. Connor's Case, 19 Ct. Cl. 675.

The U. S. Rev. Stats. § 5519, relating to conspiracies to deprive persons of the equal protections of the laws, is unconstitutional as a provision for the punishment of a conspiracy, within a State, to deprive an alien of rights guaranteed to him therein

sonant to the principles of republican government to con-
* 285 sider the right of concluding * specific terms of peace as of legislative jurisdiction. This has generally been the case in free governments. The determinations respecting peace, as well as war, were made in the public assemblies of the nation at Athens and Rome, and in all the Gothic governments of Europe, when they first arose out of the rude institutions of the ancient Germans. On the other hand, the preliminary negotiations which may be required, the secrecy and despatch proper to take advantage of the sudden and favorable turn of public affairs, seem to render it expedient to place this power in the hands of the executive department. The Constitution of the United States has been influenced by the latter more than by the former considerations, for it has placed this power with the President, under the advice and control of the Senate, who are to be considered, for this purpose, in the light of an executive council. The President is the constitutional organ of communication with foreign powers, and the efficient agent in the conclusion of treaties; but the consent of two thirds of the senators present is essential to give validity to his negotiations. To have required the acquiescence of a more numerous body would have been productive of delay, disorder, imbecility, and probably, in the end, a direct breach of the Constitution. The history of Holland shows the danger and folly

by a treaty of the United States. Baldwin *v.* Franks, 120 U. S. 678.

Vested rights of property guaranteed by treaty cannot be taken away by act of Congress or the political departments of the Government. Eastern Cherokees' Case, 20 Ct. Cl. 449.

The United States is not liable on an implied assumpsit for money had and received under a treaty in its sovereign capacity, as indemnity, from another sovereign power, as in the case of the Alabama claims. United States *v.* Weld, 127 U. S. 51; Great Western Ins. Co. *v.* United States, 19 Ct. Cl. 206; Kingsbury *v.* Mattocks, 81 Maine, 310.

The right given by treaty for foreigners, such as the Chinese, to live in the United States carries with it the implied right to labor here for a living, and State laws or constitutions which curtail such right are void as an interference with the treaty-making power. Baker *v.* Portland, 2 Fed. Cas. 472; *In re* Tiburcio Parrott, 1 Fed. Rep. 481.

A treaty provision that the citizens of the foreign country shall enjoy here the same protection as native citizens with respect to labels and trade-marks, gives no right here to a foreign citizen to a trade-mark which he has acquired in his own country. Richter *v.* Reynolds, 59 Fed. Rep. 577.

By the treaty of 1867 with Russia, ceding Alaska to the United States, the latter acquired the immovable buildings erected by the Russian-American Company upon land there owned by the Russian government. Kinkead *v.* United States, 150 U. S. 483.

of placing too much limitation on the exercise of the treaty-making power. By the fundamental charter of the United Provinces peace could not be made without the unanimous consent of the provinces; and yet, without multiplying instances, it is sufficient to observe, that the immensely important and fundamental treaty of Munster, in 1648, was made when Zealand was opposed to it; and the peace of 1661, when Utrecht was opposed. So feeble are mere limitations upon paper, — mere parchment barriers, when standing in opposition to the strong force of public exigency.

The Senate of the United States is a body of men most wisely selected for the deposit of this power. They are easily assembled, are governed by steady, systematic * views, feel * 286 a due sense of national character, and can act with promptitude and firmness.

The question whether a treaty, constitutionally made, was obligatory upon Congress, equally as any other national engagement would be, if fairly made by the competent authority, or whether Congress had any discretionary power to carry into effect a treaty requiring the appropriation of money, or other act to be done on their part, or to refuse it their sanction, was greatly discussed in Congress in the year 1796, and again in 1816. The House of Representatives, at the former period, declared by resolution, that when a treaty depended for the execution of any of its stipulations on an act of Congress, it was the right and duty of the House to deliberate on the expediency or inexpediency of carrying such treaty into effect. It cannot be mentioned at this day, without equal regret and astonishment, that such a resolution passed the House of Representatives on the 7th of April, 1796. But it was a naked abstract claim of right, never acted upon; and Congress shortly afterwards passed a law to carry into effect the very treaty with Great Britain which gave rise to that resolution. President Washington, in his message to the House of Representatives of the 30th of March, 1796, explicitly denied the existence of any such power in Congress; and he insisted that every treaty duly made by the President and Senate, and promulgated, thenceforward became the law of the land.

If a treaty be the law of the land, it is as much obligatory upon Congress as upon any other branch of the government, or upon

the people at large, so long as it continues in force and unrepealed. The House of Representatives are not above the law, and they have no dispensing power. They have a right to make and repeal laws, provided the Senate and President concur; but without such concurrence, a law in the shape of a treaty is as binding upon them as if it were in the shape of an act of Congress, or of an article of the Constitution, or of a contract made by authority of law. The argument in favor of the bind-
* 287 ing and conclusive efficacy * of every treaty made by the President and Senate is so clear and palpable, that it has probably carried very general conviction throughout the community; and this may now be considered as the decided sense of public opinion. This was the sense of the House of Representatives, in 1816, and the resolution of 1796 would not now be repeated. (*a*)[1]

The President is the efficient power in the appointment of the officers of government. He is to nominate, and, with the advice and consent of the Senate, to appoint ambassadors, or public ministers and consuls, the judges of the Supreme Court, and all other officers whose appointments are not otherwise provided for in the Constitution; but Congress may vest the appointment of

(*a*) The treaty-making power is necessarily and obviously subordinate to the fundamental laws and constitution of the state, and it cannot change the form of the government, or annihilate its constitutional powers. Story, Comm. on the Constitution, iii. § 1502.

[1] Judge McLean was of a different opinion from the author, Turner *v.* American Baptist Miss. Union, 5 McLean, 344, and the point is still open and debated between the two houses of Congress.

Congress may repeal a treaty so far as it is municipal law, provided its subject-matter is within the legislative power of Congress. Taylor *v.* Morton, 2 Curt. 454; The Cherokee Tobacco, 11 Wall. 616, 621: Ropes *v.* Clinch, 8 Blatchf. 304. But Congress has no power, it is said, to settle the rights under treaties, except in cases purely political. The construction of them is the peculiar province of the judiciary, when a case shall arise between individuals. Wilson *v.* Wall, 6 Wall. 83, 89. On the other hand, the courts of the United States cannot question the power of the other party to a treaty to do certain acts when he has been treated as having the power by the President and Senate. Doe *v.* Braden, 16 How. 635; Fellows *v.* Blacksmith, 19 How. 366; see p. 330, n. 1.

State laws, inconsistent with a treaty constitutionally concluded and ratified, are thereby abrogated. 3 Op. Att.-Gen. 291; 8 Op. Att.-Gen. 411; Hamilton *v.* Eaton, Martin, N. C. 2d part, 1 [illegible] S. C. C. 1792; [Hauenstein *v.* Lynham, 100 U. S. 483; Parrott's Chinese Case, 6 Saw. 349.] See, as to the sacrifice of private rights by treaty, *ante*, 167.

inferior officers in the President alone, in the courts of law, or in the heads of departments. (*b*)

The appointment of the subordinate officers of government concerned in the administration of the laws belongs, with great propriety, to the President, who is bound to see that the laws are faithfully executed, and who is generally charged with the powers and responsibility of the executive department. (*x*) The associa-

(*b*) Art. 2, sec. 2. [By statute of Jan. 16, 1883 (25 St. at L. 403), provision is made for the appointment of three civil service commissioners. It is made the duty of such commissioners to aid the President, as he may request, in preparing rules provi[illegible]g for "open competitive examinations for testing the fitness of applicants for the public service now classified, or to be classified hereunder." All offices so classified are to be filled "by selections according to grade from among those graded highest as the results of such competitive examinations." Appointments are to be apportioned among the states and territories and the District of Columbia, according to population. There is to be a period of probation before any appointment becomes absolute. It is made the duty of heads of departments and of heads of offices, on request by the President, to classify the offices over which they are heads, in a manner prescribed in the act. It is further provided that, after six months from the passage of the act, all appointments and promotions, with specified exceptions, within said classes, shall be by means of such competitive examinations. — B.]

(*x*) The President's constitutional duty to see that the laws be faithfully executed, includes the power, through the attorney general, to direct a U. S. marshal to attend and protect from threatened injury a judge of the U. S. Supreme Court while discharging his official duties. *In re* Neagle, 135 U. S. 1.

The President may act through the heads of the executive departments, who are his authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, have always been held to be presumably his acts. Runkle *v.* United States, 122 U. S. 543, 557; United States *v.* Badeau, 31 Fed. Rep. 697, 699. So long as the control of the subject-matter has not been parted with by the political department, the judiciary will not compel it to act. United States *v.* Blaine, 139 U. S. 306. A claimant's bill in the nature of interpleader, or to quiet title to an international award held by the government, does not conflict with the diplomatic authority vested in the President by the Constitution. United States *v.* La Abra S. M. Co. 29 Ct. Cl. 432.

In general, Equity will not interfere by injunction or mandamus with any governmental matters, such as the lawful exercise of the police power by municipal officers, or the public duties of any department of the government. New Orleans *v.* Paine, 147 U. S. 261; Chicago P. S. Exchange *v.* McClaughry, 148 Ill. 372; Hilligoss *v.* Grinslade, 32 Ill. App. 45. Mandamus lies to compel an executive officer of the government to perform a ministerial duty, but he will not be thus interfered with in the exercise of his ordinary official duties, even when those duties require an interpretation of the law. United States *v.* Black, 128 U. S. 40; see Bayard *v.* United States, 127 U. S. 246; United States *v.* Raum, 135 U. S. 200; *In re* Penn. Co., 137 U. S. 451; United States *v.* Brown, 41 Fed. Rep. 481; *post*, p. 321. Where

tion of the Senate with the President, in the exercise of this power, is an exception to the general delegation of executive authority; and if he were not expressly invested with the exclusive right of nomination in the instances before us, the organization of this department would be very unskilful, and the government degenerate into a system of cabal, favoritism, and intrigue. But the power of nomination is, for all the useful purposes of restraint, equivalent to the power of appointment. It imposes upon the President the same lively sense of responsibility, and the same indispensable necessity of meeting the public approbation or censure. This, indeed, forms the ultimate security that men in public stations will dismiss interested considerations, and * 288 act with a steady, zealous, and * undivided regard for the public welfare. The advice and consent of the Senate, which are requisite to render the nomination effectual, cannot be attended, in the nature of the case, with very mischievous effects. Having no agency in the nomination, nothing but simple consent or refusal, the spirit of personal intrigue and personal attachment must be pretty much extinguished, from a want of means to gratify it. On the other hand, the advice of so respectable a body of men will add still further inducements to a coolly reflected conduct in the President, and will be at all times a check on his own misinformation or error. (*a*) [1]

(*a*) It was settled, in the case of Marbury *v.* Madison, 1 Cranch, 137, that when a person has been nominated to the Senate for office, by the President, and the Pres-

[1] See, as to the power of removal, *post*, 311, n. 1.

the executive has not exhausted its power, as in the case of withholding payment of a claim made under a treaty, pending an investigation of fraud as to the claim, which involves the exercise of judgment and discretion, mandamus cannot issue to compel action by the head of a department. Frelinghuysen *v.* Key, 110 U. S. 63; United States *v.* Blaine, 139 U. S. 321. When a Federal statute delegates to an officer or tribunal full jurisdiction over a subject in which the United States are interested, the exercise of authority or discretion within the power thus conferred is conclusive, in the absence of fraud. United States *v.* California & Oregon Land Co., 148 U. S. 31, 43; United States *v.* Lamont, 2 App. D. C. 532. State officials, acting under unconstitutional state legislation, may be controlled by injunction or mandamus. *In re* Ayers, 123 U. S. 443; see Yale College *v.* Sanger, 62 Fed. Rep. 177. But a Federal court cannot inquire into the legal adoption of a duly declared amendment of the State constitution. Smith *v.* Good, 34 Fed. Rep. 204.

The U. S. Rev. Stats., § 1768, excepts judges of the U. S. courts from the power thereby conferred upon the President to suspend civil officers appointed with the

The remaining duties of the President consist in giving information to Congress of the state of the Union, and in recommending to their consideration such measures as he shall judge necessary or expedient. (*x*) He is to convene both houses of Congress, or either of them, on extraordinary occasions, and he may adjourn them, in case of disagreement. He is to fill up all vacancies that may happen during the recess of the Senate, by granting commissions, which shall expire at the end of their next session. (*b*) He is to receive ambassadors and other public ministers, to commission all the officers of the United States, and to take care that the laws be faithfully executed. (*c*)

ident has received the advice and consent of the Senate to the appointment, and has signed the commission, the appointment is final and complete, and the person appointed is entitled to the possession of the commission, and to hold the office until constitutionally removed. The principle settled in that case was, that the official acts of the heads of the executive department, as organs of the President, which are of a political nature, and rest, under the Constitution and laws, in executive discretion, are not within judicial cognizance. But when duties are imposed upon such heads, affecting the rights of individuals, and which the President cannot lawfully forbid, — as, for instance, to record a patent, or furnish the copy of a record, — the person, in that case, is the officer of the law, and amenable thereto in the ordinary course of justice. Ib. 170, 171.[2]

(*b*) In the official opinion given by Mr. Wirt, as Attorney-General of the United States, to the President, in 1823, he considered that, according to the reason and spirit of the Constitution, the President has the rightful power to supply vacancies in office existing when the appointment is made during the recess of the Senate, though the vacancy did *happen* before the adjournment of the Senate. The instances he gives of the necessity of such a construction and power are those in which it was nearly or quite impossible to have sent in a nomination before the adjournment of the Senate. Op. Att.-Gen. i. 476.

(*c*) Art. 2, sec. 2, 3. It was considered, in the message of President Jackson to Congress, of the 21st December, 1836, in relation to Texas, to be an unsettled question to whom, under the government of the United States, strictly belonged the power of

[2] *Post*, 322, n. 1.

consent of the Senate; but this exception does not apply to the courts of the territories or of Alaska. McAllister *v.* United States, 141 U. S. 174; 22 Ct. Cl. 318; Wingard *v.* United States, 141 U. S. 201. As to his power to remove territorial judges, see also 24 Am. L. Rev. 686.

(*x*) It appears to be competent for Congress to make the revival of a statute depend upon the proclamation of the President, showing the ascertainment by him of the fact that the edicts of certain nations has been so revoked or modified that they did not violate the neutral commerce of the United States. "The same principle would apply in the case of the suspension of an act upon a contingency to be ascertained by the President, and made known by his proclamation." Harlan, J., in Field *v.* Clark, 143 U. S. 649, 683, citing The Brig Aurora, 7 Cranch, 382.

The propriety and simplicity of these duties speak for themselves. The power of receiving foreign ministers includes in it the power to dismiss them, since he alone is the organ of communication with them, the representative of the people in all diplomatic negotiations, and accountable to the community not only for the execution of the law, but for the competent qualifications and conduct of foreign agents.

7. His Responsibility. — In addition to all the precautions which have been mentioned to prevent abuse of the executive trust in the mode of the President's appointment, his term of office, * 289 and the * precise and definite limitations imposed upon the exercise of his power, the Constitution has also rendered him directly amenable by law for mal-administration. The inviolability of any officer of government is incompatible with the republican theory, as well as with the principles of retributive justice. The President, Vice-President, and all civil officers of the United States may be impeached by the House of Representatives for treason, bribery, and other high crimes and misdemeanors, and upon conviction by the Senate removed from office. (*a*) If, then, neither the sense of duty, the force of public opinion, nor the transitory nature of the seat, are sufficient to secure a faithful discharge of the executive trust, but the President will use the authority of his station to violate the Constitution or law of the land, the House of Representatives can arrest him in his career, by resorting to the power of impeachment.[1] (*x*)

I have now finished a general survey of the office of President of the United States; and, considering the nature and extent of

originally recognizing a new state. It was either necessarily involved in some of the great powers given to Congress, or in that given to the President and Senate, to form treaties with foreign powers, and to appoint ambassadors and other public ministers, or in that conferred upon the President to receive ministers from foreign nations. It was admitted to be most expedient, that the recognition of the independence of a newly assumed state should be left to the decision of Congress, and especially when the exercise of the power would probably lead to war.

(*a*) [Art. 1, sec. 2, 5, sec. 3, 6, and] art. 2, sec. 4.

[1] *Post*, 343, n. 1.

(*x*) In England, an impeachment by the Commons in Parliament cannot be defeated by the pardon of the sovereign, or by the prorogation or dissolution of Parliament. See Pike's Constitutional History of the House of Lords, p. 233.

the powers necessarily incident to that station, it was difficult to constitute the office in such a manner as to render it equally safe and useful, by combining in the structure of its powers a due proportion of energy and responsibility. The first is necessary to maintain a firm administration of the law; the second is equally requisite, to preserve inviolate the liberties of the people. The authors of the Constitution appear to have surveyed the two objects with profound discernment, and to have organized the executive department with consummate skill.

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LECTURE XIV.

OF THE JUDICIARY DEPARTMENT.

As the judiciary power is intrusted with the administration of justice, it interferes more visibly and uniformly than any other part of government with all the interesting concerns of social life. Personal security and private property rest entirely upon the wisdom, the stability, and the integrity of the courts of justice. In the survey which is to be taken of the judiciary establishment of the United States, we will in the present lecure consider, (1.) The judges, in relation to their appointment, the tenure of their office, and their support and responsibility; (2.) The structure, powers, and officers of the several courts.

1. Of the Appointment, Tenure, and Support of the Judges. — The Constitution (*a*) declares that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." In this respect it is mandatory upon the legislature to establish courts of justice commensurate with the judicial power of the Union. Congress have no discretion in the case. (*b*) They were bound to vest the whole judicial power, in an original or appellate form, in the courts mentioned and contemplated in the Constitution, and to provide courts inferior to the Supreme Court, in which the judicial power, unabsorbed by the Supreme Court, might be placed. The judicial power of the United States is, in point of origin and
* 291 title, equal * with the other powers of the government, and is as exclusively vested in the courts created by or in pursuance of the Constitution, as the legislative power is vested in Congress, or the executive power in the President. (*a*) The

(*a*) Art. 3. sec. 1.
(*b*) Martin *v.* Hunter, 1 Wheaton, 328–337.
(*a*) Story, Comm. iii. pp. 449–456.

President is to nominate, and, by and with the advice and consent of the Senate, to appoint "judges of the Supreme Court, and all other officers whose appointments are not therein otherwise provided for, and which shall be established by law. But Congress may, by law, vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments." (*b*) It has never been judicially settled, but it has been very authoritatively and very wisely settled by the uniform practice of the government, that the judges of the District Courts are not inferior officers, whose appointments might be withdrawn by law from the President and Senate, and placed in other hands.

The advantages of the mode of appointment of public officers by the President and Senate have been already considered. The mode is peculiarly fit and proper in respect to the judiciary department. The just and vigorous investigation and punishment of every species of fraud and violence, and the exercise of the power of compelling every man to the punctual performance of his contracts, are grave duties, not of the most popular character, though the faithful discharge of them will certainly command the calm approbation of the judicious observer. The fittest men would probably have too much reservedness of manners, and severity of morals, to secure an election resting on universal suffrage. Nor can the mode of appointment by a large deliberative assembly be entitled to unqualified approbation. There are too many occasions, and too much temptation for intrigue, party prejudice, and local interest, to permit such a body of men to act, in respect to such appointments, with a sufficiently single and steady regard for the general welfare. * In * 292 ancient Rome, the prætor was annually chosen by the people, but it was in the *comitia* by centuries, and the choice was confined to persons belonging to the patrician order, until the close of the fourth century of the city, when the office was rendered accessible to the plebeians; and when they became licentious, says Montesquieu, (*a*) the office became corrupt. The popular elections did very well, as he observes, so long as the people were free, and magnanimous, and virtuous, and the public was without corruption. But all plans of government which suppose the people will always act with wisdom and integrity are

(*b*) Const. art. 2, sec. 2.

(*a*) Esprit des Lois, liv. viii. c. 12.

plainly Utopian, and contrary to uniform experience. Government must be framed for man as he is, and not for man as he would be if he were free from vice. Without referring to those cases in our own country, where judges have been annually elected by a popular assembly, we may take the less invidious case of Sweden. During the diets which preceded the revolution of 1772, the states of the kingdom sometimes appointed commissioners to act as judges. The strongest party, says Catteau, (*b*) prevailed in the trials that came before them, and persons condemned by one tribunal were acquitted by another.

By the Constitution of the United States, (*c*) "the judges, both of the Supreme and inferior courts, are to hold their offices during good behavior; and they are, at stated times, to receive for their services a compensation which shall not be diminished during their continuance in office." The tenure of the office, by rendering the judges independent both of the government and people, is admirably fitted to produce the free exercise of judgment in the discharge of their trust. This principle, which has been the subject of so much deserved eulogy, was derived from the English constitution. (*d*) The English judges * 293 anciently held their seats * at the pleasure of the king, and so does the lord chancellor to this day. It is easy to perceive what a dangerous influence this must have given to the king in the administration of justice, in cases where the claims or pretensions of the crown were brought to bear upon the rights of a private individual. But, in the time of Lord Coke, (*a*) the barons of the exchequer were created during good behavior, and so ran the commissions of the common-law judges at the restoration of Charles II. (*b*) It was still, however, at the

(*b*) View of Sweden, c. 8.

(*c*) Art. 3, sec. 1.

(*d*) The high judicial officer in the ancient kingdom of Aragon, called the Justicia, and appointed by the king, having repeatedly and boldly protected private individuals from the persecutions of the crown, was, in more than one instance, removed from office at the instance of the king. To guard against the like prostration of the independent discharge of duty, it was provided, by a statute of Alfonso V., in 1442, that the justice should continue in office during life, *removable only on sufficient cause by the king and the cortes united.* Prescott's Hist. of Ferdinand and Isabella, i. Int. 108. This was the most ancient precedent in favor of the establishment of an independent judiciary, and it did great credit to the wisdom and spirit of the free states of Aragon.

(*a*) 4 Inst. 117.

(*b*) 1 Sid. 2. Charles I., in his message to Parliament, July 5, 1641, informing

pleasure of the crown to prescribe the form of the commission, until the Act of Settlement of 12 and 13 Wm. III. c. 2, which was in the nature of a fundamental charter, imposing further limitations upon the crown, and adding fresh securities to the Protestant succession, and the rights and liberties of the subject. It established that the commissions of the judges be made *quamdiu se bene gesserint*, though they were still to be removable upon the address of both houses of Parliament. (*c*) The excellence of this provision has recommended the adoption of it by other nations of Europe. It was incorporated into one of the modern reforms of the constitution of Sweden, (*d*) and it was an article in the French constitution of 1791, and in the French constitution of 1795, and it was inserted in the constitutional charter of Louis XVIII. The same stable tenure of the judges was contained in a provision in the Dutch constitution of 1814, and it is a principle which likewise prevails in most of our state constitutions, and, in some of them, under modifications more or less extensive and injurious.

In monarchical governments, the independence of the * judiciary is essential to guard the rights of the subject * 294 from the injustice of the crown; but in republics it is equally salutary, in protecting the Constitution and laws from the encroachments and the tyranny of faction. Laws, however wholesome or necessary, are frequently the object of temporary aversion, and sometimes of popular resistance. It is requisite that the courts of justice should be able, at all times, to present a determined countenance against all licentious acts; and to deal impartially and truly, according to law, between suitors of every description, whether the cause, the question, or the party be popular or unpopular. To give them the courage and the firmness to do it, the judges ought to be confident of the security of

them of having signed the bill for abolishing the High Commission Court and the Star Chamber, added, also, that he had granted that the judges should thereafter hold their places *quamdiu se bene gesserint*. Hume, in his History of England, vi. 423, says, that this grant of the judges' patents during good behavior was made at the request of the Parliament.

(*c*) The English judges, notwithstanding the form of their commissions, continued to consider that the demise of the crown vacated their seats. But this imperfection, if one really existed, was removed by the statute of 1 Geo. III., enacted at the recommendation of the king.

(*d*) Catteau's View of Sweden, c. 5.

their salaries and station. Nor is an independent judiciary less useful as a check upon the legislative power, which is sometimes disposed, from the force of party, or the temptations of interest, to make a sacrifice of constitutional rights; and it is a wise and necessary principle of our government, as will be shown hereafter in the course of these lectures, that legislative acts are subject to the severe scrutiny and impartial interpretation of the courts of justice, who are bound to regard the Constitution as the paramount law, and the highest evidence of the will of the people. (*a*)

The provision for the permanent support of the judges is well calculated, in addition to the tenure of their office, to give them the requisite independence. It tends, also, to secure a succession of learned men on the bench, who, in consequence of a certain undiminished support, are enabled and induced to quit the lucrative pursuits of private business for the duties of that important station. The Constitution of the United States, on this subject, was an improvement upon all our previously existing constitutions. By the English Act of Settlement of 12 & 13 William III., it was declared that the salaries of the judges should be ascertained and *established;* but by the statute of 1 Geo. III., the salaries of the judges were absolutely secured to them during the continuance of their commissions. The constitution of Massachusetts followed the declaration in the English statute of William, and provided that permanent and honorable salaries
* 295 should be established by law for the judges; but * this was not sufficiently precise and definite to guard against all evasion; and the more certain provision in the Constitution of the United States has been wisely followed, in the subsequent constitutions of most of the individual states. In Pennsylvania, the judges of the Supreme Court, and the president judges of the courts of common pleas, by the constitution of that state, are to receive, at stated times, an adequate compensation for their services, "to be fixed by law, and not to be diminished during their continuance of office." The legislature, by act, in 1843, repealed the act of 1839, which had increased the salaries of the

(*a*) The protection of law and liberty from the encroachments of the sovereign was an avowed purpose of the institution of the *Justicia* in the Aragonese constitution, ne quid autem damni detrimentive leges aut libertates nostræ patiantur, judex quidam medius adesto ad quem a rege provocare, si aliquem læserit, injuriasque arcere si quas forsan reipub. intulerit, jus fasque esto. Blancas, Commentarii, 26, cited in 1 Prescott, Ferdinand and Isabella, Int. 107, n. 59.

judges; and they also, by act of 1841, assessed upon the salaries of the judges a tax of two per cent, which the state treasurer retained. The invalidity of the statutes reducing the salaries and assessing a tax thereon was afterwards adjudged as being unconstitutional, and a peremptory *mandamus* was awarded to the state treasurer to pay the salary so retained, free of the reduction and of the taxation. *Commonwealth ex relat. Hepburn* v. *Mann*, 5 Watts & Serg. 403. The authority of the constitutional provision and the void nature of the statutes were illustrated and enforced in the opinion of the Supreme Court, as given by Mr. Justice Rogers. But the decision of the court has been questioned, on the ground that the *increased* salary was subject to legislative control, under the restriction, however, that the allowance was not to be lessened in respect to the judges, or any of them, below that point at which it stood when they respectively came into office. This last construction is supported by the Federalist, No. 79, and by Mr. Justice Story in his Commentaries, in the remarks on a similar constitutional provision under the United States. The constitution of New York, as amended in 1821, is an exception to this remark, and it left the judiciary department in a more dependent condition, and under greater disabilities, than it found it, and greater than in any of those states in the Union, or in any of those governments in Europe, whose constitutions had been recently reformed. (*a*)

(*a*) By the constitutions of Massachusetts, Delaware, Maryland, Virginia, Kentucky, North Carolina, South Carolina, Florida, Missouri, and Illinois, the judges of the Supreme Courts hold their offices during good behavior. This was the case in Pennsylvania under the constitution of 1790; but by the amended constitution of 1838, the tenure of the judges, as to the term, was reduced; that of the judges of the Supreme Court to fifteen years, and of the president judges to ten years, and of the associate judges to five years. This was also the case in Louisiana, until the new constitution of that state, in 1845, which reduced the term of office to eight years. In the states of Maine, New Hampshire, and Connecticut, they hold during good behavior, or until seventy years of age, and in Missouri until sixty-five, and in New York, until lately, for [until] sixty years of age. In Tennessee, the judges of the Supreme Court hold their offices for twelve years, and of the inferior courts for eight years. In Arkansas, the judges of the Supreme Court hold their offices for eight years, and the judges of the Circuit Courts for four years; in the states of New Jersey, Ohio, Michigan, and Indiana, they hold for the term of seven years; in Alabama, Mississippi, and Texas, six years; and in Iowa, for four years. In Vermont and Rhode Island, they are annually elected. In Georgia, the judges of the Supreme Court for the Correction of Errors are to be elected for a term of years, to be prescribed by law, and the judges of the Superior Court for the term of four years. The judges of the Supreme Court consist of three, and by statute are elected for six years. The new

But though the Constitution of the United States has rendered the courts of justice independent of undue influence from the

constitution of Rhode Island, which was adopted in 1842, and went into operation in May, 1843, improved the tenure of the judicial office, by declaring that the judges of the Supreme Court should be elected by the legislature, and hold their offices respectively until the place of the judge be declared vacant by a resolution of the legislature passed by a majority of all the members elected to each house, at the annual session for the election of public officers. By the ordinance of Congress of July, 1787, for the government of the Northwest Territory, the commissions of the judges were to continue in force during good behavior. But the subsequent constitutions of Ohio and Indiana cut down that permanent tenure to one for seven years. The constitution of Alabama, in 1819, established the judicial tenure to be during good behavior; but the constitution has been since specially altered in that particular, so as to change the tenure to the term of six years. And by the first constitution of the State of Mississippi, in 1807, the judges held their offices during good behavior, or until sixty-five years of age, and were appointed by the joint vote of the two houses of the legislature, given *viva voce*, and recorded. But by the constitution, as amended and reordained in 1833, every officer in the government, — legislative, executive, and judicial, — is elected by the universal suffrage of the people; that is, by every free white male citizen of twenty-one years of age, who has resided within the state for one year preceding, and for the last four months within the county, city, or town in which he offers to vote. The judges of the Supreme Court of Errors and Appeals are thus chosen by districts for six years. The chancellor is elected for six years by the electors of the whole state. The judges of the Circuit Courts are elected in districts for four years. The judges of probates and clerks of courts are elected for two years, &c. This was carrying the democratic principle beyond all precedent theretofore in this country. In all the other states of the Union (at least until very recently) the judges of the higher courts of law and equity received their appointments either from the governor and council, or governor and senate, — as in Maine, Massachusetts, New Hampshire, New York, New Jersey, Maryland, Kentucky, Indiana, Louisiana, Missouri, and Michigan; or from the governor alone, — as in Pennsylvania and Delaware; or from the legislature, — as in Vermont, Rhode Island, Connecticut, Virginia, North and South Carolina, Georgia, Florida, Tennessee, Ohio, Illinois, Iowa, Alabama, and Arkansas. In Indiana, there is a peculiar qualification in the judicial appointments; for the Supreme Court is appointed by the governor and senate, the presidents of the Circuit Courts by the legislature, and the associate circuit judges *are elected by the people*. By the revised constitution of New York of 1846, a momentous revolution was effected in the mode of appointment, organization, and tenure of the judicial department, as well as in the appointment of officers generally. It was ordained that there should be a *Court of Appeals*, composed of eight judges, of whom four, to be elected by the electors of the state, for eight years, and four selected from the class of justices of the Supreme Court having the shortest time to serve; and the judges were to be so classified, that one should be elected every second year. There was to be a *Supreme Court*, having general jurisdiction in law and equity. The state was to be divided into *eight judicial districts*, and to have *four justices of the Supreme Court in each district*, and to be so classified, that one of the justices of each district shall go out of office at the end of every two years; and after the expiration of their terms under such classification, the term of their office shall be eight years. One or more of the judges of the Supreme Court, who is not a judge of the Court of Appeals, to be duly designated to preside at the general terms of the

other departments, it has made them amenable from any corrupt violation of their trust. The House of Representatives, as we

said courts to be held in the several districts, and any three or more of the justices (the presiding judge so designated to be one) to hold such general terms. Any one or more of them may hold special terms and *Circuit Courts*, and preside in courts of *Oyer and Terminer* in any county. The judges of the Court of Appeals and justices of the Supreme Court are to have a compensation for their services, not to be increased or diminished during their continuance in office. They are not to hold any other office or public trust, nor exercise any power of appointment to public office. The justices of the Supreme Court and judges of the Court of Appeals may be removed by concurrent resolutions of two-thirds of all the members elected to the assembly, and a majority of all the members elected to the senate. All other judicial officers and justices of the peace may be removed by the senate, on the recommendation of the governor. The judges of the Court of Appeals to be elected by the electors of the state, and the justices of the Supreme Court by the electors of the several judicial districts. *One county judge* to be elected in each of the counties of the state, except the city of New York, to hold his office for four years, and to hold the County Court, and perform the duties of surrogate. The County Court to have no original civil jurisdiction, except in special prescribed cases. But the county judge and two justices of the peace to hold *Courts of Sessions*, with criminal jurisdiction; and he is to receive an annual salary, to be fixed by the board of supervisors, and to be neither increased nor diminished during his continuance in office. Justices of the peace, for services in Courts of Sessions, to be paid a *per diem* allowance out of the county treasury. The legislature may provide for the election of a surrogate in counties where the population exceeds 40,000; and they may confer equity jurisdiction, in special cases, upon the county judge, and establish inferior local courts, of civil and criminal jurisdiction, in cities. Justices of the peace are to be elected in each town at their annual town meeting, whose term of office is to be four years, and they may be removed in a due manner by the county, city, or state courts, as prescribed. The clerk of the Court of Appeals is to be *ex officio* clerk of the Supreme Court, and to be chosen by the electors of the state, and to hold his office for three years, and to be paid out of the public treasury. No judicial officer, except justices of the peace, shall receive any fees or perquisites of office.

This is the substance of the new judicial system, under the revised constitution of New York, and its very democratic character pervades the whole instrument. The central appointing power, with the extensive patronage which, under the prior constitutions of 1777 and 1821, existed in the governor and senate, is broken up and diffused through every part of the body politic. All offices of any moment now rest on popular election. Besides the judicial officers already mentioned, the Secretary of State, Comptroller, Treasurer, Attorney-General, a State Engineer and Surveyor, the Canal Commissioners, the Inspectors of State Prisons, the Clerk of the Court of Appeals, Sheriffs, Clerks of Counties, the Register and Clerk of the city of New York, District Attorneys, and generally all local officers, are to be chosen by popular election.

The revised constitution of New York of 1846 is more democratic than any of the state constitutions in the Union, and it contains more specific restrictions and limitations on the exercise of legislative power than are anywhere to be met with. The convention seem to have most anxiously guarded against the influences of selfishness, intrigue, favoritism, and corruption, which have been supposed to have heretofore affected the action of the legislative department. All depends now upon the discreet

have already seen, is invested with the power of impeachment, and the judges may, by that process, be held to answer before the Senate, and, if convicted, they may be removed from office.

2. Its General Powers. — The federal judiciary being thus established on principles which are essential to maintain that department in a proper state of independence, and to secure the pure and vigorous administration of the law, the Constitution proceeded to designate, with comprehensive precision, the objects of its jurisdiction. The judicial power extends (*b*) [1] to all cases in law and equity arising under the Constitution, the laws, and treaties of the Union; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party;

exercise of the right of suffrage; and as the convention, in their circular address, truly observed, "the happiness and progress of the people of this state will, under God, be in their own hands." Perhaps the most unwise feature in the revised constitution is the election, by universal suffrage, and for comparatively short periods, of all judicial officers. The convention have disregarded, in this respect, the lessons taught by the former constitutions of 1777 and 1821, as well as the wisdom of the Constitution of the United States. The organization of the judicial department is not so essential as the supply of intelligent, learned, and honest judges to administer the laws. The danger to be apprehended, as all past history teaches us, in governments resting in all their parts on universal suffrage, is the spirit of faction, and the influence of active, ambitious, reckless, and unprincipled demagogues, combining, controlling, and abusing the popular voice for their own selfish purposes. Much more grievous would be such results when applied to the election of judges, for that would tend to break down and destroy the independence and integrity of the administration of justice.

The constitutional provision for making judges elective for short periods, by universal suffrage, is contagious, and every new constitutional reform or establishment tends that way. In the constitution of Wisconsin, established in 1846, the judges of the highest courts were to be elected for five years only.

In respect to the compensation of the judges of the Superior Courts, the constitutions of the states of Maine, Rhode Island, New Jersey, Pennsylvania, Delaware, Virginia, Tennessee, South Carolina, Georgia, Florida, Alabama, Ohio, Indiana, Illinois, Michigan, Missouri, Mississippi, Arkansas, and Louisiana either establish or direct the salaries to be fixed by law, and that they shall not be diminished during the continuance of the judges in office. In New Hampshire, North Carolina, and Kentucky, adequate and permanent, or fixed salaries, are directed to be provided by law. In other states (and New York is one of them) the compensation of the judges, and the duration of it, rest entirely in legislative discretion; for though the statute (as in New York) may declare that the judges shall have a specified annual salary, the statute is liable, at any future time, to legislative repeal.

(*b*) Art. 3, sec. 2. Amendments to the Constitution, art. 11.

[1] *Post*, 326, n. 1.

to controversies between two or more states; to controversies between a state, when plaintiff, and citizens of another state, or foreign citizens or subjects; to controversies between citizens of different states, and between citizens of the same state, claiming lands under grants of different states; and between a state or citizens *thereof, and foreign states; and between *296 citizens and foreigners. The propriety and fitness of these judicial powers seem to result, as a necessary consequence, from the union of these states in one national government, and they may be considered as requisite to its existence. The judicial power in every government must be coextensive with the power of legislation. It follows, as a consequence, that the judicial department of the United States is, in the last resort, the final expositer of the Constitution, as to all questions of a judicial nature. (*a*) [1] (*x*) Were there no power to interpret, pronounce, and

(*a*) The Federalist, Nos. 33, 39, 80; Story's Comm. on the Const. i. pp. 360, 362, 363, notes; Marshall, C. J., in Cohens *v.* Virginia, 6 Wheaton, 264, 384. The whole question is fully examined, and all the contemporary discussions in relation to it placed in a striking view, in Story on the Const. i. pp. 344–382.

[1] But the judicial power seems to be limited as against a co-ordinate branch of the government. For when an injunction was sought to restrain the President from carrying out the Reconstruction Acts on the ground of their alleged unconstitutionality, Chase, C. J., said: "Suppose the bill filed, and the injunction prayed for allowed. If . . . the President complies with the order of the court, and refuses to execute the acts of Congress, . . . may not the House of Representatives impeach the President for such refusal?" Mississippi *v.* Johnson, 4 Wall. 475, 500; *post*, 323, n. 1; *ante*, 254, n. (*b*).

(*x*) The courts are not given an immediate and general supervision of the constitutionality of the acts of the legislature. In Chicago & Grand Trunk Ry. Co. *v.* Wellman, 143 U. S. 339, 345, Brewer, J., said: "Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the Act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act."

The giving of advisory opinions "is not the exercise of the judicial function at all, and the opinions thus given have not the quality of judicial authority." Prof. James B. Thayer, in a learned article upon The Origin and Scope of the American Doctrine of Constitutional Law (7 Har-

execute the law, the government would either perish through its own imbecility, as was the case with the articles of confederation, or other powers must be assumed by the legislative body, to the destruction of liberty. That the interpretation of treaties, and the cases of foreign ministers and maritime matters, are properly confided to the federal courts, appears from the close connection those cases have with the peace of the Union, the confusion that different proceedings in the separate states would tend to produce, and the responsibility which the United States are under to foreign nations for the conduct of all its members. The other cases of enumerated jurisdiction are evidently of national concern, and they constitute one of the principal motives to union, and one of the principal cases of its necessity, which was the insurance of the domestic tranquillity. The want of a federal judiciary to embrace these important subjects was once severely felt in the Germanic confederacy, and disorder, license, and desolation reigned in that unhappy country, until the establishment of the imperial chamber by the Emperor Maximilian, near the close of the fifteenth century; and that jurisdiction was afterwards the great source of order and tranquillity in the Germanic body. (*b*)

The judicial power, as it originally stood, extended to suits prosecuted *against* one of the United States by citizens of another state, or by citizens or subjects of any foreign state; but the states were not willing to submit to be arraigned as defendants * 297 before the federal courts, at the instance * of private persons, be the cause of action what it might. The decision of the Supreme Court of the United States, in the case of *Chisholm* v. *The State of Georgia*, (*a*) decided in 1793, in which it was

(*b*) Robertson's Charles V. i. 183, 394, 397.

(*a*) 2 Dallas, 419.

vard L. Rev. 129, 153); which article argues that the power of the courts to declare legislative Acts constitutionally invalid, has been assumed by the courts and is only inferentially, and not expressly, derivable from the State constitutions. See also 28 Am. L. Rev. 614; 29 id. 711.

Advisory opinions to the legislature are treated as addressed to the judges individually and not as a court, and as requiring an individual answer. See Justices' Opinion, 160 Mass. 593. In *Re* Penitentiary Commissioners, (Col.) 35 Pac. Rep. 915, the Supreme Court of Colorado declined to give such an opinion *ex parte*, respecting a controversy which had already arisen, under a statute already enacted, especially as private rights were likely to be involved by litigation arising therefrom, but observed that the giving or withholding of such opinions did not wholly depend upon the fact whether objections were or were not made. See also *In re* University Fund, (Col.) 33 id. 415.

adjudged that a state was suable by citizens of another state, gave much dissatisfaction, and the legislature of Georgia carried their opposition to an open defiance of the judicial authority. The inexpediency of the power appeared so great, that Congress, in 1794, proposed to the states an amendment to that part of the Constitution, and it was subsequently amended in this particular, under the provision in the fifth article. It was declared by the amendment, (*b*) that the judicial power of the United States should not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state. (*c*) The inhibition applies only to citizens or subjects, and does not extend to suits by a state, or by foreign states or powers (*d*) They retain the capacity to sue a state as it was originally granted by the Constitution; and the Supreme Court has original jurisdiction in the case of suits by a foreign state against one of the members of the Union. (*e*) [1] (*x*)

(*b*) Amendments, art. 11.

(*c*) As the United States have no existence, as a political ideal being, except under the organization of the Constitution and laws of the United States, it is assumed as a principle flowing from the sovereignty of the United States, that the officers of the government are not subject to suits for acts in the regular discharge of their official duties. Opinions of the Attorneys-General, i. 457.

(*d*) The Cherokee Nation *v.* Georgia, 5 Peters, 1; New Jersey *v.* New York, ib. 284. A *mandamus* is a *suit* within the meaning of the Constitution, for it is a litigation of a right in a court of justice, seeking a decision. Weston *v.* City Council of Charleston, 2 Peters, 449; Holmes *v.* Jennison, 14 id. 564.

(*e*) Blair, J., and Cushing, J., in Chisholm *v.* State of Georgia, 2 Dallas, 419. That a foreign prince or state may sue in our own as well as in the English courts of law and equity, see King of Spain *v.* Oliver, 1 Peters C. C. 276; The Colombian Govern-

[1] As to the word "suit," see *Ex parte* Milligan, 4 Wall. 2, 112 *et seq.*; *post*, 326, n. 1.

A foreign sovereign may sue to prevent injury to property of himself or his subjects. On this ground Kossuth was enjoined at the suit of the Emperor of Austria from making notes purporting to be receivable as money in Hungary, and to be guaranteed by that state, although they were not imitations of any notes then current. Emperor of Austria *v.* Day & Kossuth, 3 De G., F. & J. 217. See Hullett *v.* King of Spain, 1 Dow & C. 169;

(*x*) A suit lies by a foreign sovereign in either a Federal or State Court to protect the property of his nation; and such suit is not abated by his death or deposition while it is pending. The Sapphire, 11 Wall. 164; Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 290; King of Prussia *v.* Kuepper, 23 Mo. 553. A foreign sovereign may be required, as a non-resident plaintiff, to give security for costs when suing upon a commercial transaction. The Beatrice, 36 L. J. Adm. 10; Republic of

With these general remarks on the constitutional principles of the judiciary department and the objects of its authority, we

ment *v.* Rothschild, 1 Sim. 104; King of Spain *v.* Machado, 4 Russ. 238; 1 Dow, P. C. N. S. 165, S. C. No direct suit can be maintained against the *United States*, without the authority of an act of Congress, nor can any direct judgment be awarded against them for costs. Marshall, C. J., in Cohens *v.* Virginia, 6 Wheaton, 411, 412; United States *v.* Clarke, 8 Peters, 444; United States *v.* Barney, Dist. C. Maryland, 3 Hall, L. J. 128; United States *v.* Wells, 2 Wash. 161; Op. Att.-Gen. ii. 967, 968. But if an action be brought by the United States to recover money in the hands of a party, he may, by way of defence, set up any legal or equitable claim he has against the United States, and need not, in such case, be turned round to an application to Congress. Act of Congress, March 3, 1797, c. 74, sec. 3, 4; United States *v.* Wilkins, 6 Wheaton, 135, 143; Walton *v.* United States, 9 Wheaton, 651; United States *v.* Macdaniel, 7 Peters, 16; United States *v.* Ringgold, 8 Peters, 163; United States *v.* Clarke, ib. 436; United States *v.* Robeson, 9 Peters, 319; Same *v.* Hawkins, 10 Peters, 125; Same *v.* Bank of the Metropolis, 15 Peters, 377. In the

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United States *v.* Prioleau, 2 H. & M. 559. And a foreign republic, which has been recognized by a government, may sue in the courts of the latter in its own name, and without joining any party as plaintiff who can be compelled to give discovery. United States of America *v.* Wagner, L. R. 2 Ch. 582; Republic of Mexico *v.* De Arangois, 5 Duer, 634. But a foreign sovereign cannot sue, it seems, to restrain acts which only violate his political privileges, Kossuth's Case, *supra*; and he cannot be sued in England for an act done in his sovereign character in his own country, Duke of Brunswick *v.* King of Hanover, 2 H. L. C. 1; Gladstone *v.* Ottoman Bank, 1 H. & M. 505. Compare further, Smith *v.* Weguelin, L. R. 8 Eq. 199; Gladstone *v.* Musurus Bey, 1 H. & M. 495; Penn. Law J. Dec. 1847, p. 97. [Suits may be maintained by foreign sovereigns in the United States courts wherever they have a cause of action of a civil nature. The Sapphire, 11 Wall. 164. See further, Republic of Peru *v.* Weguelin, 20 L. R. Eq. 140; Costa Rica *v.* Erlanger, 1 Ch. D. 171. In general, a sovereign cannot be sued in the courts of a foreign jurisdiction; but if the sovereign sues in such courts, the defendant may file a counterclaim or set-off. And such sovereign may be joined as defendant in a suit

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Costa Rica *v.* Erlanger, 3 Ch. D. 62. In New York, a foreign independent government, which sues as a plaintiff there, may be required to give security for costs as a non-resident, under the Code of Civil Proc. § 3268. Republic of Honduras *v.* Soto, 112 N. Y. 310; Republic of Mexico *v.* De Arrangois, 3 Abb. Pr. 470. As to the status of the Pope as a foreign sovereign, see 21 Journal du Droit Int. 835.

A foreign government cannot be coerced by suing its minister or agent. Manning *v.* Nicaragua, 14 How. Pr. 517. And the former president of a foreign republic cannot be sued here, for sovereign acts of his government. Hatch *v.* Baez, 7 Hun, 596. But a Court of Chancery may administer a trust fund in its custody, although a foreign sovereign who is interested in it may not think fit to come before the Court in a suit relating thereto. Morgan *v.* Larivière, L. R. 7 H. L. 423; L. R. 7 Ch. 550. The existence of the trust must not be in dispute; for if this is denied with respect to funds in the possession of an agent of the foreign government within the jurisdiction, the suit

proceed to a particular examination of the several courts of the United States, as ordained by law.

case of the late Bank of the United States, who claimed damages by way of set-off on a protested bill drawn by the United States, the Attorney-General, in an elaborate official opinion, held that the set-off could not be allowed in a suit by the United States against the bank, for dividends due the United States, and withheld. Op. Att.-Gen. ii. 964, 982. But in the same case of the Bank of the United States *v.* The United States, in 2 How. 711, the United States sued the bank for dividends withheld; and the bank, by way of set-off, claimed 15 per cent damages, under the law of Maryland (which on this point was the law at the city of Washington), on a protested bill drawn by the government of the United States on France, and taken by the bank as first indorsee, and presented at Paris for payment, and protested for non-payment, and taken up by a banking-house in Paris, *supra protest*, for the honor of the Bank of the United States, which was the first indorser. It was held, by a majority of the court, that the bank, on satisfying the banking-house in Paris, became the lawful holder of the bill, and as such holder entitled to the damages by way of set-off against

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to obtain property in the jurisdiction of the court, on which both plaintiff and the foreign sovereign have claims. Strousberg *v.* Costa Rica, 44 L. T. 199. The property of a foreign sovereign is also exempt from molestation, with certain exceptions. Vavasseur *v.* Krupp, 9 Ch. D. 351; The Charkieh, 42 L. J. Adm. 17. — B.]

As to suits to which a state is a party, see p. 400 and notes.

It is not uncommon in modern times for sovereign powers to allow proceedings against themselves in their own courts. But in the absence of statute, the old principle has been held applicable to the United States. Hill *v.* United States, 9 How. 386; United States *v.* McLemore, 4 How. 286; The Siren, 7 Wall. 152, 254; Case *v.* Terrell, 11 Wall. 199; iii. 171, n. 1. And a state may withdraw its consent after a suit has been begun against it. Beers *v.* Arkansas, 20 How. 527. [See Carr *v.* United States, 98 U. S. 433; United States *v.* Lee, 106 U. S. 196. In this last case, it is held, in an elaborate opinion by Mr. Justice Miller, that an action of ejectment will lie against officers of the government in possession of property used for public purposes, and held only for the United States, and

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cannot proceed in the absence of such government. Wright *v.* Mills, 63 L. T. 186. See Gladstone *v.* Ottoman Bank, 1 H. & M. 505; Twycross *v.* Dreyfus, 5 Ch. D. 605. The negotiation by a government of a loan in a foreign country does not introduce into the contract the peculiar laws of such country. Smith *v.* Weguelin, L. R. 8 Eq. 212; Goodwin *v.* Robarts, 1 App. Cas. 476; L. R. 10 Ex. 76, 337. A suit cannot be maintained in England upon the bonds of a foreign government. Ibid.; Crouch *v.* Credit Foncier of England, L. R. 8 Q. B. 374; Twycross *v.* Dreyfus, 5 Ch. D. 605.

The only exceptions to the rule that a foreign sovereign or State cannot be sued in the English courts, are: (1) When he sues as plaintiff, he is liable, when just, to respond upon the defendant's counter-claim or cross-action; (2) notice may be ordered to him of a suit against funds in the hands of third parties within the jurisdiction. Strousberg *v.* Republic of Costa Rica, 44 L. T. (N. S.) 199. The property of a foreign sovereign cannot be reached by a suit *in rem*. The Constitution, 4 P. D. 39; The Parlement Belge, 5 P. D. 197. In The Charkieh, L. R. 4 Adm. & Ecc. 59, it was said that a sovereign who as-

* 298 **3. Jurisdiction of the Supreme Court.** — * The Supreme Court was instituted by the Constitution, which ordained

the United States as drawer, in like manner as any individual holder of a protested bill would be. Mr. Ch. J. Taney, who was the Attorney-General that gave the opinion alluded to in the former part of this note, added a new opinion founded on the special circumstances of the case, against the allowance of the set-off, denying that the United States were bound, either in law or equity, to pay, or the bank entitled to claim, the contested damages. Independent of anything special in the case, the general doctrine of the decision was sound and unquestionable. To entitle the party to his set-off, his claim must have been previously submitted to the accounting officers of the treasury and been disallowed, or he must reasonably account for the omission. See sec. 3 and 4 of the act aforesaid. In the case *Ex parte* Madrazzo, 7 Peters, 627, a subject of the King of Spain filed a libel in the *admiralty* against the *State of Georgia*, alleging that the state was in possession of moneys, being the proceeds of certain property belonging to him, and claiming a right to institute a suit in the admiralty for the same, and that the 11th amendment to the Constitution of the United States did not take away the jurisdiction of the courts of the United States in suits in *admiralty* against a state. But on appeal from the decree of the Circuit Court, sustaining the libel, to the Supreme Court of the United States, it was held that the proceeding in question was a mere *personal* suit against a state, to recover property in its possession; and that a private person could not commence such a suit; and

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hence that the court had jurisdiction to jurisdiction. Chesapeake, &c., R. R. Co. determine the validity of the title of the United States. An equally elaborate dissenting opinion was delivered by Mr. Justice Gray, and concurred in by Justices Woods and Bradley, and Waite, C. J., holding that the court had no such

v. Miller, 19 W. Va. 408. The consent must be by the legislature. Goldsmith *v.* Revenue Cutter, 6 Oreg. 250. The immunity may be waived. Clark *v.* Barnard, 108 U. S. 436. — B.]

Court of Claims. (*x*) — It was not until

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sumes the character of a trader, waives his privilege; but this view will not be taken in the Courts of the government against which the suit is brought. Troy & Greenfield Railroad *v.* Commonwealth, 127 Mass. 43; United States *v.* Clarke, 8 Pet. 436; Curran *v.* Arkansas, 15 How. 304; The Davis, 10 Wall. 15; Carr *v.* United States, 98 U. S. 433; Long *v.* The Tampico, 16 Fed. Rep. 491. An assignment of a claim against a foreign government, made before it is established, will be upheld in Equity. Peugh *v.* Porter, 112 U. S. 737.

A foreign sovereign, residing in England, cannot be sued there against his will for breach of a contract of marriage which he has there entered into under an assumed name. A certificate from the Foreign or Colonial office, as the case may be, is conclusive as to such sovereign's status. Mighell *v.* Sultan of Johore, [1894] 1 Q. B. 149; see 21 Journal du Droit Int. 576; Hettihewage Siman Appu *v.* Queen's Advocate, 9 App. Cas. 571, 588.

(*x*) By the "Bowman Act" (22 St. at L. 485) claims pending in Congress, which involve the investigation of facts, and claims or matters pending in any executive department which may involve contraverted questions of law or fact, may be transmitted to the Court of Claims for adjustment. See Taylor *v.* United States, 25 Ct. Cl. 75; Moore *v.* United States, id. 82; Conard *v.* United States, id. 433. The "Tucker Act" (Mar. 3, 1887, 24 St.

that "the judicial power of the United States should be vested in one Supreme Court, and in such inferior courts as Congress

that it was not a case *where the property was in the custody of a court of admiralty, or brought within its jurisdiction, and in possession of any private person.* The jurisdiction would seem to have been impliedly admitted in the latter case. A state cannot be sued in its own courts without its consent. Michigan State Bank *v.* Hastings, Walker, Ch. (Mich.) 9. This is an attribute of sovereignty and of universal law. But a foreign sovereign may voluntarily become a party to a suit in the tribunals of another country, and have his rights asserted and enforced. And it was declared in the case of The Exchange, 7 Cranch, 116, that all persons and property within the territorial jurisdiction of any sovereign were amenable to the local jurisdiction, with such exceptions only as common usage and public policy had allowed. The result is, (1.) That no citizen of any of the United States, or subject of a foreign state, can sue a state. (2.) That a foreign state may sue one of the United States before the Supreme Court of the United States, and there only. (3.) That the United States cannot be sued. (4.) That the United States may sue a state, and perhaps they may, as a *bona fide assignee* of an individual creditor of a state, and perhaps an individual state, or a foreign state, as such assignee, may do it. See Hamilton's Report on Public Credit, 1790, p. 9. This last point is without any judicial support that I am aware of; and it may be questioned how far voluntary assignments, made and accepted for the sake of the remedy, would be available.

1855 that steps were taken to remedy this failure of justice, and the act of Feb. 24 (10 U. S. St. at L. 612, c. 122) established a court for the investigation of certain claims against the United States. This board, however, had no power to render final judgments, or to do more than to make a favorable or adverse report to Congress. And it was only by the act of March 3, 1863 (12 U. S. St. at L. c. 92, p. 765), that it became an independent court. It still has the jurisdiction given by the earlier statute over all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred to said court by either house of Congress; and it cannot qualify its jurisdiction by rules. Clyde *v.* United States, 13 Wall. 38. The act of 1863, § 2, provides that petitions, &c., for the satisfaction of such private claims against the government shall be

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at L. 505) defines the jurisdiction of this court. See this act fully annotated in Gould & Tucker's Notes on the U. S. Statutes, p. 353. See also United States *v.* Tinsley, 68 Fed. Rep. 433; Cole *v.* United States, 29 Ct. Cl. 47 The French Spoliation Claims were referred to this court by 23 St. at L. 283; also claims for depredations of friendly Indians, by 26 St. at L. 851. The claims of the Pottawatomie Indians were also referred to the Court of Claims by 23 Stat. at L. 372; 26 id. 1021.

After the decision in Bonner *v.* United States, 9 Wall. 156, that the Court of Claims had no jurisdiction of a suit founded upon equitable considerations, the Act of Mar. 3, 1887 (24 St. at L. 505) was passed, allowing suits against the government in that court either at law, in equity, or admiralty, and also allowing suits on such claims, if not exceeding $1,000 in value for the district courts, and $10,000 in value for the circuit courts, to be brought in the district where the claimant resides. See Jones *v.* United

might from time to time ordain and establish." (*a*) (*x*) But it received its present organization from Congress, for the Consti-

(*a*) Art. 3, sec. 1.

transmitted to the court unless it is otherwise resolved by the house in which they are presented. Section 3 gives additional jurisdiction of all set-offs, counter-claims, &c., on the part of the government against the claimant, and the court may give judgment in favor of the government for the balance found due to it, if any. [See Allen *v.* United States, 17 Wall. 207. The provision is not rendered void by the seventh amendment to the Constitution. McElrath *v.* United States, 102 U. S. 426. — B.] It may be mentioned that the rule is otherwise when the United States is plaintiff; for under the statutes allowing a set-off in that case, no judgment can be rendered against the government, although a balance be shown in the defendant's favor. United States *v.* Eckford, 6 Wall. 484 (citing De Groot *v.* United States, 5 Wall. 419, 432); Watkins *v.* United States, 9 Wall. 759.

The jurisdiction of the court is extended to claims of owners of property abandoned or captured during the rebellion, by act of March 12, 1863 (12 U. S. St. at L. c. 120, p. 820). It has been thought to be exclusive. Elgee *v.* Lovell, 1 Woolw. 102, 117. Compare Mail Co. *v.* Flanders, 12 Wall. 130, 135. And held not to be subject to appeal by the claimant. Pargoud's Appeal, 4 Ct. of Cl. 349. It is not to include claims growing out of destruction or appropriation of, or damage to, property by the army or navy during the war. July 4, 1864 (13 U. S. St. at L. c. 240, p. 381); Filor *v.* United States, 9 Wall. 45; United States *v.* Russell, 13

States, 13 Sawyer, 341, 346; United States *v.* Jones, 131 U. S. 1; Southern Pac. R. Co. *v.* United States, 38 Fed. Rep. 55; Johnson *v.* United States, 6 Utah, 403. The findings of this court upon matters referred to it by a department under the Act of 1887, § 12, with the claimant's consent, is merely advisory, and not subject, as a judgment, under § 9, to review by the Supreme Court. *In re* Sanborn, 148 U. S. 222; 27 Ct. Cl. 485; See Armstrong *v.* United States, 29 id. 148; Cotton *v.* United States, id. 207.

The Court of Claims cannot entertain a suit against the government founded upon a tort: Schillinger *v.* United States, 155 U. S. 163; United States *v.* Palmer, 128 U. S. 262; Carpenter *v.* United States, 45 Fed. Rep. 341; or upon the infringement of a patent, apart from contract: United States *v.* Berdan, F. M. Co., 156 U. S. 552; or upon a treaty with a foreign nation: Great Western Ins. Co. *v.* United States, 112 U. S. 193; Alling *v.* United States, 114 U. S. 564; Burthe *v.* Denis, 133 U. S. 514; The Ganges, 25 Ct. Cl. 110; not including, however, a claim originally based upon a treaty but really founded, as in the Alabama Claims, upon an appropriation made by Congress in pursuance thereof: United States *v.* Weld, 127 U. S. 55; Williams *v.* Heard, 140 U. S. 537. As to claims upon "implied contract," see United States *v.* Gill, 20 Wall. 517; United States *v.* Palmer, 128 U. S. 262; Hollister *v.* Benedict Manuf. Co., 113 U. S. 59, 67; McAleer *v.* United States, 25 Ct. Cl. 238; Gill *v.* United States, id. 415; Central Pacific R. Co. *v.* United States, 28 id. 427;

(*x*) Upon the history of the U. S. Supreme Court, see Mr. H. L. Carson's History in the Centennial volume, and the essay of Mr. Westel W. Willoughby (John Hopkins' series).

tution had only declared, in general terms, that there should be a Supreme Court, with certain original and appellate powers.

Wall. 623; Pugh *v.* United States, ib. 633; United States *v.* Kimball, ib. 636. The Supreme Court has determined that the Court of Claims has not jurisdiction of claims against the government founded in fact on the unauthorized torts of its agents, although in form on an implied contract. Gibbons *v.* United States, 8 Wall. 269. [Langford *v.* United States, 101 U. S. 341.] Nor of suits founded on merely equitable considerations. Bonner *v.* United States, 9 Wall. 156. Persons complaining of exactions under the revenue laws are confined to the remedies which those statutes furnish. Nichols *v.* United States, 7 Wall. 122. [Where the suit is to recover money which the United States has obtained by fraud of its agents, the court has jurisdiction. United States *v.* State Bank, 96 U. S. 30; Boughton *v.* United States, 12 Ct. of Cl. 330. As to its equitable jurisdiction, see Burke *v.* United States, 13 Ct. of Cl. 231. The jurisdiction does not extend to claims under treaties. *Ex parte* Atocha, 17 Wall. 439; Langford *v.* United States, 12 Ct. of Cl. 338. See Knote *v.* United States, 95 U. S. 149, 156. See further, as to claims under revenue laws, United States *v.* Kaufman, 96 U. S. 567; s. c. 11 Ct. of Cl. 659; Campbell *v.* United States, 12 Ct. of Cl. 470; Ramsey *v.* United States, 14 id. 367. — B.]

When sec. 14 of the act of 1863 was in force, it was construed to give the Secretary of the Treasury power to revise all the decisions of the Court of Claims requiring payment of money. This was held to take away the judicial character of the court, and to make an appeal to the Supreme Court of the United States impossible. *Post*, 326, n. 1; Gordon *v.* United States, 1 Nott & H. xxxiii, note, 2 Wall. 561. The section was repealed after the rendering of the above decision, by the act of March 17, 1866, 14 U. S. St. at L. 9, and a claimant has now an appeal as of right when the amount in controversy exceeds $3,000. United States *v.* Adams, 6 Wall. 101; *Ex parte* Zellner, 9 Wall. 244.

An appeal is given on behalf of the

McArthur *v.* United States, 29 id. 191; Merriam *v.* United States, id. 250; Forehand *v.* United States, 17 Wash. L. R. 37. The Act of Mar. 3, 1887, ch. 359 (24 St. at L. 505) allows suits to be brought against the United States upon express or implied contracts, and the United States may file set-offs or counterclaims in such suits. As to interest upon claims appealed to the Supreme Court, see 26 St. at L. 537; Harvey *v.* United States, 113 U. S. 243; United States *v.* Jones, 131 U. S. 1; White *v.* Arthur, 10 Fed. Rep. 83, 87.

The limitation as to claims against the United States is six years. See 24 St. at L. 505; Ford *v.* United States, 116 U. S. 213; Finn *v.* United States, 123 U. S. 227; United States *v.* Louisiana, 127 U. S. 182; Buck *v.* United States, 25 Ct. Cl. 120; Warder *v.* United States, id. 159. The Court of Claims may, within two years after its judgment, grant a new trial. Belknap *v.* United States, 150 U. S. 588. The prosecution of claims against the United States in the Court of Claims, or the Supreme Court, is wholly dependent upon the acts of Congress. United States *v.* Gleeson, 124 U. S. 255. Technical objections to the pleadings are not favored in this court. See United States *v.* Behan, 110 U. S. 338; United States *v.* Old Settlers, 148 U. S. 427; Chappell *v.* United States, 34 Fed. Rep. 673. A State may prosecute in the Court of Claims its demand against the United States, if founded upon a Federal law. United States *v.* Louisiana, 123 U. S. 32.

It consists of a chief justice and eight associate justices, any five of whom make a quorum; and it holds one term annually, at the seat of government, commencing on the first Monday in December, and continued at discretion. (*b*) But though five of the judges are requisite for business in general, yet any one or more of them may make all necessary orders in a suit, preparatory to the hearing or trial, and continue the court from day to day, in the absence of a quorum; and the judge of the fourth circuit attends at the city of Washington, on the first Monday of August, annually, for interlocutory matters.

The Supreme Court has exclusive jurisdiction of all controversies of a civil nature, where a state is a party,[1] except between a state as *defendant* and its citizens; and except, also, between a state as *defendant*, and citizens of other states or aliens, in which cases it has no jurisdiction; but in all these cases where a state is *plaintiff*, it has original but not exclusive jurisdiction. (*y*) It has, also, exclusively, all such jurisdiction of suits, or proceedings against ambassadors, or other public ministers, or their

(*b*) Acts of Congress of April 29, 1802; February 24, 1807, sec. 5; May 4, 1826; January 21, 1829 [c. 12]; March 3, 1837, c. 34; and of 17th June, 1844, c. 96.

United States from all final judgments adverse to the United States. Act of June 25, 1868, 15 U. S. St. at L. c. 71, p. 75, § 1.

Only such aliens as are citizens or subjects of a government which accords to citizens of the United States the right to prosecute claims against such government in its courts can sue in the Court of Claims under the abandoned and captured property acts before mentioned. Act of July 27, 1868, c. 276, § 2, 15 U. S. St. at L. 243. A British subject is not prevented from suing by this act, United States *v.* O'Keefe, 11 Wall. 178; nor a Prussian, Brown's Case, 5 Ct. of Cl. 571; nor a French, Rothschild's Case, 6 Ct. of Cl. 204; nor a Spanish, Molina's Case, 6 Ct. of Cl. 269; nor a Swiss, Lobsiger's Case, 5 Ct. of Cl. 687.

[1] *Post*, 323, n. 1.

(*y*) The original jurisdiction of the Supreme Court was intended to be exercised sparingly, and not to be extended by construction. California *v.* So. Pac. Ry. Co., 157 U. S. 229. In the constitutional grant to it (Art. III., sec. 2) of judicial power in "all cases, in law and equity, arising under this constitution," &c., the clauses providing for cases where a State is a party, only distribute the jurisdiction under the first clause and do not add to such jurisdiction; and in a suit between a State and citizens of another State the parties' character is the vital consideration, the addition of a Federal question being immaterial. Ibid. Under that constitutional provision this court may entertain an original suit by the United States against a state to settle the boundary between a State and a Territory. United States *v.* Texas, 143 U. S. 621.

domestics, or domestic servants, as a court of law can have or exercise, consistently with the law of nations; and original but not exclusive jurisdiction of all suits brought by ambassadors or other public ministers, or in which a consul or vice-consul shall be a party. (*c*)[2] The Supreme Court was also clothed by the Constitution (*d*) "with appellate jurisdiction, both as to law and fact, * with such exceptions and under such regu- * 299 lations as Congress should make;" and, by the Judiciary Act of 1789, appeals lie to this court from the circuit courts, and the courts of the several states. (*x*) Final judgments and decrees, in civil actions and suits in equity, in the circuit courts of the United States, whether brought there by original process, or removed there from the state courts, or by *appeal* from the district courts, in cases where the matter in dispute exceeds two thousand dollars, exclusive of costs, may be re-examined by writ of error, and reversed or affirmed, in the Supreme Court. (*a*)[1] Final judg-

(*c*) Act of Congress, September 24, 1789, sec. 13.

(*d*) Art. 3, sec. 2.

(*a*) Act of Congress of September 24, 1789, sec. 22. In the cases of Gordon *v.* Ogden, and Smith *v.* Honey, 3 Peters, 33, 469, it was decided, that whatever may have been the amount claimed by the plaintiff in the court below, if the judgment in his favor be less than $2,000, and the writ of error has been sued out by the *defendant* below, the court has not jurisdiction; but if the writ of error be brought by the *plaintiff* below, and the amount claimed in his declaration exceeded $2,000, the court has jurisdiction, because, if the judgment be reversed, he may recover what he claims. [Knapp *v.* Banks, 2 How. 73; Bennett *v.* Butterworth, 8 How. 124.]

[2] *Post*, 314, and note.

[1] *Review of Decisions of Circuit Courts.* — A judgment of the Circuit Court may be reviewed without regard to the sum in dispute in civil actions brought by the United States for the enforcement of the revenue laws, or the collection of duties on merchandise imported. Act of May 31, 1844. See United States *v.* Carr, 8 How. 1. Or in any case under the copyright or patent laws. Act of July 8, 1870, 16 U. S. St. at L. 198, c. 230, §§ 56, 107; Philips *v.* Nock, 13 Wall. 185. Or in any civil action against a collector or other officer of the revenue for official acts or money exacted by him and paid

(*x*) Under the Act of Mar. 3, 1887, authorizing suits against the United States in the lower courts, the Supreme Court reviews cases at law on writ of error, and equity and admiralty cases on appeal. Chase *v.* United States, 155 U. S. 489. The acts relating to the jurisdiction of the Supreme Court are collected in the Supplement to U. S. Rev. Stats. p. 901, note. The appellate powers of this court are granted by the Constitution, but are regulated and defined by the Acts of Congress. Nat. Ex. Bank *v.* Peters, 144 U. S. 570. They extend over the judicial acts of all inferior courts established by Congress under the Constitution. United States *v.* Coe, 155 U. S. 76.

ments and decrees in the circuit courts, in cases of admiralty and maritime jurisdiction, and of prize or no prize, where the

into the United States treasury. Act of March 27, 1868, c. 34, 15 U. S. St. at L. 44. Or in any suit or prosecution, civil or criminal, commenced in a state court, for any wrong done or act omitted during the rebellion under color of any authority from the President or any act of Congress, such suit, &c., having been removed to the Circuit Court. Act of March 3, 1863, c. 81, § 6, 12 U. S. St. at L. 757. See 303, n. 1. Or in questions of law, under the Civil Rights Bill of April 9, 1866. The Ku-Klux Act of April 20, 1871, c. 22, § 1, 17 U. S. St. at L. 13, gives the same rights of appeal, &c., as the Civil Rights Bill. But under the Bankrupt Act of March 2, 1867, § 9, the matter in dispute must exceed $2,000.

As to the mode in which a criminal case can be taken from the Circuit to the Supreme Court, see 335, n. 2. *Ex parte* Gordon, 1 Black, 503. As to *habeas corpus*, see 301, n. 1. [The act of Feb. 16, 1875 (18 St. at L. 315), provided that the circuit courts sitting in admiralty shall make separate findings on the law and on the facts, and the right of trial by jury upon the facts is given. Since the passage of this act the Supreme Court has treated the findings of fact in the lower court as conclusive. (*y*) The Abbotsford, 98 U. S. 440; The Benefactor, 102 U. S. 214.

By the same statute, the amount necessary in any case to give a right to have the action of the Circuit Court reviewed is increased from $2,000 to $5,000. In estimating the amount necessary to give the Supreme Court jurisdiction on appeal, distinct judgments in favor of different plaintiffs cannot be added together. *Ex parte* Baltimore & Ohio R. Co., 106 U. S. 5, and cases cited; The Connemara, 103 U. S. 754. See further, Town of Elgin *v.* Marshall, 106 U. S. 578, 582; Whitsitt *v.* R. R. Co., 103 U. S. 770. As to the power of the Supreme Court to review decisions of the Circuit Court on questions of fact where there has been a waiver of a jury trial, see Boogher *v.* Ins. Co., 103 U. S. 90; Supervisors *v.* Kennicott, ib. 554.

By statute of March 3, 1875 (18 St. at L. 470), a right of review by the Supreme Court is given in case of an order of the Circuit Court dismissing a suit for want of jurisdiction, or remanding a suit which has been removed from a state court. Ayers *v.* Chicago, 101 U. S. 184. A right of review was given in all cases under the Civil Rights Act (18 St. at L. 335); but the act itself has been declared unconstitutional. The Civil Rights Cases, 109 U. S. 3.

The Supreme Court reviews proceedings to questions involving the jurisdiction of those courts. See Ambler *v.* Eppinger, 137 U. S. 480.

Under § 5 of the judiciary act of Mar. 3, 1891, the Supreme Court cannot take jurisdiction of an appeal or writ of error from a district or circuit court, in which the jurisdiction is the only issue, without the certificate of the lower court presenting that question for its determination. Maynard *v.* Hecht, 151 U. S. 324; Colvin *v.* Jacksonville, 157 U. S. 368; Hudson *v.* Parker, 156 U. S. 277; see *infra*, 330, n. (*x*)

(*y*) See Alexandre *v.* Machan, 147 U. S. 72. Upon an appeal in admiralty on the instance side the Circuit Court is to state the law and the facts separately. The Gazelle, 128 U. S. 474. Whatever was matter of fact in a State court, whose action is reviewed by this court, is matter of fact there. Lloyd *v.* Matthews, 155 U. S. 222. By the Act of Feb. 25, 1889 (25 St. at L. 693) in appeals and writs of error from the circuit and district courts where the amount involved is less than $5,000, the review by the Supreme Court is limited

matter in dispute exceeds two thousand dollars, exclusive of costs, may be reviewed on appeal in the Supreme Court: (*b*) and in admiralty and prize cases new evidence is admitted to be receivable on appeal in the Supreme Court. (*c*) This admission is con-

(*b*) Though seamen may sue jointly for wages in the admiralty, under shipping articles for the same voyage, their contracts are treated as distinct: and though several claims of this description, contained in one suit, amount in the aggregate to more than $2,000, that is not sufficient to give jurisdiction on appeal to the Supreme Court. Oliver *v.* Alexander, 6 Peters, 143; Conkling's Treatise (2d ed.), 32; [Rich *v.* Lambert, 12 How. 347; compare Shields *v.* Thomas, 17 How. 3.]

(*c*) Act of Congress, March 3, 1803, [c. 40,] sec. 2. It was decided, in United States *v.* Goodwin, 7 Cranch, 108, that in civil cases at law, the judgment of the Circuit Court is final, where the cause is removed by *writ of error* from the *District Court*, and no writ of error lies therefrom in such cases to the Supreme Court of the United States. See 2 Wheaton, 395; 12 Peters, 143, s. p. But by the act of Congress of July 4, 1840, c. 43, sec. 3, this distinction was abolished, and writs of error now lie to the Supreme Court from all judgments of a circuit court in cases brought there by *writs of error* from the District Court, in like manner as if the suit had been originally brought in the Circuit Court.

ings of inferior United States courts on *habeas corpus* to the extent only of determining whether such courts had jurisdiction. *Ex parte* Carll, 106 U. S. 521; *Ex parte* Mason, 105 U. S. 696; *Ex parte* Virginia, 100 U. S. 339; *Ex parte* Lange, 18 Wall. 163; *Ex parte* Parks, 93 U. S. 18; *In re* Stupp, 12 Blatch. 501. — B.]

Review of Decisions of other United States Courts. — See, as to appeals from the Court of Claims, *ante*, 297, n. 1.

Writs of error and appeals from the final decisions of the supreme courts of the territories in like manner as from the circuit courts, are given by the acts organizing the territories. Freeborn *v.* Smith, 2 Wall. 160. And see act of June 12, 1858, § 18. So from the Supreme Court of the District of Columbia. Act of March 3, 1863, § 11. See Campbell *v.* Read, 2 Wall. 198; Brown *v.* Wiley, 4 Wall. 165; Garnett *v.* United States, 11 Wall. 256; *Ex parte* De Groot, 6 Wall. 497. [By statute of April 7, 1874 (18 St. at L. 27), the appellate jurisdiction of the Supreme Court over territorial courts is to be exercised by writ of error where there was a trial by jury, and by appeal where there was none. Hecht *v.* Boughton, 105 U. S. 235. By act of Feb. 25, 1879 (20 St. at L. 320), the amount necessary to give Supreme Court a right to review decisions of Supreme Court of District of Columbia is increased from $2,000 to $2,500, and this applied to cases then pending. Dennison *v.* Alexander, 103 U. S. 522. — B.]

See, as to what are final judgments, *post*, 316, n. 1.

Appeals from the district courts in prize causes lie directly to the Supreme Court, when the amount in controversy exceeds $2,000, and in other cases when the judge certifies that a question of general importance is involved. Act of June 30, 1864, c. 174, § 13, 13 U. S. St. at L. 306. See The Alicia, 7 Wall. 571.

The United States may take appeals, &c., to the United States Supreme and Circuit Courts without giving security for costs. Acts of Feb. 21, 1863, c. 50, 12 St. at L. 657; July 27, 1868, c. 255, 15 St. at L. 226. As to time within which writs of error and appeals must be taken, see act of June 1, 1872, § 2.

formable to the doctrine and usage of appellate courts of admiralty, permitting the parties, upon the appeal, to introduce new allegations and new proofs, and to add new counts to the libel. (*d*) So, also, a final judgment or decree, in any suit in the highest court of law or equity of a state, may be brought up on error in point of law, to the Supreme Court of the United States, provided the validity of a treaty, or statute of, or authority exercised under, the United States, was drawn in question in the state court, and the decision was against that validity; or provided the validity of any state authority was drawn in question, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of its validity; or provided the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, was drawn in question, and the decision was against *300 the title, right, privilege, or *exemption, specially claimed under the authority of the Union. (*a*)[1] Upon error from a decision in a state court, no other error can be assigned or regarded than such as appears upon the face of the record, and immediately respects the questions of validity, or construction of the Constitution, treaties, (*x*) statutes, commissions, or authorities in dispute.

The Supreme Court is also armed with that superintending authority over the inferior courts which ought to be deposited in the highest tribunal and dernier resort of the people of the United

(*d*) The Marianna Flora, 11 Wheaton, 1, 38; Foster *v.* Gardiner, C. C. Mass. Amer. Jur. ii. 21.

(*a*) Act of Congress of September 24, 1789, sec. 25.

[1] See the very similar act of Feb. 5, 1867, 14 U. S. St. at L. 386, c. 28, § 2, which extends to cases "where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution," &c. But this does not apply to the case of any person in military custody charged with a military offence or with having aided or abetted rebellion. *Vide post*, 326, n. 1, 316, n. 1, for some questions under this act.

(*x*) Questions relating to the rights of parties under a foreign treaty cannot be first raised in the U. S. Supreme Court, when the record does not show that they were raised in the court below. Spies *v.* Illinois, 123 U. S. 131. The appellate jurisdiction does not exist in a suit for a share of an award under a treaty, its construction or validity not being involved. Borgmeyer *v.* Idler, 159 U. S. 408.

States. It has power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and to issue writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office under the authority of the United States. (*b*) This court, and each of its judges, have power to grant writs of *ne exeat* and of injunction; but the former writ cannot be granted unless a suit in equity be commenced, and satisfactory proof be made that the party designs quickly to leave the United States; and no injunction can be granted to stay proceedings in a state court, nor in any case, without reasonable notice to the adverse party. (*c*) All the courts of the United States have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. (*d*) *So the judges *301

(*b*) Act of September 24, 1789, sec. 13.

(*c*) Act of Congress, March 2, 1793, [c. 57,] sec. 5.

(*d*) Act of September 24, 1789, sec. 14; United States *v.* Hamilton, 3 Dallas, 17; *Ex parte* Bollman, 4 Cranch, 75; *Ex parte* Kearney, 7 Wheaton, 38; *Ex parte* Watkins, 7 Peters, 568. *The principles and usages of law* here mean those general principles and usages which are to be found, not in the legislative acts of any particular state, but in that generally recognized and long-established law, which forms the substratum of the laws of every state. Marshall, Ch. J., in United States *v.* Burr. The Judiciary Act of 1789, sec. 17, gave to the courts of the United States power to punish, by fine or imprisonment, at the discretion of the courts, all *contempts* of authority, in any cause or hearing, before the same. But the act of Congress of March 2, 1831, c. 99, limited and defined this power, by declaring that the power to issue attachments and inflict summary punishments, for contempt of court, shall not be construed to extend to any cases except the misbehavior of any person in the presence of the court, or so near thereto as to obstruct the administration of justice; and the misbehavior of any of the officers of the said courts in their official transactions; and the disobedience or resistance, by any officer of the said courts, party, juror, witness, or any other person, to any lawful writ, process, order, rule, decree, or command of the said courts. The provisions of this act of Congress have been adopted in Tennessee by statute, in 1831, and in Ohio by statute, in 1834, with even some impediment thrown in the way of the prompt execution of the power; for the statute in the latter state declares that the charge is to be stated in writing, and the accused shall be heard in his defence by himself or counsel. The power of the English courts is more extensive. Thus, where several persons were to be tried successively for the same treasonable act, the Court of Oyer and Terminer prohibited publication of any of the proceedings, until the whole of the trials had been brought to a conclusion; and it was held that a publication, disregarding this order, was a contempt punishable by fine and imprisonment, and that a party disregarding a summons to appear and answer for the contempt, might be fined in his absence. The King *v.* Clement, 4 B. & Ald. 218; 11 Price, 68,

of the Supreme Court, as well as the judges of the district courts, may, by *habeas corpus*, relieve the citizens from all manner of unjust imprisonment occurring under or by color of the

s. c. [See *In re* Cheltenham & Swansea Railway Carriage & Wagon Co., L. R. 8 Eq. 580.] The fair and impartial administration of justice in such cases would seem to require the existence and exercise of such a power. The act of Congress, however, reaches and prohibits all interference by attachment and summary punishment for contempts committed out of the presence of the court, by libels upon the court and the parties, and pending causes; and it is a very considerable, if not injudicious, abridgment of the immemorially exercised discretion of the courts in respect to contempts. But in the "System of Penal Law, prepared for the State of Louisiana," in 1824, by Edward Livingston, Esq., the courts were stripped of almost all power to preserve themselves from insult. The code provided for contempts *in the presence of the court*, by word, clamor, noise, or disobedience to legal orders, or violence, or threats. It provided, also, for contempts by using verbally, in court, or in any pleading or writing, *addressed to the judges*, in any *cause pending*, any indecorous, contemptuous, or insulting expression, to or of the judges, with intent to insult. But how did it provide? Contempts were to be tried on indictment (which may be at another session), and the jury were to pass upon the intent, and whether the words were indecorous, contemptuous, or insulting. There is no provision at all for insulting gestures or looks. Code, tit. 5, c. 11. The New York Revised Statutes, ii. 278, have dealt with the subject of contempts more temperately and judiciously, and with a wiser regard for the honor and dignity of the courts, so essential to the orderly, pure, independent, and impartial administration of justice. They provide that every court of record may punish summarily *disorderly, contemptuous, or insolent behavior*, committed in the immediate presence of the court, and tending to interrupt its proceedings and impair the respect due to its authority; and for breaches of the peace, noises, and disturbances, tending directly to interrupt its proceedings; and for wilful disobedience or resistance to lawful orders; and *for the publication of false or grossly inaccurate reports of its proceedings.* The *commissioners appointed to revise the civil code of Pennsylvania*, by their *report*, in January, 1835, followed the substance of the Pennsylvania act of 1809, on the subject of contempts, and confined the power of imprisonment to contempts committed in open court. No publication out of court, respecting the conduct of the court, or any of its officers, jurors, witnesses, or parties in any cause pending in court, exposes the party to summary punishment, and the only remedy for the persons aggrieved is by indictment or action at law. The act of Pennsylvania of 16th June, 1836, enacted the same provision. In the case *Ex parte* Poulson, which arose upon a motion in the Circuit Court of the United States for the Eastern District of Pennsylvania, in 1835, in the cause of Drew *v.* Swift, for a rule on Poulson, the editor of a daily paper, to show cause why an attachment should not issue against him for a contempt, in publishing a very libellous article upon the plaintiff pending the trial, Judge Baldwin felt himself bound to deny the motion, in consequence of the act of Congress of 1831. That act had withdrawn from the courts of the United States the common-law power to protect their suitors, officers, witnesses, and themselves, against the libels of the press, however atrocious, and though published and circulated pending the very trial of a cause. The case before him was one which showed, in a very strong light, the unreasonableness of the law, in leaving the suitor unprotected at the moment when he stands most in need of it, and when the mischief to him might be great and remediless. The want of such protection, and the undue distrust which the denial of the

authority of the United States, or for acts done, or omitted to be done, in pursuance of a law of the United States, or of a judicial authority of any court or judge thereof. The justices of the Supreme Court, and the judges of district courts, may grant writs of *habeas corpus*, when subjects of any foreign government, and domiciled therein, are in custody, under the authority or process of the United States, or of any state, for acts done under the order or sanction of any foreign state, the validity of which depends upon the law of nations, or under color thereof; and to hear the case, and discharge the prisoner, if entitled thereto by reason of such alleged authority set up, and the law of nations applicable thereto; and all proceedings had in the mean time, under any state authority, are declared void. (*a*) [1] (*x*)

common-law power over contempts implies, tend to impair, in the estimation of the public, the value of the administration of justice.

The power of the courts to punish summarily for contempts has been lately much restrained in England; for in the case of the King *v.* Faulkner (2 Mont. & Ayr. Cas. in Bank. 311), it was held, in the Court of Exchequer, that a single commissioner of the Court of Bankruptcy, sitting alone, had no power to punish any contempt, however gross or personal.

(*a*) Acts of Congress of September 24, 1789, sec. 14, and March 2, 1833, [c. 57,] sec. 7, and August 29, 1842, c. 257. This last statute was passed in consequence of the case of McLeod, who was indicted for murder, in crossing the river Niagara, in the night, with an armed force, and seizing and destroying the steamboat Caroline, attached to the American shore, and in which affray an American citizen was killed. He pleaded authority from the Canadian powers, which authority was admitted, or assumed, by the British government; but the plea was overruled by the judicial authorities of New York, and McLeod brought to trial. See 1 Hill, 377, and 25 Wendell, 483. [See also La Manche, 2 Sprague, 207, 221; Burou *v.* Denman, 2 Exch. 167.]

[1] *Habeas Corpus.* — The privilege of the writ was still further extended by the act of Feb. 5, 1867, c. 28, 14 U. S. St. at L. 385, by which the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, may grant writs of *habeas corpus* in all cases where any person may be restrained of his liberty in violation of the Constitution, or of any treaty or law of the United States. [See Seavy *v.* Seymour, 3 Cliff. 439; Elec. Coll. of S. C., 1 Hugh. 571; *Ex parte* Bridges, 2 Woods, 428; *In re* Stupp, 12

(*x*) It is discretionary with the U. S. Circuit Court whether a prisoner held under State process in alleged restraint of his liberty under the U. S. Constitution, or for a crime within the exclusive jurisdiction of the Federal courts, shall be discharged upon *habeas corpus* in advance of his trial in the State court; and while the court is not bound to award the writ as soon as the application is made, its discretion yields to any special circumstances requiring immediate action. In the absence of such urgent circumstances, the judgment of the highest State court in

4. Jurisdiction of the Circuit Courts. — The limits and jurisdiction of the circuit courts of the United States have been subject to

Blatchf. 501.] Under this act, it was held that an appeal lay from the judgment of a circuit court on such a writ when exercising original as well as appellate jurisdiction. *Ex parte* McCardle, 6 Wall. 318. But the act of March 27, 1868, repeals so much of the former one as authorizes appeals from the judgments of the Circuit Court to the Supreme Court, or the exercise of any such jurisdiction by the Supreme Court on appeals. See *Ex parte* McCardle, 7 Wall. 506. It has, however, been determined that the Supreme Court still has such appellate jurisdiction as it had before the act of 1867, which may be exercised by the writ of *habeas corpus*, aided by the writ of *certiorari*. *Ex parte* Yerger, 8 Wall. 85. See *In re* Martin, 5 Blatchf. 303; *post*, 326, n. 1.

In cases arising under the Judiciary Act, it has been often laid down that the Supreme Court could issue a *habeas corpus ad subjiciendum* only in the exercise of its appellate jurisdiction. *Ex parte* Barry, 2 How. 65; *In re* Kaine, 14 How. 103, 116, 119, 130. [*Ex parte* Hung Hang, 2 Supr. Ct. Rep. 863, 108 U. S. 552; *Ex parte* Siebold, 100 U. S. 371; *Ex parte* Clarke, ib. 399.] For Congress cannot enlarge the original jurisdiction of the court; and it has even been held on this ground that the court could not by means of this writ review an order of commitment made by a district judge sitting at chambers. *In re* Metzger, 5 How. 176; *In re* Callicot, 8 Blatchf. 89, explaining *Ex parte* Yerger. In Kaine's Case, above cited, a commissioner had ordered the prisoner to be committed, and a writ of *habeas corpus*, issued from the Circuit Court, had been dismissed after a hearing, and the further question was raised whether a writ issuing from the Supreme Court to review the decision of the Circuit Court was issued "for the purpose of an inquiry into the cause of commitment" within the fourteenth section of the Judiciary Act; and the majority of the court seem to have thought that it was. See *Ex parte* Wells, 18 How. 307.

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which the question can be determined, should be first obtained, and its decision, if adverse, may be reviewed by the U. S. Supreme Court in respect of any Federal right distinctly asserted by the accused and denied by such judgment. *Ex parte* Royall, 117 U. S. 241; 112 id. 181; *Ex parte* Fonda, 117 id. 516; *In re* Loney, 134 U. S. 372; *Re* Duncan, 139 U. S. 449, 454; *Re* Frederich, 149 U. S. 70, 75; New York *v.* Eno, 155 U. S. 89; Pepke *v.* Cronin, id. 100; Andrews *v.* Swartz, 156 U. S. 272; Bergemann *v.* Backer, 157 U. S. 655; *In re* Welch, 57 Fed. Rep. 576. See 29 Am. L. Rev. 143; 20 id. 582; 24 id. 674; 25 id. 149, 481, 663, 671, 677.

The Act of Congress of Mar. 3, 1885 (23 St. L. 437), amended U. S. Rev. Stats. § 764, and allows appeals from the circuit court to the Supreme Court in *habeas corpus* cases. The latter court can on such appeal review both law and fact. Johnson *v.* Sayre, 158 U. S. 109; see *In re* Lennon, 150 U. S. 393, 397. Appeals are now limited to six months from the date of the judgment or order. St. of Mar. 3, 1893 (27 St. L. 751), amending R. S. § 766. Under the amendatory act of 1885, there is now no absolute right to the writ upon original application therefor to the Supreme Court. Wales *v.* Whitney, 114 U. S. 564; *Ex parte* Mirzan, 119 U. S. 584; *Ex parte* Terry, 128 U. S. 289; see *Ex parte* Royall, *supra;* Carper *v.* Fitzgerald, 121 U. S. 87, 88; Palliser *v.* United States, 136 U. S. 257; *Re* Sun Hung, 11 Sawyer, 173. Judgments of the circuit courts of appeals, in *habeas corpus* cases, may be re-

frequent changes, and their number has been steadily increasing with the increase of states and districts, ever since the first organization of the national courts under the act of Congress of the 24th of September, 1789. They are established in each district (with a few exceptions) of the nine great circuits into which the United States are now (*b*) divided. The first circuit is composed of the districts of Maine, New Hampshire, Massachusetts, and Rhode Island; the second circuit, of the districts of Connecticut, Vermont, and the northern and southern districts of New York; the third circuit, of the district of New Jersey, and the eastern and western districts of Pennsylvania; the fourth circuit, of the districts of Maryland, Delaware, and Virginia; the fifth circuit, of the districts of Alabama and Louisiana; the sixth circuit, of the districts of North Carolina, South Carolina, and Georgia; the seventh circuit, of the districts of Ohio, Indiana, Illinois, and Michigan; the eighth circuit, of the districts of Kentucky, east, middle, and west Tennessee, and the district of Missouri; and the ninth circuit, of the districts of Mississippi and Arkansas. In each district of these circuits, with the excep-

(*b*) 1840.

viewed in the Supreme Court by *certiorari*. Lau Ow Bew *v.* United States, 144 U. S. 47; see Kurtz *v.* Moffitt, 115 U. S. 487, 497. In extradition the writ of *habeas corpus* cannot perform the office of a writ of error. *Re* Savin, 131 U. S. 267; *In re* Luis Oteiza y Cortes, 136 U. S. 330; Willis *v.* Bayles, 105 Ind. 363; State *v.* Neel, 48 Ark. 283; *In re* Bion, 59 Conn. 372.

The writ cannot, without express statutory authority, be issued by a circuit court of appeals to be served, and to effect a person's release, outside of the circuit. *In re* Boles, 48 Fed. Rep. 75. It is properly removed by appeal to that court from the circuit court. King *v.* M'Lean Asylum, 64 id. 331.

The writ is used very cautiously in the Federal courts to obstruct the ordinary administration of State criminal laws. *In re* Wood, 140 U. S. 278, 370. Federal and State courts have concurrent jurisdiction in matters of extradition. Roberts *v.* Reilly, 116 U. S. 80; *In re* Doo Woon, 18 Fed. Rep. 898; *Ex parte* Brown, 28 id. 653. The fact that a State statute conflicts with the State constitution does not enable a Federal court to issue the writ of *habeas corpus* if it does not conflict with the Federal constitution and the prisoner is not held in custody under it. Andrews *v.* Swartz, 156 U. S. 272. The circuit courts have jurisdiction of this writ on the ground of diverse citizenship. King *v.* M'Lean Asylum, 64 Fed. Rep. 331. The remission to the demanding State for its decision of a constitutional question as to its laws does not warrant a release by *habeas corpus* out of a Federal court from the custody of the asylum State. Pearce *v.* Texas, 155 U. S. 311; *In re* White, 55 Fed. Rep. 54; see Lambert *v.* Barrett, 157 U. S. 697. In *habeas corpus* proceedings, the prisoner is not presumed innocent. State *v.* Jones, 113 N. C. 669; see s. c. 22 L. R. A. 678, and note.

tion of some of the districts in Alabama, Louisiana, Mississippi, and Arkansas, two circuit courts are annually held by one of the judges of the Supreme Court and the district judge of the district; but the Supreme Court may, in cases where special circumstances shall in their judgment render the same necessary, assign two of the judges of the Supreme Court to attend a circuit court; (*x*) and when the district judge shall be absent, or shall have been counsel, or be interested in the cause, the Circuit Court may consist only of a judge of the Supreme Court. (*c*) [2]

* 302 * These circuit courts, thus organized, are vested with original cognizance, concurrent with the courts of the several states,[1] of all suits of a civil nature, at common law, or

(*c*) Acts of Congress of April 29, 1802, c. 31; of March 3, 1837, c. 34; of February 22, 1838, c. 12; and of August 16, 1842, c. 180.

[2] *Limits of the Circuits.* — The first circuit is composed of the districts stated in the text; also the second; to the third add Delaware; the fourth is composed of the districts of Maryland, West Virginia, Virginia, North Carolina, and South Carolina; to the fifth add Georgia, Florida, Mississippi, and Texas; the sixth is composed of Ohio, Michigan, Kentucky, and Tennessee; the seventh, of Indiana, Illinois, and Wisconsin; the eighth, of Minnesota, Iowa, Missouri, Kansas, Arkansas, and Nebraska; [and Colorado, 19 St. at L. 61]; the ninth, of California, Oregon, and Nevada. 12 Wall. iv.; act of July 23, 1866, and of March 2, 1867.

The act of April 10, 1869, c. 22, 13 U. S. St. at L. 44, appoints resident circuit judges for each of the nine circuits, with the same power and jurisdiction therein as the justice of the Supreme Court allotted to the circuit, and designates the judges who may hold the circuit courts. This relieves the judges of the Supreme Court of part of their work. *Vide post*, 305, n. 1; Appleton *v.* Smith, 1 Dillon, 202; United States *v.* Gordon, 5 Blatchf. 18; 16 U. S. St. at L. 179, c. 186. When the judge is interested, &c., he may either certify the case to the most convenient circuit court in the next adjacent state, under the act of Feb. 28, 1839, Richardson *v.* Boston, 1 Curt. 250; or may request the judge of another circuit to hold the court in his place; act of March 3, 1863, c. 93, 12 U. S. St. at L. 768; the former act not being repealed by the latter. Supervisors *v.* Rogers, 7 Wall. 175.

[1] *Original Jurisdiction of the Circuit Courts.* — Under the act of Aug. 6, 1861, the circuit courts have jurisdiction of proceedings instituted in them for the confiscation of land. But in a case where the proceedings had been according to the course of admiralty, an appeal was allowed, only to direct a new trial with a jury, &c., as in cases of seizure upon land.

(*x*) The judges of the Supreme Court are members of the circuit courts, though not formally commissioned as such, and are entitled to protection from assault or personal violence when discharging their official duties. *In re* Neagle, 135 U. S. 1, 40, 67, 75.

in equity, where the matter in dispute exceeds five hundred dollars, exclusive of costs, and the United States are plaintiffs, or an

Union Ins. Co. *v.* United States, 6 Wall. 759; Armstrong's Foundry, ib. 766; St. Louis Street Foundry, ib. 770. See United States *v.* Hart, ib. 770, 772; United States *v.* Athens Armory, U. S. Dist. C. 35 Ga. 344; Miller *v.* United States, 11 Wall. 268, 304.

The right of aliens to sue the United States or their officers for acts done under certain statutes passed during the rebellion, is limited by the act of July 27, 1868, 15 U. S. St. at L. 243, c. 276, § 2.

The act of March 2, 1833, as to cases under the revenue laws, does not now apply to cases under the internal revenue acts. Act of July 13, 1866, § 67; Ins. Co. *v.* Ritchie, 5 Wall. 541; Hornthall *v.* Collector, 9 Wall. 560; Assessor *v.* Osbornes, ib. 567.

The circuit courts have jurisdiction, concurrently with the district courts, of bills in chancery filed by direction of the commissioner of internal revenue to enforce the lien of the United States for tax upon any real estate, &c. Act of July 20, 1868, c. 186, § 106, 15 U. S. St. at L. 167.

Under the Civil Rights Bill of April 9, 1866, circuit and district courts have concurrent jurisdiction of all causes, civil or criminal, affecting persons who are denied or cannot enforce the rights secured to them by that act in the state courts. *Post*, 304, n. 1; Blyew *v.* United States, 13 Wall. 581. There is a like concurrent jurisdiction of all causes, civil and criminal, arising under the act of May 31, 1870, c. 114, § 8, 16 U. S. St. at L. 142, except as therein otherwise provided. Also of proceedings under the Ku-Klux Act against any person who, under color of any state law, &c., subjects any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States. Act of April 20, 1871, c. 22, § 1, 17 U. S. St. at L. 13. Section 6, of the same act, gives an action in the Circuit Court to persons injured in the ways mentioned in the act, against persons who have knowledge that the wrongful act is about to be committed, and power to aid in preventing it, but neglect or refuse to do so.

The circuit courts have a general superintendence and jurisdiction of all cases and questions arising under the bankrupt laws, and concurrent jurisdiction of all suits at law or in equity between the assignee in bankruptcy and any person claiming an adverse interest, touching any property or rights of property of the bankrupt transferable to or vested in such assignee. Act of March 2, 1867, § 2.

Appellate Jurisdiction of the Circuit Courts.—Appeals in equity cases, and writs of error in cases at law, when the debt or damages claimed exceed $500, as also appeals from the rejection or allowance of claims, are given by the Bankrupt Act of March 2, 1867, § 8. See § 24.

An appeal is given by the act of Feb. 5, 1867, from the decision of inferior judges, justices, or courts, in *habeas corpus* cases under that act.

The appeal from the district court in prize causes is now direct to the Supreme Court, if the sum in controversy exceeds $2,000, or if the district judge certifies that a general question of law is involved. Act of June 30, 1864, § 13. See The Alicia, 7 Wall. 371; [The City of Panama, 101 U. S. 453, 458.]

[By the act of March 3, 1875 (18 St. at L. 470), the jurisdiction of the circuit courts was extended to all suits of a civil nature at law or in equity, where the amount in dispute exceeds, exclusive of costs, five hundred dollars, "and arising under the Constitution or laws of the United States, or treaties made or which

alien is a party, and the suit is between a citizen of the state where the suit is brought, and a citizen of another state. (*a*) (*x*)

(*a*) The damages laid in the declaration, if they exceed $500, give the jurisdiction as to the matter in dispute. Muns *v.* Dupont, 2 Wash. 463. It is the amount of damages claimed in the declaration that determines the jurisdiction in the federal courts. Gordon *v.* Longest, 16 Peters, 97. The limitation to $500 and upwards was abolished by the act of March 3, 1815, in cases where the United States are plaintiffs. The suits between citizens, in civil causes, where the demand is to any small amount, belong to the local state courts, and are generally cognizable before single magistrates, and with juries reduced in number, or without juries, as the case may be. A late English statute (8 & 9 Vict. c. 127) instituted a court of that kind, of an efficient organization and summary jurisdiction. It consists of a single judge, who is to be a barrister, a pleader, or an attorney of ten years' standing; and it has jurisdiction to try summarily all suits for debts under £20. The judge has power to commit, in all cases of fraud or misconduct, to prison for forty days, and is the judge of all matters of law and fact, and there is to be no appeal from his decisions; but *certiorari* will lie to remove all suits above £10.

shall be made under their authority, . . . or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens or subjects;" "and shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein." For cases construing the clause, "arising under the Constitution," &c., see Celluloid Mfg. Co. *v.* Goodyear, &c. Co., 13 Blatchf. 375; Miller *v.* Mayor, &c. of New York, ib. 469. The construction of the citizenship clause is the same as that of the similar language in the section of the same statute providing for the removal of cases from the state to the United States courts. Pacific R. R. *v.* Ketchum, 101 U. S. 289. (See *infra*, 303, n.)

By statute of March 3, 1879 (20 St. at L. 354), jurisdiction is given the circuit courts to review by writ of error decisions of district courts in criminal cases where the sentence involves imprisonment or a fine of over three hundred dollars.

Prior to the act of July 12, 1882, the circuit courts had original jurisdiction of all suits by and against national banks. County of Wilson *v.* Nat. Bank, 103 U. S. 770. But by statute July 12, 1882 (22 St. at L. 162), the jurisdiction is given, with certain exceptions, to the state courts.— B.]

(*x*) The presumption is against the jurisdiction of the circuit court when it does not affirmatively appear, in some part of the record, to exist under the Federal constitution and statutes. *In re* Barry, 42 Fed. Rep. 113; United States *v.* Southern Pacific R. Co., 49 id. 297; United States *v.* Central Pacific R. Co., id. 304; St. Louis, I. M. & S. Ry. Co. *v.* Newcom, 12 C. C. A. 503; Ward *v.* George F. Blake Manuf. Co., id. 295. The same rule applies in all cases coming before the Supreme Court upon writ of error or appeal. Parker *v.* Ormsby, 141 U. S. 81, 83; Stuart *v.* Easton, 156 U. S. 46. The jurisdiction, under the Act of Aug. 13, 1888, whether original, or acquired by removal, must appear by the plaintiff's

They have likewise exclusive cognizance, except in certain cases which will be hereafter mentioned, of all crimes and offences cog-

statement of his claim. Tennessee *v.* Union & Planters' Bank, 152 U. S. 454. But diverse citizenship may be shown by amendment. Bowden *v.* Burnham, 59 Fed. Rep. 752. And averments defective as to the citizenship of corporations may be waived by answer and taking evidence. Kennedy *v.* Solar Ref. Co., 69 id. 715. The circuit courts are not necessarily bound by each other's decisions, but each should follow the decisions of the circuit court of appeals for its own circuit. Northern Pacific R. Co. *v.* Sanders, 47 Fed. Rep. 604; Edison Electric Light Co. *v.* Bloomingdale, 65 id. 212.

The Act of 1887, as corrected by the Act of Aug. 13, 1888, (25 St. at L. 433), § 1, provides: "Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." This provision does not apply to actions of tort: Van Bokkelen *v.* Cook, 5 Sawyer, 587; New Providence *v.* Halsey, 117 U. S. 336; Blacklock *v.* Small, 127 U. S. 96; Ambler *v.* Eppinger, 137 U. S. 480; or to suits removed from the State courts. Delaware County *v.* Diebold S. & L. Co., 133 U. S. 473. The requirement that the assignor must have been able to sue refers to his citizenship, and not to the jurisdictional amount. Bowden *v.* Burnham, 59 Fed. Rep. 752. The right to sue depends upon the position of the assignor and assignee when the suit is begun. Jones *v.* Shapera, 57 Fed. Rep. 457.

The assignee must plead and show his assignor's ability to sue in a Federal court when the assignment was made. Parker *v.* Ormsby, 141 U. S. 81; Metcalf *v.* Watertown, 128 U. S. 586; Chase *v.* Sheldon R. M. Co., 56 Fed. Rep. 625; Bowden *v.* Burnham, 59 id. 752. In a suit upon negotiable paper, the note or bill of exchange must on its face be negotiable, and the citizenship of the original owners must be alleged. Raisin Fertilizer Co. *v.* Snell, 21 Fed. Rep. 353; Adams *v.* Republic County, 23 id. 211; Chase *v.* Sheldon R. M. Co., 56 id. 625; Stanton *v.* Shipley, 27 id. 498; Bull *v.* Kasson Bank, 123 U. S. 105; Superior Court *v.* Ripley, 138 U. S. 93. See Shoecraft *v.* Bloxham, 124 U. S. 730; Brock *v.* N. W. Fuel Co., 130 U. S. 341; Ambler *v.* Eppinger, 137 U. S. 480; New Orleans *v.* Benjamin, 153 U. S. 411; Holmes *v.* Goldsmith, 147 U. S. 150; Plant Inv. Co. *v.* Jacksonville Ry. Co., 152 U. S. 71; Mississippi Mills *v.* Cohn, 150 U. S. 202; Mexican Nat. R. Co. *v.* Davidson, 157 U. S. 201; Steel *v.* Rathbun, 42 Fed. Rep. 390; Wilson *v.* Knox County, 43 id. 481; Jewett *v.* Bradford S. B. & T. Co., 45 id. 801; Barling *v.* Bank of British North America, 50 id. 260; Wachusett Nat. Bank *v.* Sioux City Stove Works, 56 id. 321; Jones *v.* Shapera, 57 id. 457; Kerney Board *v.* McMaster, 68 id. 177. An administrator, as defendant, must have a diverse citizenship from that of the complainant, though his intestate may have had the requisite citizenship. Bangs *v.* Loveridge, 60 Fed. Rep. 963. As to who are "assignees" within the St. of 1888, see also Sere *v.* Pitot, 6 Cranch, 332; Childress *v.* Emory, 8 Wheat. 642; New Orleans *v.* Gaines, 138 U. S. 595; Davies *v.* Lathrop, 20 Blatch. 397, 404; Greaves *v.* Neal, 57 Fed. Rep. 816; Marine Ins. Co. *v.* St. Louis, &c. Ry. Co., 41 id. 643. As to the citizenship of national banks, see Petri *v.* Commercial Nat. Bank, 142 U. S. 644; Fisher *v.* Yoder, 53 Fed.

nizable under the authority of the United States, exceeding the degree of ordinary misdemeanors, and of them they have concur-

Rep. 565. It is not a valid objection that a *bona fide* transfer which would give the circuit court jurisdiction, was made for the purpose of securing such jurisdiction. D'Wolf *v.* Rabaud, 1 Peters, 498; Barney *v.* Baltimore, 6 Wall. 280; Manhattan Ins. Co. *v.* Broughton, 109 U. S. 121; Hoyt *v.* Wright, 4 Fed. Rep. 168. When an assignment is fictitious, or merely collusive, and the plaintiff merely a nominal party, the jurisdiction is determined by the citizenship of the real parties. Farmington *v.* Pillsbury, 114 U. S. 138, 143; Hartog *v.* Memory, 116 U. S. 588; Bernards Township *v.* Stebbins, 109 U. S. 341; see Banigan *v.* Worcester, 30 Fed. Rep. 392; Neal *v.* Foster, 13 Sawyer, 236; Richardson *v.* Mattison, 5 Biss. 31; Greenwalt *v.* Tucker, 10 Fed. Rep. 884; Marion *v.* Ellis, id. 410; 9 id. 367. Where the interest is joint, each party must be competent to sue, or liable to be sued, apart from the others' citizenship. Peninsular Iron Co. *v.* Stone, 121 U. S. 631. If two plaintiffs are citizens of different States, and the defendant of a third State, the suit cannot be brought in either plaintiff's State. Smith *v.* Lyon, 133 U. S. 315. But the court may dismiss one joint party made a defendant because he refuses to join as a co-plaintiff. Hicklin *v.* Marco, 56 Fed. Rep. 549. The Supreme Court must determine the circuit court's jurisdiction, though the parties consent to a consideration of the merits. Morris *v.* Gilmer, 129 U. S. 315; Nashua & Lowell R. Co. *v.* Boston & Lowell R. Co., 136 U. S. 356, 374.

By the above Act of Aug. 13, 1888, suits in the circuit courts are to be brought in the district in which the defendant resides, except when the citizenship of the parties is the jurisdictional fact. See Reinstadler *v.* Reeves, 33 Fed. Rep. 308; Werner *v.* Murphy, 60 id. 769. Thus an equity suit for specific performance is to be brought in the district in which one of the parties resides. Municipal Ins. Co. *v.* Gardiner, 62 Fed. Rep. 954. But a defendant who is sued in another district, where he is found, may waive this defect by a voluntary appearance. St. Louis, &c. R. Co. *v.* McBride, 141 U. S. 127; Hardenberg *v.* Ray, 33 Fed. Rep. 812; 151 U. S. 112; Southern Express Co. *v.* Todd, 12 C. C. A. 351; Smith *v.* Atchison, &c. R. Co., 64 Fed. Rep. 1. This provision does not apply to a suit removed by the defendant from a State court. Baltimore & O. R. Co. *v.* Meyers, 62 Fed. Rep. 367. It applies in general to suits for infringing patents. Union S. Co. *v.* Hall Signal Co., 65 Fed. Rep. 625; Kennedy *v.* Penn. I. & C. Co., 67 id. 339; see Smith *v.* Sargent M. Co., id. 801.

In a suit between corporations created by two different States, brought in a third State, the Federal court has jurisdiction if the defendant waives its privilege of being sued only in its own district. Central Trust Co. *v.* McGeorge, 151 U. S. 129. A foreign corporation which has an agent in another State, on whom service can be made, may be sued as an "inhabitant" of that State in a Federal court. Shainwald *v.* Davis, 69 Fed. Rep. 704; see Dinzy *v.* Illinois Cent. R. Co., 61 id. 49. Diverse citizenship is shown when the defendant is a Federal corporation alleged to be a citizen of another State than that of the plaintiff's residence. Union Pac. Ry. Co. *v.* Harris, 158 U. S. 326.

The defendant has the burden of proof as to such citizenship. Foster *v.* Cleveland, &c. Ry. Co., 56 Fed. Rep. 434. A circuit court has jurisdiction of an equity suit to quiet title, or to remove a cloud from title, where the land lies, though the defendants are inhabitants of other districts. Dick *v.* Foraker, 155 U. S. 404; United States *v.* Southern Pac. Ry. Co.,

rent jurisdiction with the district courts. (*b*) But no person can be arrested in one district for trial in another, and no civil suit

(*b*) See *infra*, 360–363.

63 Fed. Rep. 481. In determining jurisdiction by citizenship, the parties should be classed according to their real interests. Cilley *v.* Patten, 62 Fed. Rep. 498. A citizen of a Territory cannot sue a citizen of a State in the Federal courts. Sneed *v.* Sellers, 66 id. 371.

When the jurisdiction is based on citizenship alone, the suit may be brought in the district of either the plaintiff's or defendant's residence. 25 St. at L. 433; Winona Bank *v.* Avery, 34 Fed. Rep. 81; see Fales *v.* Chicago, &c., Ry. Co., 32 id. 673; Gavin *v.* Vance, 33 id. 84; Yuba County *v.* Pioneer G. M. Co., 32 id. 183; Bostwick *v.* American Finance Co., 43 id. 897; McCormick H. M. Co. *v.* Walthers, 134 U. S. 41. A suit by the United States can only be brought in the defendant's district. United States *v.* Southern Pacific R. Co., 49 Fed. Rep. 297; United States *v.* Central Pac. R. Co., id. 304. Citizenship is not properly or sufficiently averred by stating the party's "residence." Everhart *v.* Huntsville College, 120 U. S. 223; *post*, p. 344, note; Ward *v.* Blake Manuf. Co., 56 Fed. Rep. 437.

Under the act of 1888, suit does not lie against an alien temporarily in the district. Meyer *v.* Herrara, 41 Fed. Rep. 65. Jurisdiction once given by adverse citizenship to a Federal court is not affected by a subsequent change of parties. Mollan *v.* Torrance, 9 Wheat. 537; Phelps *v.* Oaks, 117 U. S. 236, 240; Hardenberg *v.* Ray, 151 U. S. 112; 13 Sawyer, 158; Wetherby *v.* Stinson, 62 Fed. Rep. 173. So a suit to set aside a decree as fraudulently obtained is not defeated by a change of citizenship after such decree. Foster *v.* Mansfield &c. R. Co., 36 Fed. Rep. 627. In general, the fact that the beneficiary and the grantor are citizens of the same State does not defeat Federal jurisdiction when the trustee is a citizen of a different State. Dodge *v.* Tulleys, 144 U. S. 451; see Bowdoin College *v.* Merritt, 63 Fed. Rep. 213; Mass. & S. C. Co. *v.* Cane Creek, 155 U. S. 283. But when a State sues for a citizen's benefit, the beneficiary's citizenship is the plaintiff's citizenship. Maryland *v.* Baldwin, 112 U. S. 490. When a Federal Court has taken possession of property on the original bill, its jurisdiction in passing upon a cross-bill filed for complete relief in disposing of such property does not depend upon the parties' citizenship. Morgan's La. & T. R. & S. Co. *v.* Texas Central Ry. Co., 137 U. S. 171, 201; First National Bank *v.* Salem Capitol Flour Mills Co., 12 Sawyer, 485; 31 Fed. Rep. 580; Osborne *v.* Barge, 30 id. 805; see Vannerson *v.* Leverett, 31 id. 376.

Under the Act of 1888, the limitation of the amount to $2,000 does not apply to suits brought by the United States as plaintiff or petitioner. United States *v.* Shaw, 39 Fed. Rep. 433; United States *v.* Kentucky River Mills, 45 id. 273. So a receiver of a national bank may recover in the circuit court a debt due to the bank without regard to the amount. Yardley *v.* Dickson, 47 Fed. Rep. 835. The amount is exclusive of costs and interest. Smith *v.* Greenhow, 109 U. S. 669; Moore *v.* Edgefield, 32 Fed. Rep. 498; Bernheim *v.* Birnbaum, 30 id. 885; Hynes *v.* Briggs, 41 id. 468. Separate claims, though properly joined under a State statute, cannot be computed together to make up the jurisdictional amount. Holt *v.* Bergevin, 60 Fed. Rep. 1. But the demand of one plaintiff may be made up of distinct amounts each less than the $2,000, and these may have been acquired by assignment. Bernheim *v.* Birnbaum, 30 Fed. Rep. 885. Interest may

can be brought against an inhabitant of the United States out of his district;(*c*) and the act of Congress provides against the assumption of federal jurisdiction to be created by the assignment of promissory notes, or other choses in action, except foreign bills of exchange.[2] This restriction applies to assignees by operation of law, (*d*) but it does not apply to notes payable to bearer:(*e*) nor to suits by Indorsee *v.* Indorser, for that creates a new contract;(*f*) nor to suits in equity by a judgment creditor;(*g*) nor to cases in which the United States are a party. (*h*) The circuit courts have also appellate jurisdiction from all final decrees and judgments in the district courts, where the matter in dispute, exclusive of costs, exceeds fifty dollars. If the remedy be on final decrees in the district courts, in cases of admiralty and maritime jurisdiction, and the matter in dispute exceeds three

(*c*) Process of foreign attachment cannot be issued by the circuit courts of the United States, where the defendant is domiciled abroad, or not found within the district. The circuit courts cannot issue process beyond the limits of their district, except subpœna for witnesses and executions in two special cases. Toland *v.* Sprague, 12 Peters, 300.

(*d*) Sere *v.* Pitot, 6 Cranch, 332.

(*e*) Bullard *v.* Bell, 1 Mason, 251 ; Bank of Kentucky *v.* Wister, 2 Peters, 318.

(*f*) Young *v.* Bryan, 6 Wheaton, 146.

(*g*) Bean *v.* Smith, 2 Mason, 252 ; Dexter *v.* Smith, ib. 303.

(*h*) Bank of United States *v.* Planters' Bank of Georgia, 9 Wheaton, 904.

[2] *Post*, 349, n. 1.

be added to the damages to make up the amount necessary for jurisdiction. Brown *v.* Webster, 156 U. S. 328. A valid defence to part of the plaintiff's claim made in good faith, reducing it below $2,000, does not deprive the circuit court of its jurisdiction. Schunk *v.* Moline &c. Co., 147 U. S. 500 ; Peeler *v.* Lathrop, 48 Fed. Rep. 780 ; Hardin *v.* Cass County, 42 id. 652. In a bill brought by the plaintiff on behalf of himself and others, the plaintiff's individual claim need not always exceed the $2,000. See Handley *v.* Stutz, 137 U. S. 366 ; Hill *v.* Glasgow R. Co., 41 Fed. Rep. 610 ; Hynes *v.* Briggs, id. 468 ; Hartford Fire Ins. Co. *v.* Bonner Mercantile Co., 44 id. 151.

When a stockholder applies for a receiver of a corporation, the entire corporate assets represent the value in controversy. Towle *v.* American Building Society, 60 Fed. Rep. 131.

By § 74 of the Tariff Act of Aug. 27, 1894 (28 St. at L. 570), the circuit courts may on petition in equity, prevent and restrain the combinations and trusts in restraint of trade in imported articles, prohibited by § 73. By the act of Feb. 10, 1891 (26 St. at L. 744), the circuit courts may *subpœna* witnesses and require production of books and papers before the Interstate Commerce Commission. By the Act of July 2, 1890 (26 St. at L. 209), the circuit courts were empowered to restrain contracts and combinations in restraint of trade or commerce between the States, or with foreign nations, declared illegal by that Act.

hundred dollars, it is by appeal; and if on final judgments in civil actions, and the matter in dispute exceeds fifty dollars, it is by writ of error. (*i*) And if any suit be commenced *in a state court against an alien, or by a citizen of the *303 state in which the suit is brought against a citizen of another state, or against a citizen of the same state claiming lands under a grant from another state, and the matter in dispute exceeds five hundred dollars, exclusive of costs, the defendant, on giving security, may remove the cause to the next circuit court. (*a*)[1] The circuit courts have also original cognizance in

(*i*) Acts of Congress of September 24, 1789, sec. 11, 21, 22; and March 3, 1803, [c. 40,] sec. 2.

(*a*) Act of Congress of September 24, 1789, sec. 12. In Smets *v.* Williams, 4 Paige, 364, it was declared, that the amount of the original claim of the plaintiff, and not the amount ultimately found due, determined the jurisdiction of the Court of Chancery of New York, where it was limited to a certain sum.

[1] *Removal of Suits from State to United States Courts.* — This may take place to the Circuit Court if any suit or prosecution, civil or criminal, be commenced in a state court for any wrong done or act omitted during the rebellion under color of any authority from the President, or any act of Congress. Act of March 3, 1863, § 5, 12 U. S. St. at L. 756, 757; act of May 11, 1866, § 3, 14 U. S. St. at L. 46. These provisions are constitutional, The Mayor *v.* Cooper, 6 Wall. 247; McCormick *v.* Humphrey, 27 Ind. 144; except so far as they provide for removal of a judgment of a state court after the trial by jury for a retrial on the facts and the law, which contravenes the 7th amendment, The Justices *v.* Murray, 9 Wall. 274. See acts of Feb. 5, 1867, and Jan. 22, 1869, § 1; and generally Short *v.* Wilson, 1 Bush, 350; Eifort *v.* Bevins, ib. 460; Edwards *v.* Ward, 2 id. 606; Woodson *v.* Fleet, 2 Abb. U. S. 15; Murray *v.* Patrie, 5 Blatchf. 343.

So, if any suit or prosecution, civil or criminal, be commenced in a state court, against any person who is denied or cannot enforce there the rights secured to him by the Civil Rights Act, for any cause whatever, or against any officer or other person for wrongs done under color of authority derived from said act, or the Freedmen's Bureau Acts, or for refusing to do any act as inconsistent with the Civil Rights Act, such defendant has the right to remove the cause to the proper district or circuit court. Act of April 9, 1866, c. 31, § 3, 14 U. S. St. at L. 27; McKee *v.* Rains, 10 Wall. 22; *post*, 304, n. 1. [Held constitutional in Strauder *v.* West Virginia, 100 U. S. 303. It was held in this case that a state law to the effect that no colored persons should be on a jury was a denial of equal rights. In Virginia *v.* Rives, ib. 313, it was held that the mere fact that the officer of the state whose duty it was to select jurors refused to select any colored persons, was not a ground for removal. As to the proper remedy in such case, see *Ex parte* Virginia, ib. 339. — B.]

So an alien defendant, or a citizen of another state sued by a citizen of the state in which suit is brought, if the matter in dispute exceeds $500, and the suit as to such defendant is to restrain or enjoin him, or can be finally determined without the presence of other defendants

equity and at law of all suits arising under the revenue laws of the United States, or under any law of the United States relative

in the cause, and if a citizen of the state in which suit is brought is also a defendant, may remove the cause as against himself into the next circuit court at any time before final hearing. Act of July 27, 1866, c. 288, 14 U. S. St. at L. 306; Bixby *v.* Couse, 8 Blatchf. 73; Allin *v.* Robinson, 1 Dillon, 119. Amended so that a controversy for more than $500 between a citizen of the state in which suit is brought and a citizen of another state, may be removed by the latter, whether plaintiff or defendant, if he will file in the state court an affidavit that from prejudice or local influence he will not be able to obtain justice there, and give security for appearance, &c. Act of March 2, 1867, c. 196, 14 U. S. St. at L. 558. This is discussed and held constitutional in Johnson *v.* Monell, 1 Woolw. 390; Railway Co. *v.* Whitton, 13 Wall. 270, 287. See, generally, Sneed *v.* Brownlow, 4 Coldw. 253; Washington, Al. & G. R. R. *v.* Alexandria & W. R. R., 19 Gratt. 592, 602; Sands *v.* Smith, 1 Dillon, 290; Case *v.* Douglas, ib. 299; Beecher *v.* Gillett, ib. 308; Akerly *v.* Vilas, 1 Abb. U. S. 284.

So, any suit or prosecution, civil or criminal, against an internal revenue officer or person acting under him, for acts done under color of his office, or against any person holding property by title derived from any such officer, concerning such property and affecting the validity of the internal revenue acts, may be removed to the Circuit Court at any time before trial. Act of July 13, 1866, c. 184, § 67, 14 U. S. St. at L. 171. See Commonwealth *v.* Casey, 12 Allen, 214; Benchley *v.* Gilbert, 8 Blatchf. 147. [This provision was elaborately considered and held constitutional in Tennessee *v.* Davis, 100 U. S. 257; Davis *v.* South Carolina, 107 id. 597. — B.]

So any suit at law or in equity against any corporation other than a banking corporation, organized under a law of the United States, or against a member thereof, as such member, may be removed to the proper circuit or district court by a sworn petition stating that they have a defence under the Constitution, or any treaty, or law, of the United States. Act of July 27, 1868, c. 255, § 2, 15 U. S. St. at L. 227; Fisk *v.* Union Pacific R. R., 6 Blatchf. 362; 8 id. 243.

The only question for a state court to determine when an application is made to remove a cause to the Circuit Court is whether the applicant has brought himself within the act of Congress. If it decides that he has, the removal follows as of right, and further proceedings in the state court are void. Compare Rosenfield *v.* Adams Exp. Co., 21 La. Ann. 233; Williams *v.* Adkins, 6 Coldw. 615; Akerly *v.* Vilas, 24 Wisc. 165; 1 Abb. U. S. 284; Stevens *v.* Phœnix Ins. Co., 41 N. Y. 149; Fisk *v.* Union Pacific R. R., 8 Blatchf. 243; 6 id. 362; Hatch *v.* Chicago, R. I., & P. R. R., 6 id. 105.

As to removal of suits from state courts to the Supreme Court, see 300 and note.

As to removal of suits from one circuit court to another, &c., *ante*, 301, n. 2, *end*.

[St. March 3, 1875, § 2 (18 St. at L. 470), provided that in civil suits, at law or in equity, where the matter in dispute exceeds, exclusive of costs, five hundred dollars, and "arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a

to copyrights and patent-rights growing out of inventions and discoveries, and to protect such rights by injunction. (*b*) The

(*b*) Acts of April 17, 1800, c. 25, sec. 3; of February 15, 1819, sec. 1, and of July 4, 1836, c. 357, sec. 17; act of March 2, 1833, entitled *further to provide for the collection of duties on imports*, [c. 57,] sec. 2.

state and foreign states, citizens, or subjects, either party may remove said suit into the circuit court of the United States for the proper district. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit," &c. As to the effect of this statute in repealing earlier statutes, see King *v.* Cornell, 106 U. S. 395; Venable *v.* Richards, 105 id. 636; Stone *v.* Sargent, 129 Mass. 503. The court disregards the pleadings, and arranges the parties on one side or the other, according to their real interest; and then, if no plaintiff and defendant are citizens of the same state, the case is one for removal. Removal Cases, 100 U. S. 457; Hyde *v.* Ruble, 104 id. 407; Broadway Nat. Bank *v.* Adams, 130 Mass. 431; Danvers Savings Bank *v.* Thompson, 133 id. 182. The requisite citizenship must exist both when the suit is begun and when the petition is filed. Gibson *v.* Bruce, 2 Supr. Ct. Rep. 873; 108 U. S. 561. A corporation is to be treated as a citizen of the state creating it. Memphis, &c. R. R. Co. *v.* Alabama, 107 U. S. 581; Steamship Co. *v.* Tugman, 106 id. 118. For cases construing the clause "arising under the Constitution," &c., see Albright *v.* Teas, 106 U. S. 613; Dubuclet *v.* Louisiana, 103 id. 550; Railroad Co. *v.* Mississippi, 102 id. 135. Under the second clause a removal of the entire suit may be had when there is a separate controversy between two or more of the parties, which could be determined without deciding the remainder of the issues. Barney *v.* Latham, 103 U. S. 205; Corbin *v.* Van Brunt, 105 id. 576; N. Y. Mut. Ins. Co. *v.* Allen, 134 Mass. 389; Danvers Savings Bank *v.* Thompson, 130 id. 490. As to who are the real parties in interest, see Bacon *v.* Rives, 106 U. S. 99; Amory *v.* Amory, 95 id. 186; as to when the state jurisdiction is ousted, Kern *v.* Huidekoper, 103 U. S. 485; Stone *v.* Sargent, 129 Mass. 503.

As to removal of criminal proceedings on the ground of a denial of civil rights, see Bush *v.* Kentucky, 107 U. S. 110; Neal *v.* Delaware, 103 id. 370; Strauder *v.* West Virginia, 100 id. 303; Virginia *v.* Rives, ib. 313. Comp. State *v.* Smalls, 11 S. C. 262.

As to the time within which a petition to remove must be filed under acts of 1866 and 1867, see Jifkins *v.* Sweetzer, 102 U. S. 177; under act of 1875, Hewitt *v.* Phelps, 105 id. 393.

When a removal is claimed on the ground of local prejudice, it must appear that all the parties on one side are citizens of different states from any on the other. Myers *v.* Swann, 107 U. S. 546. An alien has no right to a removal either under the separate controversy or under the local prejudice clause of the act of 1875. King *v.* Cornell, 106 U. S. 395. A collusive assignment to give jurisdiction is void, and gives no jurisdiction. Hayden *v.* Manning, 106 U. S. 586.

In Gaines *v.* Fuentes, 92 U. S. 10, it was held (two judges dissenting) that the right of removal under the act of March 2, 1867, was not confined to cases where the Circuit Court might have taken original jurisdiction as it had been prior to that act. — B.]

jurisdiction in cases of copyrights applies, without regard to the character of the parties, or the amount in controversy; and with respect to the jurisdiction of the circuit courts, it may be laid down as the settled doctrine, that they are courts of *limited*, though not of *inferior*, jurisdiction; and it is necessary, therefore, that there should appear upon the record of a circuit court, the facts or circumstances which gave jurisdiction, either expressly or by necessary legal intendment. (*c*)

5. Jurisdiction of the District Courts. — The district as well as the circuit courts are derived from the power granted to Congress by the Constitution, of constituting tribunals inferior to the Supreme Court. (*d*) The United States are at present divided into thirty-five districts, which generally consist of an entire state; but in New York, Pennsylvania, Virginia, North Carolina, South Carolina, Tennessee, Louisiana, Mississippi, and Alabama, there are more districts than one. A court is established in each district, with some exceptions, consisting of one judge, who holds annually, in most of them, four stated terms, and in some of them only three, or two, or one; and he holds, also, special courts in his discretion. There are at present only twenty-nine district judges; and it seems to be practically settled, since the act of 1801, that Congress may, in their discretion, abolish the inferior courts, and create new ones under a different organization.

The district courts have, exclusive of the state courts, *304 * cognizance of all lesser crimes and offences, cognizable under the authority of the United States, and committed within their respective districts, or upon the high seas, and which are punishable by fine not exceeding one hundred dollars, by imprisonment not exceeding six months, or when corporal punishment, not exceeding thirty stripes, is to be inflicted. (*a*) They

(*c*) Turner *v.* The Bank of North America, 4 Dallas, 11; M'Cormick *v.* Sullivant, 10 Wheaton, 192. See also *post*, 314. The circuit courts are not authorized to issue writs of *mandamus*, except when necessary for the exercise of their acknowledged jurisdiction. M'Intire *v.* Wood, 7 Cranch, 504. It will therefore lie to a district court refusing to proceed to judgment in a case subject to the appellate jurisdiction of the Circuit Court. Smith *v.* Jackson, 1 Paine, 453. It is a general principle of the common law, that where a limited authority is given, if the party to whom it is given extends his jurisdiction to objects not within it, his warrant will be no protection to the officers who act under it. Morrell *v.* Martin, 3 Mann. & Gr. 581.

(*d*) Art. 1, sec. 8.

(*a*) By the act of Congress of August 23, 1842, c. 188, and of August 8, 1846, c. 98,

have also exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under imposts, navigation, or trade laws of the United States, where the seizures are made upon the high seas, or on waters within their districts navigable from the sea with vessels of ten or more tons burden;(*b*) and also of all other seizures made under the laws of the United States; and also of all suits for penalties and forfeitures incurred under those laws. (*x*) They have also cognizance, concurrent with the circuit courts and the state courts, of causes where an alien sues for a tort committed in violation of the law of nations, or of a treaty of the United States; and of all suits at common law, in which the United States are plaintiffs, and the matter in dispute amounts, exclusive of costs, to two

the district courts were declared to have concurrent jurisdiction with the circuit courts, of all crimes and offences against the United States, the punishment of which is not capital.

(*b*) The *exclusive* original cognizance of all civil causes of admiralty and maritime jurisdiction is understood to be exclusive *as between the district and circuit courts*, and that the jurisdiction may be concurrent with courts of common law, in cases in which a common-law remedy may be adequate and proper, inasmuch as the Judiciary Act of 1789, sec. 9, when on this very point, "saves to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it."

(*x*) The jurisdiction of the district courts over penalties will not be treated as transferred to the circuit courts by uncertain language in a statute, as in the contract labor law (23 St. at L. 332, § 3) enabling the penalty to be sued for in the circuit courts. Lees *v.* United States, 150 U. S. 476; see United States *v.* Mooney, 11 Fed. Rep. 476. As such penalties are of a quasi-criminal nature, this jurisdiction is not limited by the act of 1888, giving the circuit courts original cognizance "of all suits of a civil nature," exceeding $2,000 in amount. United States *v.* Whitcomb M. B. Co., 45 Fed. Rep. 89; *post*, p. 331, n. Diverse citizenship is not a ground of jurisdiction in the district courts. *In re* Burrus, 136 U. S. 586. A suit for the full amount of a penal bond exceeding $2,000, when at the trial it appears that less than $2,000 is claimed, must be dismissed. Cabot *v.* McMaster, 61 Fed. Rep. 129; see State *v.* Hill, 60 id. 1005. Under the Rev. Stats. § 563, the district court has jurisdiction of a set-off by the United States when sued by a district attorney to recover fees. Tuthill *v.* United States, 38 Fed. Rep. 538. The district courts, as well as the Supreme and circuit courts, have, under Rev. Stats. § 716, power to issue the writ of *ne exeat*. Lewis *v.* Shainwald, 48 Fed. Rep. 492. As to their jurisdiction in suits relating to national banks, see Stephens *v.* Bernays, 41 Fed. Rep. 401; 44 id. 642; 119 Mo. 143; Farmers' Nat. Bank *v.* McElhinney, 42 id. 801. In general a national bank can sue in the Federal courts to recover upon a note only where diverse citizenship is shown. Danahy *v.* Denison Nat. Bank, 64 Fed. Rep. 148.

By § 4 of the judiciary act of Mar. 3, 1891, the appellate jurisdiction of the old circuit courts over the district courts was abolished.

hundred dollars. They have jurisdiction, likewise, exclusive of the courts of the several states, of all suits against consuls or vice-consuls, except for offences above the magnitude which has been mentioned.(*c*) They have also cognizance of complaints by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of its coast;(*d*) and to repeal patents unduly obtained.(*e*)[1]

(*c*) Act of Congress of September 24, 1789, c. 20, sec. 9; [*ante*, 45, n. 1.] By act of Congress of Aug 8, 1846, c. 105, the district and circuit courts and the commissioners to take affidavits, &c., have jurisdiction, as justices of the peace, against offenders against the United States, and, on the application of foreign consuls and commercial agents, to enforce their awards and decrees by arrest and imprisonment, &c.

(*d*) Act of April 20, 1818, [c. 88,] sec. 7.

(*e*) Act of February 21, 1793, c. 11, sec. 10. By the act of Congress of August 23, 1842, c. 188, the district courts, as courts of admiralty, and the circuit courts, as courts of equity, are to be deemed always open for the purpose of filing pleadings and issuing process, and for interlocutory motions and orders.

[1] *Jurisdiction of District Courts.* — See, as to their admiralty jurisdiction, *post*, 369, n. 1, where the interpretation of the saving clause in note (*b*) by the later decisions is also given.

The district courts have cognizance, concurrent with the circuit and state courts, of all suits at common law, when the United States or any officer thereof, under the authority of any act of Congress, shall sue, although the matter in dispute is less than $100. Act of March 3, 1815, § 4.

So they have jurisdiction, concurrent as above, of suits and proceedings against national banks. Act of June 3, 1864, § 57.

So they have original jurisdiction in all matters and proceedings in bankruptcy. Act of March 2, 1867, § 1. [See Claflin *v.* Houseman, 93 U. S. 130.]

In the way of criminal jurisdiction, it has been enacted that the District Court may, on the report of the district attorney, try at special session in a summary way, unless, at the time for pleading, the accused shall demand a jury, any master, officer, or mariner of any vessel belonging, in whole or in part, to citizens of the United States, complained of for the commission of any offence, not capital or otherwise infamous, against any United States law for the protection of persons or property engaged in commerce or navigation. Act of June 11, 1864, c. 121, § 2, 13 U. S. St. at L. 124; *post*, 363, n. 1.

The district courts have also, exclusively of the state courts, cognizance of all crimes and offences against the Civil Rights Bill, and also, concurrently with the circuit courts, of all causes, civil and criminal, affecting persons who are denied or cannot enforce the rights secured to them by that act, in the state courts; and in all cases where the United States laws fail to furnish remedies and punish offences against law, the common law, as modified by the constitution and statutes of the state so far as not inconsistent with the Constitution and laws of the United States, is to govern in the United States courts. Act of April 9, 1866, 14 U. S. St. at L. 27, c. 31, § 3; *ante*, 302, n. 1, 303, n. 1.

They have, in like manner, exclusively of state courts, cognizance of all crimes

The judges of the district courts have, also, in cases where the party has not had a reasonable time to apply to the Circuit Court, as full power to grant writs of injunction to operate within their respective districts, as is exercised by the judges of the Supreme Court, and to continue until the *next circuit *305 court. (*a*) They may also grant injunctions, in particular cases, under the act *for the better organization of the treasury department.* (*b*)

In addition to these general powers vested in the district courts, they have, in those cases where the districts are so situated as not to permit conveniently the presence of a judge of the Supreme Court, the powers of a circuit court superadded to their ordinary powers of a district court. (*c*)

To guard against the inconvenience of a difference of opinion between the circuit judge and the district judge, when holding together a circuit court, it is provided by law, that in all cases of appeal or error, from the district to the circuit court, judgment is to be rendered in conformity to the opinion of the judge of the Supreme Court presiding in such circuit court. And in all other cases of a disagreement of opinion between the circuit and district judges, the point may be certified into the Supreme Court for its decision;[1] but in no case shall im-

(*a*) Act of February 13, 1807, [c. 13,] sec. 1.
(*b*) Act of Congress of May 15, 1820, [c. 107,] sec. 4 and 5.
(*c*) Act of February 19, 1831, [c. 28.]

and offences against the act of May 31, 1870, c. 114, 16 U. S. St. at L. 140, and the concurrent jurisdiction under the same act and under the Ku-Klux Act, which has already been mentioned, *ante*, 302, n. 1.

See, as to the summary trial of officers and mariners for offences not capital or otherwise infamous, act of June 11, 1864, c. 121, 13 U. S. St. at L. 124; *post*, 363, n. 1.

[1] *Certificate of Division.* — The associate justice of the Supreme Court, and the resident circuit judge, holding court under the act of April 10, 1869, *ante*, 301, n. 2, can certify a division of opinion. Ins. Co. *v.* Dunham, 11 Wall. 1. The certificate of division brings nothing before the court but the points certified, Ward *v.* Chamberlain, 2 Black, 430; which must be points of law, Silliman *v.* Hudson R. Bridge, 1 Black, 582; Wilson *v.* Barnum, 8 How. 258; Dennistoun *v.* Stewart, 18 How. 565; Brobst *v.* Brobst, 4 Wall. 2; and distinctly stated; Sadler *v.* Hoover, 7 How. 646. [See Weeth *v.* N. E. Mort. Co., 106 U. S. 605. The request to certify need not be expressly stated, if it can be fairly inferred from the record. United States *v.* Harris, 106 U. S. 629. As to the difference of procedure in civil and criminal cases, see Rev. St. U. S. §§ 650–652; *Ex parte* Tom Tong, 2 Supr. Ct. Rep. 871; 108 U. S. 556. — B.]

prisonment be allowed, or punishment be inflicted, where the judges of the Circuit Court are divided in opinion upon the question. (*d*)

The superior courts of the several territories of the United States, in which no district court is established, have the enlarged jurisdiction of circuit courts, subject to revision by writ of error and appeal to the Supreme Court. (*e*)[2] The district and territorial judges of the United States are required to reside within their respective jurisdictions; and no federal judge can act as counsel, or be engaged in the practice of the law. (*f*)

* 306 * **6. Jurisdiction of Auxiliary State Courts.** — The state courts are, in some cases, invested, by acts of Congress, with the cognizance of cases arising under the laws of the United States. By the acts of March 8, 1806, and April 21, 1808, and March 3, 1815, the county courts within or adjoining the revenue districts in certain parts of the states of New York, Pennsylvania, and Ohio, were authorized to take cognizance of prosecutions for fines, penalties, and forfeitures, arising under the revenue laws of the United States; and the State or county courts adjoining any collection district, in relation to taxes or internal duties which may, at any time hereafter, be assessed,

(*d*) Act of April 29, 1802, [c. 31,] sec. 5, 6.
(*e*) Act of March 3, 1805, [c. 38,] sec. 1.
(*f*) Act of December 18, 1812, sec. 1.

Several questions may be decided at the same time. United States *v.* Chicago, 7 How. 185. But the division of opinion must be actual, and if certified *pro formæ* only, or if the question rests on a hypothesis, it is the practice of the Supreme Court to decline to answer. Nesmith *v.* Sheldon, 6 How. 41; Webster *v.* Cooper, 10 How. 54; Pelham *v.* Rose, 9 Wall. 103. A division on a motion addressed to the discretion of the court does not present a point which can be certified, although touching its jurisdiction. United States *v.* Avery, 13 Wall. 251; United States *v.* Rosenburgh, 7 id. 580.

By the act of June 1, 1872, in case of a division of opinion, that of the presiding justice is to prevail for the time being; but after final judgment, decree, or order, it is the judges' duty to certify the difference as to any question which might have been reviewed on certificate under the act of 1802, and then either party may remove the final judgment, decree, or order to the Supreme Court, on writ of error or appeal, subject, &c. [The right to a review in such case is irrespective of the amount in controversy, ever since the act of 1875 (18 St. at L. 315). Dow *v.* Johnson, 100 U. S. 158. — B.]

[2] *Ante*, 299, n. 1.

have cognizance of all suits for taxes, duties, fines, penalties, and forfeitures, arising thereon. (*a*)

In attending to this general survey of the organization of the judiciary establishment of the United States, it will be perceived that all the great features of the system are to be found in the act of Congress which was passed in September, 1789, at the first session of the first Congress under the present Constitution. That act has stood the test of experience since that time, with very little alteration or improvement; and this fact is no small evidence of the wisdom of the plan, and of its adaptation to the interest and convenience of the country. The act of 1789 was the work of much profound reflection, and of great legal knowledge; and the system then formed and reduced to practice has been so successful and so beneficial in its operation, that the administration of justice in the federal courts has been constantly rising in influence and reputation.

The principal officers of the courts are attorneys and counsellors, clerks and marshals.[1]

(*a*) *Vide infra*, 400–405. [As to next paragraph, see 300, n. 1.

[1] To these may be added commissioners and registers in bankruptcy.

Commissioners (*x*) were first authorized to be appointed by the Circuit Court for the purpose of taking bail and affidavits in civil cases, by the act of Feb. 10, 1812. See act of March 1, 1817; Admiralty Rules, 5, 35. By the latter act they could also take depositions *de bene esse* in certain cases, but could not issue a *habeas corpus ad testificandum*. *Ex parte* Barnes, 1 Sprague, 133.

Since these acts their powers have been considerably enlarged. By the act of Aug. 23, 1842, they were to exercise all the powers that any justice of the peace or other magistrate of any of the United States might then exercise in respect to offenders for any crime or offence against the United States under the Judiciary Act, § 33, and to issue process for seamen's wages, as authorized by act of July 20, 1790, § 6.

By the act of Aug. 8, 1846, they were to enforce the decisions of foreign consuls in certain cases.

When authorized to do so by the United States courts, they may, upon complaint under oath, issue warrants for the apprehension of persons whose extradition is sought under any treaty or convention of the United States, and hear and report upon the evidence to the Secretary of State. Act of Aug. 12, 1848, § 1. The commissioners should be specially designated for the purpose. *In re* Henrich, 5 Blatchf. 414. And special commissioners may be appointed for the purpose. United States *v.* Stowell, 2 Curtis, 153.

The action of a commissioner in committing a prisoner may be revised on

(*x*) A commissioner of a circuit court is an officer of the court, authorized by law, and entitled to such fees, when certified by the court as correct, as are set forth in United States *v.* Allred, 155 U. S. 591.

7. Of Attorneys and Counsel. — Attorneys and counsel are regularly admitted by the several courts, to assist the parties in their pleadings, and in the conduct of their causes in those cases in which the parties do not appear and manage their own * 307 causes personally, * as they are expressly permitted to do. (*a*) This privilege conceded to parties, though reasonable in itself, is, upon the whole, useless; and the necessity of a distinct profession, to render the application of the law easy and certain to every individual case, has always been felt in every country under the government of written law. As property becomes secure, and the arts are cultivated, and commerce flourishes, and when wealth and luxury are introduced, and create the infinite distinctions and refinements of civilized life, the law will gradually and necessarily assume the character of a complicated science, requiring for its application the skill and learning of a particular profession. After the publication of the twelve tables, suitors at Rome were obliged to resort to the assistance of their patrons, and judicial proceedings became the study and

(*a*) Act of Congress of September 24, 1789, sec. 35.

habeas corpus in conjunction with a *certiorari*. *In re* Henrich, 5 Blatchf. 414; *In re* Martin, ib. 303; *ante*, 301, n. 1.

Their number was enlarged, and superior courts of territories empowered to appoint them, by act of Sept. 18, 1850. See act of April 9, 1866, § 4. By the act of Feb. 24, 1855, they were empowered to issue warrants for the arrest of deserters from foreign vessels in certain cases.

By the act of May 15, 1862, they were given powers to take surety of the peace and for good behavior, like to those of other officers, under the act of July 16, 1798.

They are to institute proceedings against persons violating the Civil Rights Bill, and have the same duties with regard to offences under that act as they are authorized to exercise with regard to other offences against the laws of the United States. Act of April 9, 1866, c. 31, § 4, 14 U. S. St. at L. 28.

They are to exercise all the powers that any justice of the peace may exercise under the act of July 20, 1790, § 7. Act of July 28, 1866, c. 309, 14 U. S. St. at L. 343.

They may take proof of debts in bankruptcy in all cases, subject to the revision of such proofs by the register and by the court. Act of July 27, 1868, c. 258, § 3, 15 U. S. St. at L. 228.

Their numbers are increased, and they are to institute proceedings against persons violating the act of May 31, 1870, c. 114, and have the same duties with regard to offences under that act, as they are authorized to exercise with regard to other offences against the laws of the United States. 16 U. S. St. at L. 142, § 9.

Provision for the appointment of *registers in bankruptcy* is made, and their duties are defined in the act of March 2, 1867, §§ 3–7, and act of July 27, 1868, § 3.

practice of a distinct and learned body of men. (*b*) The division of advocates into attorneys and counsel has been adopted from the prevailing usage in the English courts. The business of the former is to carry on the practical and more mechanical parts of the suit, and of the latter to draft or review and correct the special pleadings, to manage the cause at the trial, and also during the whole course of the suit to apply established principles of law to the exigencies of the case. In the Supreme Court of the United States, the two degrees of attorney and counsel are kept separate, and no person is permitted to practise both as attorney and counsellor in that court. This was by a rule of the court in February, 1790; and when, afterwards, in August, 1801, the court declared that counsellors might be admitted as attorneys, on taking the usual oath, this did not mean or imply, that if a counsellor was thus admitted as attorney, he could continue to act as counsellor. He must make his election between the two degrees.[1] In all the other courts of the United States, as well as in the courts * of New York and the other states, *308 the same person can be admitted to the two degrees of attorney and counsel, and exercise the powers of each. (*a*)

Besides the ordinary attorneys, the statute has directed (*b*) that a meet person, learned in the law, be appointed to act as

(*b*) Gravina, de Ortu et Prog. Jur. Civ. sec. 33, 40.

(*a*) In the convention which met in the year 1846 to revise the constitution of New York, there was a strong effort made to remove all impediments to the free admission of all persons to the courts of justice to act as counsel and attorneys. But the character and utility of the profession were saved, and the attempted innovation resulted in the constitutional provision, that "any male citizen of the age of 21 years, of good moral character, and who possesses the requisite qualifications of learning and ability, should be entitled to admission to practice in all the courts of this state." This was leaving the rule for admission to be essentially as it before existed, for it must of necessity belong to the courts, in which the admission is applied for, to judge of the satisfactory test of the good moral character and the requisite learning and ability of the candidates.

The courts ought to be vigilant and thorough in their examination respecting the ability, learning, and character of candidates for admission to practise as advocates in the courts. The interests of clients, the safety of the community, the purity, intelligence, and integrity of the administration of justice, and, indeed, the preservation of all our constitutional rights and liberties, are deeply concerned in the elevated, moral, and educational standard and character of the members of the legal profession.

(*b*) Act of Congress of September 24, 1789, sec. 35.

[1] He can now act as both. *Ex parte* Garland, 4 Wall. 333, 375.

Attorney-General of the United States; and besides special and incidental duties, it is made generally his duty to prosecute and conduct all suits in the Supreme Court in which the United States are concerned, and to give his advice and opinion upon questions of law, when required by the President or the heads of the departments.[1] Each judicial district has likewise a public officer to act as attorney for the United States in the district, and to prosecute all delinquents for crimes or offences cognizable under the authority of the United States, and to prosecute all civil actions within his district in which the United States are concerned. (*c*)

3. **Of Clerks.** — Clerks are appointed by the several courts, except that the clerk of the district court is *ex officio* clerk of the circuit court in such district. (*x*) They have the custody of the

(*c*) Ib. The act of Congress of 29th May, 1830, [c. 153,] sec. 1, instituted the office of *Solicitor of the Treasury;* and it is his duty to direct and superintend all orders, suits, or proceedings in law or equity, for the recovery of money, chattels, and lands, in the name and for the use of the United States, and to have charge of all lands and other property conveyed to the United States in payment of debts, and of all trusts created for their use in payment of debts due to them, and to sell and dispose of lands assigned to the United States, or vested in them by mortgage in payment of debts; and to instruct the district attorneys, marshals, and clerks of the circuit and district courts, in relation to suits in which the United States are concerned. See the act aforesaid, in which his powers and duties are specifically detailed. [See 12 U. S. St. at L. 739; 14 id. 207.]

[1] But not when required by a subordinate officer, 10 Op. Att.-Gen. 458; and only in actual cases presented for the action of an executive department, 11 Op. Att.-Gen. 189; ib. 431; 10 id. 50. See, generally, as to this office, 6 Op. Att.-Gen. 326, and especially the act of June 22, 1870, c. 150, 16 U. S. St. at L. 162, establishing the Department of Justice, and also creating the office of Solicitor-General.

An act of Jan. 24, 1865, requiring a test oath of attorneys and counsellors before they should be allowed to practise in the United State courts, was held unconstitutional in *Ex parte* Garland, 4 Wall. 333, stated at length, *post*, 409, n. 1. See *Ex parte* Law, 35 Ga. 285; Murphy & Glover Test Oath Cases, 41 Mo. 339. See further, as to the constitutional rights of attorneys, Randall, Petr., 11 Allen, 473; *Ex parte* Bradley, 7 Wall. 364.

The clerk of each circuit court is to be appointed by the judge of that circuit. Act of April 10, 1869, c. 22, § 3, 16 U. S. St. at L. 45.

As to his bond, see act of March 3, 1863, c. 93, § 2, 12 U. S. St. at L. 768.

(*x*) An order of court requiring a service to be performed is sufficient authority as between a clerk of court, or a commissioner, and the government for the performance of the service, and for the allowance of the proper fee therefor. United States *v.* Van Duzee, 140 U. S. 169; United States *v.* Allred, 155 U. S. 591.

seal and records, and are bound to sign and seal all process, and to record the proceedings and judgments of the courts. And this is a trust of so much importance, that, in addition to the ordinary oath of office, clerks are obliged to give security to the public for the faithful performance of their duty. (*d*) To guard still further against abuse of office, all moneys paid into the circuit or district courts, or received by the officers in cases pending therein, are required to be immediately deposited in bank; and no money can be drawn out of the bank, except by an order of a judge, to be signed by him, and certified of record by the clerk. The clerks are likewise bound, at every regular session of the courts, to exhibit an account of all the moneys remaining in court. (*e*)

9. **Of Marshals.** — * Marshals are analogous to sheriffs at * 309 common law.[1] (*x*) They are appointed for each judicial district by the President and Senate, for the term of four years, but are removable at pleasure; and it is the duty of the marshal to attend the district and circuit courts, and to execute, within the district, all lawful precepts directed to him, and to command all requisite assistance in the execution of his duty. There are also various special duties assigned by statute to the marshals. The appointment of deputies is a power incidental to the office,

(*d*) Act of Congress of September 24, 1789, sec. 7.
(*e*) Act of March 3, 1817, [c. 108.]

[1] The marshals of the several districts and their deputies have the same powers in executing the laws of the United States as sheriffs and their deputies in the several states have by law in executing the laws of the respective states. Act of July 29, 1861, c. 25, § 7, 12 U. S. St. at L. 282. [By statute, March 1, 1879, c. 125, § 9, 20 St. at L. 341, marshals are given power to arrest persons found operating illicit distilleries, and to take them before a judicial officer within the county.]

A vacancy in the office of marshal may be filled by the circuit judge until an appointment is made by the President. Act of March 3, 1863, c. 93, § 2, 12 U. S. St. at L. 768.

(*x*) In general if the marshal, in enforcing State remedies, performs the same duties as are imposed by State law upon the sheriffs of the State courts, he can maintain in the circuit court the same actions that the sheriff has in the State court. Wade *v.* Wortsman, 29 Fed. Rep. 754. If replevin by process from a State court is attempted of goods in a marshal's possession, he can sue on the bond in his own name in the Federal court without regard to the citizenship of himself and the obligors in the bond. Patterson *v.* Mater, 26 Fed. Rep. 31. A suit brought upon the marshal's bond in a Federal circuit court is not dependent upon citizenship. See Adler *v.* Newcomb, 2 Dillon, 45; Wetmore *v.* Rice, 1 Biss. 237; United States *v.* Davidson, id. 433; Lawrence *v.* Norton, 13 Fed. Rep. 1.

and the marshal is responsible *civiliter* for their conduct, and they are removable not only at his pleasure, but they are also by statute made removable at the pleasure of the district or circuit courts. (*a*) The act says, that the marshal shall be removable *at pleasure*, without saying by whom; and on the first organization of the government, it was made a question whether the power of removal, in case of officers appointed to hold at pleasure, resided anywhere but in the body which appointed, and of course whether the consent of the Senate was not requisite to remove. This was the construction given to the Constitution while it was pending for ratification before the state conventions, by the author of the Federalist. "The consent of the Senate," the Federalist observes, (*b*) "would be necessary to displace as well as to appoint;" and he goes on to observe, that "those who can best estimate the value of a steady administration will be most disposed to prize a provision which connects the official existence of public men with the approbation or disapprobation of that body, which, from the great permanency of its own composition, will, in all probability, be less subject to inconstancy than any other member of the government." But the construction which was given to the Constitution by Congress,

after great consideration and discussion, was different.

* 310 In the act of establishing * the treasury department, (*a*)

the secretary was contemplated as being removable from office by the President. The words of the act are, "That *whenever the secretary shall be removed from office by the President of the United States*, or in any other case of vacancy in the office, the assistant shall act," &c. This amounted to a legislative construction of the Constitution, and it has ever since been acquiesced in and acted upon, as of decisive authority in the case. It applies equally to every other officer of government appointed by the President and Senate, whose term of duration is not specially declared. It is supported by the weighty reason, that the subordinate officers in the executive department ought to hold at the pleasure of the head of that department, because he is invested generally with the executive authority, and every participation in that authority by the Senate was an exception to a general principle, and ought to be taken strictly. The President is the

(*a*) Act of Congress of September 24, 1789, sec. 27.

(*b*) No. 77. (*a*) September 2, 1789, sec. 7.

great responsible officer for the faithful execution of the law, and the power of removal was incidental to that duty, and might often be requisite to fulfil it.

This question has never been made the subject of judicial discussion; and the construction given to the Constitution in 1789 has continued to rest on this loose, incidental, declaratory opinion of Congress, and the sense and practice of government since that time. It may now be considered as firmly and definitively settled, and there is good sense and practical utility in the construction. It is, however, a striking fact in the constitutional history of our government, that a power so transcendent as that is, which places at the disposal of the President alone the tenure of every executive officer appointed by the President and Senate, should depend upon inference merely, and should have been gratuitously declared by the first Congress in opposition to that high authority of the *Federalist; and should have been sup- *311 ported or acquiesced in by some of those distinguished men who questioned or denied the power of Congress even to incorporate a national bank. (*a*) [1]

(*a*) As the instances of the exercise of the power of removal from office have been multiplied beyond all former example, under President Jackson's administration, the propriety of the concession of the power itself, by the first Congress, has been strongly questioned. It is in the power of Congress, at any time, says a high authority, to correct the extensive operation of this executive power, by placing the appointment of *inferior officers* (and which would include ninety-nine out of a hundred of the lucrative offices of the government) in other hands. 3 Story's Comm. 394–397.

[1] *Tenure of Office Acts.* — By the Tenure of Office Act of March 2, 1867, 14 U. S. St. at L. 430, c. 154, § 1, it was enacted that every person who is appointed to any civil office by and with the advice and consent of the Senate, and who becomes duly qualified to act therein, shall be entitled to hold such office until a successor shall have been in like manner appointed and duly qualified, with a proviso as to the heads of departments. It may be considered as settled by the discussion which this act received before and after its passage, and by the events to which it gave rise, that it was within the constitutional power of the legislature to pass. Johnson's Trial, *passim*, 2 Am. Law Rev. 560; Cong. Globe, Feb. 1, 1867, Mr. Hale's Speech; United States *v.* Guthrie, 17 How. 284, 298; Webster's Speech in Senate, Feb. 16, 1835, Works, iv.; Marbury *v.* Madison, 1 Cranch, 137, 167, 168, 172.

The above provisions were repealed, however, by the act of April 5, 1869, c. 10, 16 U. S. St. at L. 6, and it was enacted instead, "that every person holding any civil office to which he has been or hereafter may be appointed by and with the advice and consent of the Senate, and who shall have become duly qualified to act therein, shall be entitled to hold such office during the term for which he shall have been appointed, unless sooner removed by and with the advice and con-

The marshal is obliged to give security to the United States in twenty thousand dollars, for the faithful performance of the duties of his office by himself and his deputies, and, together with his deputies, to take an oath of office. (*b*) By the common law, the death of the principal is a virtual repeal of authority of the substitute or deputy; but to guard against any inconvenience which might arise from the operation of this principle, and to prevent the mischiefs of a vacancy in office, the act establishing the judicial courts has provided, that in case of the death of the marshal, his deputies shall continue in office, unless otherwise especially removed, and shall execute the same in the name of the deceased marshal, until another marshal shall be appointed and sworn. So, a marshal, when removed from office, or his term of office expires, may still execute all process in his hands, and he remains responsible for his prisoners until they are duly delivered over to his successor. (*c*) And with respect to the custody of the prisoners, under the law of the United States, the marshal is directed to deliver his prisoners to the keeper of one of the jails of the state in which he is marshal, in cases where the legislature of the state, in conformity with the recommendation of Congress, have made it the duty of the jailers to receive them; but where they have not, the marshal, under the direction of the district judge, is to provide his own place of security. (*d*)

(*b*) Act of Congress of September 24, 1789, sec. 27. By the act of Congress of April 10, 1806, c. 21, the marshal's bonds are to be filed and recorded in the office of the clerk of the district court or circuit court sitting within the district; and suits for the breach of the condition of any such bond may be instituted *in the name* and for the sole use of the person injured by a breach of the condition of the bond, and judgments on the bond are to remain as a security for the benefit of any person injured by the breach thereof.

(*c*) Ib. sec. 28; [Doolittle *v.* Bryan, 14 How. 563; Stewart *v.* Hamilton, 4 McLean, 534; United States *v.* Bank of Arkansas, Hempst. 460.]

(*d*) Resolutions of Congress, September 23, 1789, and March 3, 1791. See also the act of Congress of January 6, 1800, and 1 Paine, 368. The marshal is bound to take from the prisoner under United States process a bond for the limits, as in the case for prisoners under state process.

sent of the Senate, or by the appointment, with the like advice and consent, of a successor in his place, except," &c.

The President is empowered, during any recess of the Senate, in his discretion, to suspend any such civil officer, except United States judges, until the end of the next session of the Senate, and to fill the vacancy in the mean time.

LECTURE XV.

OF THE ORIGINAL AND APPELLATE JURISDICTION OF THE SUPREME COURT.

HAVING taken a general view of the great departments of the government of the United States, I proceed to a more precise examination of its powers and duties, and of the degree of subordination under which the state governments are constitutionally placed.

The Constitution of the United States is an instrument containing the grant of *specific* powers, and the government of the Union cannot claim any powers but what are contained in the grant, and given either expressly, or by necessary implication.[1] The powers vested in the state governments by their respective constitutions, or remaining with the people of the several states prior to the establishment of the Constitution of the United States, continue unaltered and unimpaired, except so far as they are granted to the United States. We are to ascertain the true construction of the Constitution, and the precise extent of the residuary authorities of the several states, by the declared sense and practice of the governments respectively, when there is no collision; and in all other cases where the question is of a judicial nature, we are to ascertain it by the decisions of the Supreme Court of the United States; and those decisions ought to be studied and universally understood, in respect to all the leading questions of constitutional law. (*a*) The people of the United States have declared the Constitution to be the supreme law of the land, and it is entitled to universal and implicit obedience. Every act of Congress, and every act of the legislatures of the

(*a*) *Vide supra*, 243.

[1] But compare Legal Tender Cases, 12 Wall. 457, *ante*, 254, n. 1.

states, and every part of the constitution of any state, * 314 which are repugnant to the Constitution * of the United States, are necessarily void. This is a clear and settled principle of constitutional jurisprudence. The judicial power of the Union is declared to extend *to all cases* in law and equity arising under the Constitution; and to the judicial power it belongs, whenever a case is judicially before it, to determine what is the law of the land. The determination of the Supreme Court of the United States, in every such case, must be final and conclusive, because the Constitution gives to that tribunal the power to decide, and gives no appeal from the decision.

With respect to the judicial power, it may be generally observed, as the Supreme Court declared, in the case of *Turner* v. *The Bank of North America*, (*a*) that the disposal of the judicial power, except in a few specified cases, belongs to Congress; and the courts cannot exercise jurisdiction in every case to which the judicial power extends, without the intervention of Congress, who are not bound to enlarge the jurisdiction of the federal courts to every subject which the Constitution might warrant. So, again, it has been decided, (*b*) that Congress has not delegated the exercise of judicial power to the circuit courts, but in certain specific cases. Both the Constitution and an act of Congress must *concur* in conferring power upon the circuit courts. A considerable portion of the judicial power, placed at the disposal of Congress by the Constitution, has been intentionally permitted to lie dormant, by not being called into action by law. (*c*) The 11th section of the Judiciary Act of 1789, giving jurisdiction to the circuit courts, has not covered the whole ground of the Constitution, and those courts cannot, for instance, issue a *mandamus*, but in those cases in which it may be necessary to the exercise of their jurisdiction. (*d*)

1. Its Original Jurisdiction. — The original jurisdiction of the Supreme Court is very limited, and it has been decided that

(*a*) 4 Dallas, 8.

(*b*) M'Intire *v.* Wood, 7 Cranch, 504; Livingston *v.* Van Ingen, 1 Paine, 45; United States *v.* Hudson & Goodwin, 7 Cranch, 32; United States *v.* Bevans, 3 Wheaton, 336.

(*c*) Conkling's Treatise, 2d ed. 68.

(*d*) Smith *v.* Jackson, 1 Paine, 453; [Bath County *v.* Amy, 13 Wall. 244.]

Congress has no power to extend it.(e)[1](x) It is confined by the Constitution to those cases which affect ambassadors, other public ministers and consuls, and to those in which a state is a party;(f) and * it has been made a question, whether *315 this original jurisdiction of the Supreme Court was intended by the Constitution to be exclusive. The Judiciary Act of 1789 seems to have considered it to be competent for Congress to vest concurrent jurisdiction, in those specified cases, in other courts; for it gave a concurrent jurisdiction, in some of those cases, to the circuit courts.(a) (y) In the case of the *United States* v. *Ravara*, (b) this point arose in the Circuit Court for Pennsylvania district, and it was held that Congress could vest a concurrent jurisdiction in other courts, of those very cases over which the Supreme Court had original jurisdiction; and that the word "original" was not to be taken to imply exclusive cognizance of the cases enumerated. But the opinion of the Supreme Court of the United States, in *Marbury* v. *Madison* (c) goes far towards establishing the principle of exclusive jurisdiction in the Supreme Court in all those cases of original jurisdiction. This last case was considered, in *Pennsylvania* v. *Kosloff*, (d) as shaking the decision in the case of *Ravara;* and yet the question was still left in doubt by the Supreme Court, in the case of the *United*

(c) Marbury *v.* Madison, 1 Cranch, 137.
(a) Act of Congress, September 24, 1789, sec. 13.
(c) 1 Cranch, 137.
(f) Art. 3, sec. 2.
(b) 2 Dallas, 297.
(d) 5 Serg. & Rawle, 545.

[1] *Ex parte* Vallandigham, 1 Wall. 243, 252; *Ex parte* Yerger, 8 Wall. 85, 98; The Alicia, 7 Wall. 571. On the other hand, since the act of 1789, in all cases where original jurisdiction is given by the Constitution, the court has authority to exercise it without any further act of Congress to regulate its process or confer jurisdiction. Kentucky *v.* Dennison, 24 How. 66, 98.

See, as to cases in which a state is a party, *post*, 323, n. 1.

In the case of a suit which was brought in the Circuit Court against a foreign consul, and which failed on other grounds, it was laid down by Nelson, J., that the jurisdiction of the Supreme Court was not exclusive. Graham *v.* Stucken, 4 Blatchf. 50; St. Luke's Hospital *v.* Barclay, 3 Blatchf. 259; Lorway *v.* Lousada, 1 Lowell, 77, 1 Am. L. Rev. 92; Pennsylvania *v.* Wheeling Bridge Co., 13 How. 518, 563, 579.

(x) *Vide supra*, 298, n. (y)

(y) The constitutional grant of original jurisdiction to the U. S. Supreme Court of all cases affecting consuls does not prevent Congress from conferring original jurisdiction, in such cases, upon the subordinate courts of the Union. Börs *v.* Preston, 111 U. S. 252.

States v. *Ortega*, (*e*) and a decision upon it was purposely waived. (*f*) [1]

Admitting this original jurisdiction of the Supreme Court may be shared by other courts in the discretion of Congress, it has been decided, as we shall presently see, that this original jurisdiction cannot be enlarged, and that the Supreme Court cannot be vested, even by Congress, with any original jurisdiction in other cases than those described in the Constitution. It is the appellate jurisdiction of the Supreme Court that clothes it with most of its dignity and efficacy, and renders it a constant *316 object of attention and solicitude on the * part of the governments and the people of the several states. (*a*)

2. Its Appellate Jurisdiction in Cases pending in State Courts. — The Supreme Court has appellate jurisdiction, in certain cases, over final decisions in the state courts, but it has no power to review its own decisions, either at law or in equity. (*b*) [2]

(*e*) 11 Wheaton, 467.

(*f*) In the official opinion of the Attorney-General of the United States, in 1797, it was held that the Supreme Court of the United States had no *criminal* jurisdiction, until given by statute, and that it was capable of having it conferred by law in the case of ambassadors, &c., as in the case of libels, &c. Op. Att.-Gen. i. 42.

(*a*) The Imperial Chamber and the Aulic Council in the Germanic Constitution were tribunals of appellate jurisdiction only. It was the original law of Germany, that no man could be sued, except in the state or province to which he belonged. Hallam on the Middle Ages, i. 371, 372.

(*b*) Washington Bridge Company *v.* Stewart, 3 How. 413; [Schell *v.* Dodge, 107 U. S. 629.]

[1] *Ante*, 314, n. 1.

[2] It may decline to follow its own decisions in subsequent cases, however, as in the Legal Tender Cases, 12 Wall. 457, *ante*, 254, n. 1. See also Washington University *v.* Rouse, 8 Wall. 439, 444.

On the next point see, besides the act referred to in the text, the act of Feb. 5, 1867, *ante*, 300, n. 1.

As to what is a suit, see 297, n. (*d*) and n. 1. Aldrich *v.* Ætna Co., 8 Wall. 491; *post*, 326, n. 1, where the appellate jurisdiction of the Supreme Court to revise decisions of state courts is also considered.

A judgment affirming that of a lower court and remanding the case to that court is not final within the act, Reddall *v.* Bryan, 24 How. 420; nor is an order affirming a refusal of a lower court to grant a new trial, Sparrow *v.* Strong, 4 Wall. 584; nor is a judgment reversing that of a lower court, and awarding a new trial, Tracy *v.* Holcombe, 24 How. 426; [Bostwick *v.* Brinkerhoff, 106 U. S. 3;] nor is a decree upon a motion to dissolve an injunction in the course of a chancery cause, when the bill is not finally disposed of, Verden *v.* Coleman, 18 How. 86; nor, generally, is a decision which rests in the discretion of a court of original jurisdiction, Cook *v.* Burnley, 11 Wall. 672, 676; Wells *v.* McGregor, 13 id. 188. But a refusal by a state court to allow the re-

We have seen (*c*) that, by the act of Congress of the 24th of September, 1789, sec. 25, a final judgment or decree in any suit in the highest court of law or equity of a state, where is drawn in question the validity of a treaty, and the decision is against its validity; or where is drawn in question the construction of a treaty, and the decision is against the title, right, or privilege set up or claimed under it, may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon a writ of error; and, upon reversal, the cause may be remanded for final decision, or the Supreme Court may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. The word *final*, in the Judiciary Act, is understood to apply to all judgments and decrees which *determine the particular cause;* and it is not to be confined to those judgments and decrees which are final so as to terminate all further or renewed litigation, in a new suit on the same right. (*d*) Under this appellate authority, it was declared in the case of *Clerke* v. *Harwood*, (*e*) that if the highest court in a

(*c*) *Supra*, 299.

(*d*) Weston *v.* City Council of Charleston, 2 Peters, 449. See Judge Conkling's Treatise on the Courts of the United States, 2d ed. 23, for a citation of the cases on this point. This treatise of the learned judge is copious, accurate, and a very useful digest for the profession. The details of the practice of the courts of the United States, supported by a full review of the statutes, judicial decisions, and rules of the courts, are excellent.

(*e*) 3 Dallas, 343.

moval of a suit to the United States courts is. Kanouse *v.* Martin, 14 How. 23. [In Williams *v.* Bruffy, 102 U. S. 248, a denial of a writ of *supersedeas* by the Virginia Court of Appeals was held a final judgment. So a judgment denying a writ of *mandamus;* this proceeding being now regarded as an action, and not merely as a prerogative writ. Hartman *v.* Greenhow, ib. 672. — B.]

The rule laid down as to appeals from United States courts is, that "when the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained by the Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed." Forgay *v.* Conrad, 6 How. 201, 204; Thomson *v.* Dean, 7 Wall. 342.

The writ lies to an inferior state court if that is the highest court in which a decision could be made in the case under the state laws. Downham *v.* Alexandria, 9 Wall. 659.

state reverse the judgment of a subordinate court, and, on appeal to the Supreme Court of the United States, the judgment of the highest state court be in its turn reversed, it becomes a mere nullity, and the mandate for execution may issue to the inferior state court. But, in the case of *Fairfax* v. *Hunter*, (*f*) a writ of error from the Supreme Court of the United States was awarded to the Court of Appeals of Virginia, upon a judgment in * 317 * that court against the right claimed under a construction of the treaties made with Great Britain in 1783 and 1794, and the judgment of the Court of Appeals was reversed, and the cause remanded, and the Court of Appeals below were required to cause the original judgment, which had been reversed in that court, to be carried into due execution. The Court of Appeals, when the cause came back to them, resolved that the appellate power of the Supreme Court of the United States did not extend to that court, and that so much of the act of Congress as extended the appellate jurisdiction of the Supreme Court to that court was not warranted by the Constitution; and that the proceedings in the Supreme Court were *coram non judice* in relation to that court; and they consequently declined obedience to its mandate. A writ of error was awarded upon this refusal, and the cause came up again before the Supreme Court of the United States, in a case in which the judgment of the court below drew in question and denied the validity of the statute of the United States, authorizing an appeal from a state court. (*a*)

A graver question could scarcely have arisen in that court, or one involving considerations of higher importance and delicacy, or more deeply affecting the permanency and tranquillity of the American Union. In the opinion which was delivered, the court observed that the Constitution unavoidably dealt in general language, and did not enter into a minute specification of powers, or declare the means by which those powers were to be carried into execution. This would have been a perilous and difficult, if not an impracticable task; and the Constitution left it to Congress, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom and the public interest should require.

The judicial power of the United States is declared to extend to all cases arising under treaties made under the

(*f*) 7 Cranch, 608.

(*a*) Martin *v.* Hunter, 1 Wheaton, 304.

*authority of the United States. It was an absolute grant *318 of the judicial power in that case, and it was competent for the people of this country to invest the general government with that, or with any other powers they might deem proper and necessary, and to prohibit the states from the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact. Congress were bound, by the injunctions of the Constitution, to create inferior courts, in which to vest all that judicial jurisdiction which was exclusively vested in the United States, and of which the Supreme Court cannot take any other than an appellate cognizance. The whole judicial power must be at all times vested, either in an original or appellate form, in some courts created under the authority of the United States. The grant of the judicial power was absolute, and it was imperative upon Congress to provide for the appellate jurisdiction of the federal courts, in all the cases in which judicial power was exclusively granted by the Constitution, and not given by way of original jurisdiction to the Supreme Court.

The court, in their examination of the judicial power, supposed that the Constitution took a distinction between two classes of enumerated cases. It intended that the judicial power, either in an original or appellate form, should extend absolutely to *all cases* in law and equity arising under the Constitution, the laws of the United States, and treaties made under their authority; and to all cases affecting ambassadors, other public ministers and consuls; and to all cases of admiralty and maritime jurisdiction; because those cases were of vital importance to the sovereignty of the Union, and they entered into the national policy, and affected the national rights, and the law and comity of nations. The original or appellate jurisdiction ought, therefore, to be commensurate with the mischiefs intended to be remedied, and the policy in view. But in respect to another class of cases, the Constitution seemed *ex industria*, to drop the word *all*, and to extend the jurisdiction of the *judiciary, not to all contro- *319 versies, but to controversies in which the United States were a party, or between two or more states, or between citizens of different states, &c., and to leave it to Congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate. But whatever weight might be due to that distinction, it was held to be manifest that the judicial

power was unavoidably, in some cases, exclusive of all state authority, and, in all others, might be made so at the election of Congress.[1] The Judiciary Act, throughout every part of it, and particularly in the 9th, 11th, and 13th sections, assumed that, in all cases to which the judicial powers of the United States extended, Congress might rightfully vest exclusive jurisdiction in their own courts. The criminal, and the admiralty and maritime, jurisdiction must be exclusive; and it was only in those cases where, previous to the Constitution, state tribunals possessed jurisdiction independent of national authority, that they could now constitutionally exercise a concurrent jurisdiction.

The exercise of appellate jurisdiction was not limited by the Constitution to the Supreme Court. Congress might create a succession of inferior tribunals, in each of which it might vest appellate as well as original jurisdiction. The appellate jurisdiction of the Supreme Court, in cases where it had not original jurisdiction, was declared to be subject to such exceptions and regulations as Congress might prescribe. It remained, therefore, entirely in the discretion of Congress to cause the judicial power to be exercised in every variety of form of appellate jurisdiction, and the appellate power was not limited to cases pending in the courts of the United States. If it had been limited to cases in those courts, it would necessarily follow that the jurisdiction of the federal courts must have been exclusive of state courts, in all the cases enumerated in the Constitution. If the judicial power of the United States extends to all cases arising under the Constitution, laws, and treaties of the Union, and to all cases
* 320 of admiralty and maritime jurisdiction, * the state courts could not, consistently with the express grant in the Constitution, entertain any jurisdiction in those cases without the right of appeal. If the state courts might entertain concurrent jurisdiction over any of those cases without control, then the appellate jurisdiction of the United States, as to such cases, would have no existence, which would be contrary to the manifest intent of the Constitution. The appellate power of the federal courts must extend to the state courts, so long as the state courts entertain any concurrent jurisdiction over the cases which the Constitution has declared shall fall within the cognizance of the judicial power. It is very plain that the Constitution did contemplate

[1] The Moses Taylor, 4 Wall. 411, 429; *post*, 369, n. 1.

that cases within the judicial cognizance of the United States would arise in the state courts, in the exercise of their ordinary jurisdiction; and that the state courts would incidentally take cognizance of the cases arising under the Constitution, the laws, and the treaties of the United States; and as the judicial power of the United States extended to all such cases, by the very terms of the Constitution, it followed, as a necessary consequence, that the appellate jurisdiction of the courts of the United States must and did extend to the state tribunals, and attach upon every case within the cognizance of the judicial power.

All the enumerated cases of federal cognizance are those which touch the safety, peace, and sovereignty of the nation, or which presume that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct or control the regular administration of justice. The appellate power, in all these cases, is founded on the clearest principles of policy and wisdom, and is deemed requisite to fulfil effectually the great and beneficent ends of the Constitution. It is likewise necessary, in order to preserve uniformity of decision throughout the United States upon all subjects within the purview of the Constitution; and the mischiefs of opposite constructions and contradictory decisions in the different states, on all these points of general concern, would be deplorable.

* The right of removal of a cause from a state court by * 321 a defendant, who is entitled to try his rights and assert his privileges in the national forum, is also the exercise of appellate jurisdiction; and the right of removal of a cause may exist before or after judgment, in the discretion of Congress. The Supreme Court, by a train of reasoning which appears to be unanswerable and conclusive, came to the decision, that the appellate power of the United States did extend to cases pending in the state courts, and that the 25th section of the Judiciary Act of 1789, authorizing the exercise of this jurisdiction in the specified cases by a writ of error, was supported by the letter and spirit of the Constitution. The judgment of the Court of Appeals, in Virginia, rendered on the mandate in the cause, and denying the appellate jurisdiction of the Supreme Court, was consequently reversed, and the judgment of the District Court in Virginia, which the Court of Appeals in Virginia had reversed, was affirmed.

3. Its Powers in Cases of Mandamus. — Whether the Supreme Court had authority to issue the compulsory process of *mandamus* to the state courts, to enforce the judgment of reversal, was a question which the court did not think it necessary to discuss or decide; and one of the judges, in the separate opinion which he gave in the cause, seemed to think that the Supreme Court, in the exercise of its appellate jurisdiction, was supreme over the parties and over the case, but that it had no compulsory control over the state tribunals. The court itself gave no intimation of an opinion whether it could or could not lawfully resort to compulsory or restrictive process, operating *in personam* upon the state tribunals; and it was no doubt deemed discreet not to assert more authority constitutionally vested in the court than was necessary for the occasion. If the appellate jurisdiction be founded, as it no doubt was in that case, on a solid basis, it would seem to carry with it, as of course, all the coercive power incident to every such jurisdiction, and requisite to support it.

* 322 * Another question which was largely discussed and profoundly considered by the Supreme Court, was touching its authority to issue a *mandamus* when not arising in a case under its appellate jurisdiction, and when not required in the exercise of its original jurisdiction. In the case of *Marbury* v. *Madison*, (*a*) the plaintiff had been nominated by the President, and, by and with the advice and consent of the Senate, had been appointed a justice of the peace for the District of Columbia, and the appointment had been made complete and absolute by the President's signature to the commission, and the commission had been made complete by affixing to it the seal of the United States. The Secretary of State, after all this, withheld the commission, and the withholding of it was adjudged to be a violation of a vested legal right, for which the plaintiff was entitled to a remedy by *mandamus*; and the only question was, whether the *mandamus* could constitutionally issue from the Supreme Court. (*b*) [1] (*x*)

(*a*) 1 Cranch, 137.

(*b*) In the case of Kendall *v.* The United States, 12 Peters, 524, it was decided that the Circuit Court for the District of Columbia had authority to issue and enforce

[1] *Mandamus.* — See, besides the cases cited in note (*b*), *Ex parte* De Groot, 6 Wall. 497. A ministerial duty, the performance of which may be enforced by

(*x*) Mandamus will not issue until all adequate remedies are exhausted. *Ex parte* Virginia Commissioners, 112 U. S. 177. As its office is to prevent an unlaw-

The Judiciary Act, sec. 13, authorized the Supreme Court to issue writs of *mandamus*, in cases warranted by the principles

obedience to a *mandamus*, requiring the performance of a mere ministerial act by the Postmaster-General, and which neither he nor the President had any authority to deny or control; for the Postmaster-General is not subject to the direction and control of the President, with respect to the execution of duties imposed upon him by law. The President has no dispensing power over the law, nor will a *mandamus* lie to correct the erroneous judgment of an inferior court. It is not the process to review judicial errors of any kind. *Ex parte* Hoyt, 13 Peters, 279; *Ex parte* Whitney, 13 Peters, 404. This is a settled principle in English and American law. The King *v.* Justices of Monmouthshire, 7 Dowl. & Ryl. 334; Judges of Oneida *v.* The People, 18 Wendell, 79; The People *v.* Judges of Dutchess C. P., 20 Wendell, 658.

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mandamus or injunction, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under circumstances admitted or proved to exist, and imposed by law. Mississippi *v.* Johnson, 4 Wall. 475, 498, stated *post*, 323, n. 1. Such is not the act of the Secretary of the Interior in ordering the Commissioner of the Land Office to cancel an entry for land. Gaines *v.* Thompson, 7 Wall. 347. See Secretary *v.* McGarrahan, 9 Wall. 298, and Litchfield *v.* Register & Receiver, ib. 571. *Post*, 323, n. 1. Nor does a *mandamus* lie to compel the head of a department to pay a salary, at the instance of the claimant of an office to which the salary is incident. United States *v.* Guthrie, 17 How. 284; United States *v.* Seaman, ib. 225; Reeside *v.* Walker, 11 How. 272; Brashear *v.* Mason, 6 How. 92; Commissioner of Patents *v.* Whiteley, 4 Wall. 522; *post*, 384, n. (*c*). Compare Grenville-Murray *v.* Earl of Clarendon, L. R. 9 Eq. 11. Some state courts have declined to issue the writ to compel a governor to perform a statutory duty of a ministerial sort, as inconsistent with the division of the powers of government into three co-ordinate departments. Mauran *v.* Smith, 8 R. I. 192, 217, and cases cited *pro* and *contra*. *Ante*, 296, n. 1, 221 n. 1; *post*, 323, n. 1.

Mandamus is an appropriate remedy to compel an inferior court to restore an

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ful assumption of jurisdiction, (*Ex parte* Gordon, 104 U. S. 515; Smith *v.* Whitney, 116 U. S. 176), it will not be issued when the proper remedy is by appeal, as from the erroneous decree of a court of admiralty, *Ex parte* Pennsylvania, 109 U. S. 174; or where a State court is continuing to proceed in a cause after its removal. Chesapeake R. Co. *v.* White, 111 U. S. 134. But it is the proper remedy to compel judicial action, or whenever there is a real refusal to hear and decide a cause. Harrington *v.* Holler, 111 U. S. 796; *Ex parte* Morgan, 114 U. S. 174; *Ex parte* Parker, 120 U. S. 743; *Re* Chateaugay Ore & Iron Co., 128 U. S. 544; *In re* Green, 141 U. S. 325; *In re* Haberman Manuf. Co., 147 id. 525; *In re* Hawkins, id. 486; *In re* Morrison, id. 14; Virginia *v.* Paul, 148 U. S. 107; *In re* Parsons, 150 U. S. 150; *In re* Hohorst, id. 653; Seymour *v.* United States, 2 App. D. C. 240. The Federal courts will not by mandamus or injunction control the action of departmental officers respecting matters within their jurisdiction and pending before them. New Orleans *v.* Paine, 147 U. S. 261. The performance of ministerial duties, not involving the exercise of judgment or discretion, may be required by the courts. Noble *v.* Union River Logging Railroad Co., 147 U. S. 165, 171; see

and usages of law, to any courts appointed, or persons holding office, under the authority of the United States. There was no

attorney at law disbarred by it in excess of its jurisdiction, *Ex parte* Bradley, 7 Wall. 364; or when an appeal is refused by the inferior court, and to compel the production of the transcript, United States *v.* Gomez, 3 Wall. 752, 766. So, the writ will issue to compel the execution of a previous order of the Supreme Court on the reversal of the judgment of the court below. *Ex parte* Milwaukee R. R., 5 Wall. 825; *Ex parte* Dubuque & P. R. R., 1 Wall. 69. [*Ex parte* Bradley is approved in Virginia *v.* Rives, 100 U. S. 313. But *mandamus* will not issue to compel an inferior court to reverse a decision rendered while acting within its jurisdiction. *Ex parte* Burtis, 103 U. S. 238; *Ex parte* Railway Co., 101 U. S. 711; *Ex parte* Flippin, 94 U. S. 348. See Marquez *v.* Frisbie, 101 U. S. 473. But *mandamus* does lie to an inferior court to compel an exercise of discretionary power one way or the other. See *Ex parte* Newman, 14 Wall. 152. Except in cases of *mandamus* to inferior courts of the United States, and to officers of the United States, the federal courts issue the writ only in aid of a jurisdiction otherwise acquired. Bath County *v.* Amy, 13 Wall. 244; Davenport *v.* County of Dodge, 105 U. S. 237, 242. In United States *v.* Shurz, 102 U. S. 378, a *mandamus* from the Supreme Court of the District of Columbia, to the Secretary of the Interior, ordering him to deliver a patent to part of the public lands, which patent had been regularly signed, sealed, countersigned, and recorded, was sustained by the Supreme Court. — B.]

In Riggs *v.* Johnson County, 6 Wall. 166, it was held that a *mandamus* might be issued by the Circuit Court to compel a county to levy a tax as required by statute, in order to pay a judgment recovered in that court on its bonds, although the levy has been enjoined by the state court, on the ground that the bonds were void by state laws. See also Webber *v.* Lee, ib. 210; United States *v.* Keokuk, ib. 514, 518: *Ex parte* Holman, 28 Iowa, 88; The Mayor *v.* Lord, 9 Wall. 409; *post*, 410. See further, generally, Von Hoffman *v.* Quincy, 4 Wall. 535; Knox County *v.* Aspinwall, 24 How. 376.

Carrick *v.* Lamar, 116 U. S. 426; United States *v.* Black, 128 U. S. 40; *In re* Penn. Co., 137 U. S. 451; United States *v.* Lamont, 155 U. S. 303; 2 App. D. C. 532; *ante*, p. 282, note; 19 Am. L. Rev. 505. The circuit courts can only issue writs of mandamus as ancillary to other proceedings, even where this writ is a civil action by the State law. Rosenbaum *v.* Bauer, 120 U. S. 450; Gares *v.* Northwest &c. Ass., 55 Fed. Rep. 209; *In re* Vintschger, 50 id. 459.

Mandamus will not operate to perform the office of an appeal, or a writ of error, or of *quo warranto*, nor will the writ be issued to compel a decision in a certain way by the lower court. *In re* Rice, 155 U. S. [418]

396; see *Re* Burdett, 127 U. S. 771; Maverick Oil Co. *v.* Hanson (N. H.), 29 Atl. Rep. 461; United States *v.* Swan, 65 Fed. Rep. 647.

A mandamus has been issued by a State court to compel the speaker of a legislative assembly to perform a duty which is purely ministerial and imposed by the State Constitution. Benton *v.* Elder, 31 Neb. 169; see 49 Albany L. J. 436; Harvey *v.* McFarland (Iowa), 57 N. W. Rep. 410. In Kansas it is held that the Governor of a State may be required by mandamus or injunction to perform purely ministerial duties imposed upon him by statute, when these duties are such as might devolve upon any other officer or

doubt that the act applied to the case, and gave the power, if the law was constitutional; but the court was of opinion that the act, in this respect, was not warranted by the Constitution, because the issuing of a *mandamus* in this case would be an exercise of original jurisdiction not within the Constitution, and Congress had not power to give *original* jurisdiction to the Supreme Court in other cases than those described in the Constitution. It had not authority to give to the Supreme Court appellate jurisdiction, where the Constitution had declared that its jurisdiction should be original, nor original jurisdiction where the Constitution had declared it should be appellate. To enable the court to issue a *mandamus*, it must be shown to be an exercise, or *necessary to an exercise, of appellate *323 jurisdiction.

The Supreme Court may accordingly issue a *mandamus* to a circuit court of the United States, commanding it to sign a bill of exceptions, for this is an exercise of power warranted by the principles and usages of law. (*a*)

4. Its Original Jurisdiction where a State is a Party. — The Constitution gives to the Supreme Court original jurisdiction in those cases in which a state shall be a party; and in *Fowler* v. *Lindsey*, (*b*) the question arose, *when* a state was to be considered a

(*a*) *Ex parte* Crane, 5 Peters, 190.(*x*) In the case of Barry *v.* Mercein, [5 How. 103,] in the Supreme Court of the United States, at Washington, January, 1847, it was adjudged that a writ of error would not lie to the Supreme Court, upon the judgment of a Circuit Court, refusing to grant a writ of *habeas corpus*, in a case of a father claiming from the mother his infant daughter. The case did not come within the provision of the 22d section of the Judiciary Act of 1789. The case was not within the limits assigned by the act of Congress to the appellate jurisdiction of the Supreme Court. [Compare *Ex parte* Everts, 1 Bond, 197, with Bennett *v.* Bennett, Deady, 299.]

(*b*) 3 Dallas, 411.

agent. Martin *v.* Ingham, 38 Kansas, 641; Householder *v.* Morrill (Kansas), 40 Pac. Rep. 664. In Missouri, on the other hand, it is held that there is no valid distinction between the Governor's political and ministerial acts and that the executive cannot be in any way controlled by another department of state government. State *v.* Stone, 120 Mo. 428. See Greenwood C. L. Co. *v.* Routt (17 Col. 156), 31 Am. St. Rep. 284 & n. In Illinois, a citizen who refuses a municipal office, to which he has been appointed, may be required by mandamus to discharge its duties, although a penalty is imposed by statute for non-acceptance. People *v.* Williams, 145 Ill. 573.

(*x*) See also *Re* Chateaugay Ore & Iron Co., 128 U. S. 544.

party.[1] (*y*) The parties in that suit claimed title to lands under grants from different states. The plaintiff brought his ejectment

[1] A suit against the governor of a state in his official character is a suit against the state. Kentucky *v.* Dennison, Governor of Ohio, 24 How. 66. [In Louisiana *v.* Jumel, 107 U. S. 711, the Supreme Court (Justices Field and Harlan dissenting) refused to maintain a suit in equity, and to issue a *mandamus* to compel the officers of the State of Louisiana to carry out a law of that state, previously passed, for levying an annual tax and appropriating the proceeds to the payment of the state debt, and providing that the act should establish a contract between the state and its creditors. The officers had been prohibited, by an amendment to the state constitution, from carrying out the act. It was contended, however, that this amendment was void, as impairing the obligation of the state contract. The court decided that the taking of the necessary steps to carry out the law passed was not a mere ministerial duty, and could not be enforced by *mandamus;* nor was any trust created by the act. Board of Liquidation *v.* McComb, 92 U. S. 531, arose under the same statute. The state board of liquidation were enjoined from admitting certain persons to the benefit of the statute. See further, for suits against officers as distinct from the government they represent, Davis *v.* Gray, 16 Wall.

(*y*) By the eleventh Amendment, "suits between individuals, unless the State is a party, in a substantial sense, are left untouched, no matter how much their determination may incidentally and consequentially affect the interests of a State, or the operations of its government." Matthews, J. in Poindexter *v.* Greenhow, 114 U. S. 270, 297. That Amendment does not apply when a State is interested only in a governmental way, as in a suit against State officers to restrain unjust and unreasonable rates fixed for common carriers by State authority. Reagan *v.* Farmers' Loan & Trust Co., 154 U. S. 362, 420.

A suit to compel State officers to do what they are required to do by a State statute is not a suit against the State. Rolston *v.* Missouri Fund Commissioners, 120 U. S. 390; *In re* Ayers, 123 U. S. 443.

The court will decline to take jurisdiction when it is clear that a State is an indispensable party. Cunningham *v.* Macon & Brunswick R. Co., 109 U. S. 446. In general it is only when some contract of the State is at the foundation of the litigation that the Federal courts are deprived of jurisdiction. Chicago & N. W. Ry. Co. *v.* Dey, 35 Fed. Rep. 866, 870; see *ante*, 298, n. (*y*).

The statute providing for removals does not apply to a suit in which a State is the sole plaintiff. Stone *v.* South Carolina, 117 U. S. 430; People *v.* Southern Pacific R. Co., 65 Cal. 553. "The mere fact that a State is the plaintiff is not a conclusive test that the controversy is one in which this court is authorized to grant relief against another State or her citizens." . . . Controversies between two States have usually been such as related to the boundaries of their territory. . . . As to "controversies between a State and citizens of another State," the object of this jurisdiction was to avoid partiality, or suspicion thereof, through a national tribunal. "The grant is of 'judicial power,' and was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one State, of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other State at all." Gray, J. in Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 287.

in the Circuit Court of Connecticut, claiming title under a grant from that state, and under a claim that the lands lay within the jurisdiction of that state. The defendant claimed title under a grant from New York, and on the ground that the lands lay within the rightful as well as actual jurisdiction of New York. The court laid down this rule on the subject of the jurisdiction of the Supreme Court, on account of the interest that a state has in the controversy, that it must be a case in which a state is either nominally or substantially the party; and that it is not sufficient that the state may be consequentially affected, as being bound to make retribution to her grantee upon the event of eviction. Though there may be a controversy relative to soil or jurisdiction between two states, yet if that controversy occurs in a suit between two individuals, to which neither of the states is a party upon the record, it is not a case within the original jurisdiction of the Supreme Court, because the states may contest the right of soil in the Supreme Court at any time, notwithstanding a decision in the suit between the individuals. Nor will a decision as to the right of soil between individuals affect the right of the state as to * jurisdiction; and that jurisdiction * 324 may remain unimpaired, though the state may have parted

203; United States *v.* Lee, 106 U. S. 196. In New Hampshire *v.* Louisiana; New York *v.* Same, 108 U. S. 76, it was held that one state could not acquire jurisdiction to sue another in the Supreme Court of the United States, by taking assignments of debts due from defendant state to citizens of plaintiff state for purposes of collection merely. — B.]

Shortly after the close of the rebellion a suit was brought in the Supreme Court purporting to be by the state of Texas, and sanctioned by the provisional governor of 1865, by the governor elected under the constitution of 1866, and by the governor afterwards appointed by the commander of the district. It was held to be well brought, three judges dissenting on the ground that, as a political fact, Texas was not one of the United States. Texas *v.* White, 7 Wall. 700. Two other cases of interest, arising out of the war, may as well be stated here as elsewhere, though not strictly in place. In the first, the state of Mississippi sought to file a bill to enjoin Andrew Johnson, President of the United States, from carrying into effect the Reconstruction Acts, so called, which were alleged to be unconstitutional; but the court refused to allow it, on the ground that they could not restrain or enforce the performance of his executive and political functions by the President. Mississippi *v.* Johnson, 4 Wall. 475; *ante*, 296, n. 1. In the second case, a bill by the state of Georgia to enjoin the Secretary of War, general of the army, and district commander from carrying out the same Reconstruction Acts (acts of Congress of March 2 and 23, 1867), on the ground that their doing so would destroy the corporate existence of the state, was dismissed, on motion, for want of jurisdiction. Georgia *v.* Stanton, 6 Wall. 50; *ante*, 322, n. 1.

with the right of soil. In such a case the Supreme Court would not allow an injunction, on a bill filed by the State of New York against the State of Connecticut, to stay proceedings in the ejectment suit between individuals, though a general claim of soil and jurisdiction was involved in the private suit, because the State of New York was not a party to the suit in the Circuit Court, nor interested in the decision. (*a*)

5. Its Appellate Jurisdiction regulated by Congress. — The appellate jurisdiction of the Supreme Court exists only in those cases in which it is affirmatively given. In the case of *Wiscart* v. *Dauchy*, (*b*) the Supreme Court considered that its whole appellate jurisdiction depended upon the regulations of Congress, as that jurisdiction was given by the Constitution in a qualified manner. The Supreme Court was to have appellate jurisdiction, "with such exceptions and under such regulations as Congress should make;" and if Congress had not provided any rule to regulate the proceedings on appeal, the court could not exercise an appellate jurisdiction; and if a rule be provided, the court could not depart from it. In pursuance of this principle, the court decided, in *Clarke* v. *Bazadone*, (*c*) that a writ of error did not lie to that court from a court of the United States territory northwest of the Ohio, because the act of Congress had not authorized an appeal or writ of error from such a court. It was urged that the judicial power extended to all cases arising under the Constitution, and that where a Supreme Court had not original, it had appellate jurisdiction, with such exceptions and under such regulations as Congress should make; and that the appellate power was derived from the Constitution, and must be full and complete, in all cases appertaining to the federal * 325 judiciary * where Congress had not by law interfered and controlled it by exceptions and regulations. The court, however, adhered to the doctrine which they had before laid

(*a*) New York *v.* Connecticut, 4 Dallas, 3. In the case of Rhode Island *v.* Massachusetts, 12 Peters, 657, it was decided, after a very elaborate discussion, that the Supreme Court had jurisdiction to ascertain and establish boundaries between two states, and to restore and confirm rights of sovereignty and jurisdiction. (*x*)

(*b*) 3 Dallas, 321.

(*c*) 1 Cranch, 212.

tri See *a* 298, n. (*y*). After the ry is adjusted, grants previ- o by the States beyond its true limits are void, if not confirmed by the other State. Coffee *v.* Groover, 123 U. S. 1.

down, and proceeded upon the principle, that though the appellate powers of the court were given by the Constitution, they were limited entirely by the judiciary statutes, which are to be understood as making exceptions to the appellate jurisdiction of the court, and to imply a negative on the exercise of such a power, in every case but those in which it is affirmatively given and described by statute.[1] This was the principle also explicitly declared in the case of *The United States* v. *More*, (*a*) and in the case of *Durousseau* v. *The United States*. (*b*) In the first of those cases, the rule of construction was carried to the extent of holding that no appeal or writ of error lay in a criminal case from the Circuit Court of the District of Columbia, because the appellate jurisdiction, as to that district, applied, by the terms of the statute, to civil cases only. The rule was afterwards, in *Ex parte Kearney*, (*c*) laid down generally, that the Supreme Court had no appellate jurisdiction from circuit courts in criminal cases confided to it by the laws of the United States. Nor has it any appellate jurisdiction over a judgment of the circuit courts, in cases brought before it by *writ of error* from a district court, though it has over judgments and decrees of the circuit courts in suits brought before them by *appeal* from the district courts. (*d*)

6. Its Appellate Jurisdiction confined to Cases under the Constitution, Treaties, and Laws. — The Constitution says, that the judicial

(*a*) 3 Cranch, 159. (*b*) 6 Cranch, 307.
(*c*) 7 Wheaton, 38; *Ex parte* Watkins, 3 Peters, 193; 7 Peters, 568, s. p. (*x*)
(*d*) United States *v.* Goodwin, 7 Cranch, 108; United States *v.* Gordon, ib. 287. But see *supra*, 299, now altered by act of Congress. Mr. Justice Story, in the case *Ex parte* Christy, 3 How. 292, 317, stated that no appeal was given or lies from the judgments either of the district or circuit courts in criminal cases. So it was adjudged that the Supreme Court has no power of appeal from the decrees of the District Court sitting in bankruptcy, and no power to issue a prohibition, except when the District Court is proceeding as a court of admiralty and maritime jurisdiction. See also *infra*, 383.

[1] *Ex parte* McCardle, 7 Wall. 506; The Lucy, 8 Wall. 307; *Ex parte* Graham, 10 Wall. 541, 542.

Neither a writ of prohibition nor *certiorari* will lie from the Supreme to the Circuit Court in a criminal case. The only mode of bringing such a case before the Supreme Court is by a certificate of the judges of the Circuit Court that they are divided in opinion. *Ex parte* Gordon, 1 Black, 503; Forsyth *v.* United States, 9 How. 571; United States *v.* Circuit Judges, 3 Wall. 673, 679.

(*x*) See also Tennessee *v.* Davis, 100 U. S. 257, 290; *In re* Coy, 127 [illegible] 731.

power shall extend to all cases arising under the Constitution, laws, and treaties of the United States; (*y*) and it has been made a question as to what was *a case* arising under a treaty. In * 326 * *Owings* v. *Norwood*, (*a*) there was an ejectment between two citizens of Maryland, for lands in that state; and the defendant set up an outstanding title in a British subject, which he contended was protected by the British treaty of 1794. The Court of Appeals decided against the title thus set up; and the Supreme Court of the United States held that not to be a case within the appellate jurisdiction of the court, because it was not a case arising under the treaty. The treaty itself was not drawn in question, either directly or incidentally. The title in question did not grow out of the treaty, and as the claim was not under the treaty, the title was not protected by it; and whether the treaty was an obstacle to the recovery, was then a question exclusively for the state court. (*b*) [1] (*z*)

(*a*) 5 Cranch, 344.

(*b*) A *case*, in the sense of the Constitution, says Mr. Justice Story (Commentaries on the Constitution, iii. 507), is a suit in law or equity, and arises when some subject touching the Constitution, laws, or treaties of the United States is submitted to the courts by a party who asserts his rights in the form prescribed by law. See also 9 Wheaton, 819, and 9 Peters, 224; [*infra*, n. 1, *ad finem*.]

[1] *Appeals from State Courts.* — Owings v. Norwood is confirmed by Henderson *v.* Tennessee, 10 How. 311; Verden *v.* Coleman, 1 Black, 472; [Miller *v.* Lancaster Bank, 106 U. S. 542; Long *v.* Converse, 91 U. S. 105; Hartell *v.* Tilghman, 99 U. S. 547.] See Lanfear *v.* Hunley, 4 Wall. 204, Semple *v.* Hagar, ib. 431, for cases where jurisdiction was declined; Reichart *v.* Felps, 6 Wall. 160, Silver *v.* Ladd, ib. 440, where jurisdiction was taken.

The Supreme Court cannot revise the judgment of a state court merely because the validity of a treaty or statute, or of an authority exercised under the United States, was drawn in question before it, if the decision was in favor of the author-

(*y*) By the U. S. Rev. Stats. § 707, the United States may appeal to the Supreme Court from all adverse judgments of the court of claims, and the claimant also has a like right of appeal where the amount in controversy exceeds $3,000, or his claim is forfeited under § 1089. Such review is limited to appeals, and cannot be had by writ of error. See United States *v.* Young, 94 U. S. 258; 95 id. 641; United States *v.* Jones, 119 U. S. 477; Shepherd *v.* Thompson, 122 U. S. 231; United States *v.* Gleeson, 124 U. S. 255; United States *v.* Davis, 131 U. S. 36; United States *v.* Mosby, 133 U. S. 273.

(*z*) When this jurisdiction depends solely upon some title, right, privilege, of immunity under the Constitution or laws of the United States, specially set up or claimed in the State Court, and there decided adversely thereto, "certain propositions," says Mr. Chief Justice Fuller in Sayward *v.* Denny, 158 U. S. 180, 183, "must be regarded as settled. 1. That the

7. Its Appellate Jurisdiction to Matter appearing on the Record. — The Judiciary Act of 1789 required, on error or appeal from a state court, that the error assigned appear on the face of the rec-

ity, treaty, or statute. Strader *v.* Baldwin, 9 How. 261; Ryan *v.* Thomas, 4 Wall. 603; *post*, 330, n. (*a*). But it was held in a case arising under the Legal Tender Acts that although the state court had decided in favor of the constitutionality of the acts, the Supreme Court of the United States had appellate jurisdiction, both by § 25 of the Judiciary Act of 1789 and by § 2 of the act of 1867 (*ante*, 300, n. 1), as the decision below was against a right claimed under the Constitution to have a note paid in coin. Trebilcock *v.* Wilson, 12 Wall. 687 (overruling Roosevelt *v.* Meyer, 1 Wall. 512). See The Banks *v.* The Mayor, 7 Wall. 16; Furman *v.* Nichol, 8 Wall. 44.

Again, if the judgment of the state court would have been the same if the error alleged to appear on the record had not been committed, or, in other words, if it does not appear by clear and necessary intendment that the question must have been raised and must have been decided in order to induce the judgment, the Supreme Court will not have jurisdiction. Williams *v.* Oliver, 12 How. 111; Gill *v.* Oliver, 11 How. 529; Millinger *v.* Hartupee, 6 Wall. 258, 262. Compare Minnesota *v.* Bachelder, 1 Wall. 109.

Again, the fact that a state court has declared a contract void which the Supreme Court might think valid is not enough. In such a case it must be the constitution or some law of the state which impairs the obligation of the contract. Railroad Co. *v.* Rock, 4 Wall. 177; Knox *v.* Exchange Bank, 12 Wall. 379; Northern R. R. *v.* The People, ib. 384. In Bridge Proprietors *v.* Hoboken Co., 1 Wall. 116, and Furman *v.* Nichol, 8 Wall. 44, the

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certificate of the presiding judge of the State court, as to the existence of grounds upon which our interposition might be successfully invoked, while always regarded with respect, cannot confer jurisdiction upon this court to re-examine the judgment below. Powell *v.* Brunswick County, 150 U. S. 433, 439, and cases cited. 2. That the title, right, privilege, or immunity must be specially set up or claimed at the proper time and in the proper way. Miller *v.* Texas, 153 U. S. 535; Morrison *v.* Watson, 154 U. S. 111, 115, and cases cited. 3. That such claim cannot be recognized as properly made when made for the first time in a petition for rehearing after judgment. Loeber *v.* Schroeder, 149 U. S. 580, 585, and cases cited. 4. That the petition for the writ of error forms no part of the record upon which action is taken here. Butler *v.* Gage, 138 U. S. 52, and cases cited. 5. Nor do the arguments of counsel, though the opinions of the State courts are now made so by rule. Gibson *v.* Chouteau, 8 Wall. 314; Parmelee *v.* Lawrence, 11 Wall. 36; Gross *v.* U. S. Mortgage Co., 108 U. S. 477, 484; United States *v.* Taylor, 147 U. S. 695, 700. 6. The right on which the party relies must have been called to the attention of the court, in some proper way, and the decision of the court must have been against the right claimed. Hoyt *v.* Sheldon, 1 Black, 518; Maxwell *v.* Newhold, 18 How. 511, 515. 7. Or, at all events, it must appear from the record, by clear and necessary intendment, that the Federal question was directly involved so that the State court could not have given judgment without deciding it; that is, a definite issue as to the possession of the right must be distinctly deducible from the record before the State court can be held to have dis-

ord, and immediately respect some questions affecting the validity or construction of the Constitution, treaties, statutes, or authorities of the Union. Under this act, it is not necessary that the

question was whether a state law did not impair the obligation of contracts. 12 Wall. 383.

In order to give the court jurisdiction, the statute, the validity of which is drawn in question, must be passed by a state, a member of the Union; it is not enough even that it is passed by a territory. Miners' Bank *v.* Iowa, 12 How. 1. Acts of other organized political bodies within the limits of the Union must be dealt with either under the power to put down insurrections, or by the penal laws of the state or territory in which they are acting. Scott *v.* Jones, 5 How. 343; *post*, 349. The court has no jurisdiction to determine whether a government organized in a state is the duly constituted government of the state or not. That is a question for the political power. Luther *v.* Borden, 7 How. 1; Texas *v.* White, 7 Wall. 700, 730, stated 323, n. 1. For other cases where the court has declined to entertain political questions, see 286, n. 1; The Protector, 12 Wall. 700 (as to the beginning and end of the rebellion).

Whether the act of Feb. 5, 1867, *ante*, 300, n. 1, repeals by omission the requirement of the Judiciary Act of 1789 that the error shall appear on the face of the record was left unsettled in Stewart *v.* Kahn, 11 Wall. 493, 503; Trebilcock *v.* Wilson, 12 Wall. 687, 694; but it seems that the law has not been changed, Klinger *v.* Missouri, 13 Wall. 257, 262. Cases under the former act are Walker *v.* Villavaso, 6 Wall. 124; The Victory, ib. 382; Furman *v.* Nichol, 8 Wall. 44; Worthy *v.* Commissioners, 9 Wall. 611; Insurance Co. *v.* The Treasurer, 11 Wall. 204. See

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posed of such Federal question by its decision. Powell *v.* Brunswick County, 150 U. S. 400, 433."

In order to obtain a review in the Supreme Court the judgment of the highest State court must have been against the plaintiff in error and have necessarily involved a Federal question duly claimed in the State court, and not merely have presented such a question with others in themselves sufficient to maintain the judgment. Brooks *v.* Missouri, 124 U. S. 394; Hale *v.* Akers, 132 U. S. 554; San Francisco *v.* Itsell, 133 U. S. 65; Cole *v.* Cunningham, id. 107; Hopkins *v.* McLure, id. 380; Beatty *v.* Benton, 135 U. S. 244; Johnson *v.* Risk, 137 U. S. 300; Butler *v.* Gage, 138 U. S. 52; Beaupré *v.* Noyes, id. 397; Missouri *v.* Andriano, id. 496; Davis *v.* Texas, 139 U. S. 651; Leeper *v.* Texas, id. 462; Williams *v.* Heard, 140 U. S. 529; New York & N. E. R. Co. *v.* Woodruff, 153 U. S. 689; Hagar *v.* California, 154 U. S. 639. See also Starin *v.* New York, 115 U. S. 248; Germania Ins. Co. *v.* Wisconsin, 119 U. S. 473; Kansas Pacific R. Co. *v.* Atchison R. Co., 112 U. S. 414; New Orleans Water-works Co. *v.* Louisiana Sugar Refining Co., 125 U. S. 18; De Saussure *v.* Gaillard, 127 U. S. 216; Chappell *v.* Bradshaw, 128 U. S. 132; Miller *v.* Swann, 150 U. S. 132; Eustis *v.* Bolles, id. 361; Newport Light Co. *v.* Newport, 151 U. S. 527; Tennessee *v.* Union & P. Bank, 152 U. S. 454; New Orleans *v.* Benjamin, 153 U. S. 411; Reagan *v.* Farmers' L. & T. Co., 154 U. S. 362, 420; No. Pac. R. Co. *v.* Patterson, id. 130; Gray *v.* Coan, id. 589; St. Louis, &c. Ry. Co. *v.* Merriam, 156 U. S. 478. So the Supreme Court has no jurisdiction to review by writ of error a State judgment alleged to impair the obligation of a contract, when no constitutional objection was made in the State court. Morrison *v.* Watson, 154

record should state in terms the misconstruction of the authority of the Union, or that it was drawn in question; but it must show some act of Congress applicable to the case, to give to the

Bridge Proprietors *v.* Hoboken Co., 1 Wall. 116; Nauer *v.* Thomas, 13 Allen, 572.

If the court can see clearly from the whole record, that a certain provision of the Constitution was relied on by the party who brings the writ of error, also that the right thus claimed by him was denied, it has jurisdiction, although the act of Congress or part of the Constitution supposed to be infringed by the state law is not pointed out in express words, Bridge Proprietors *v.* Hoboken Co., 1 Wall. 116, 143; Furman *v.* Nichol, 8 Wall. 44, 56; and it is said that if there is no valid ground for the judgment except one which raises a question under the act, it will be presumed to be based upon that, and jurisdiction will be taken. Klinger *v.* Missouri, 13 Wall. 257.

If it does not appear by necessary intendment from the record that a question within the act was raised and passed upon, there is no appellate jurisdiction, although the presiding judge certifies that it was so in fact. Railroad Co. *v.* Rock, 4 Wall. 177; Parmelee *v.* Lawrence, 11 Wall. 36. So the opinion cannot be resorted to for the purpose of showing that a question of federal cognizance was decided by the state court. Gibson *v.* Chouteau, 8 Wall. 314. So, on the other hand, if the record raises a question within the act, and it appears from the opinion only of the state court (although the same is required by a state law to be filed among the papers of a case) that there was a point in the case which was a ground of decision, but which was not within the act, the Supreme Court has jurisdiction. Rector *v.* Ashley, 6 Wall. 142. See further, Maguire *v.* Tyler, 8 Wall. 650.

It may be added that writs of error to state courts are not allowed as of right. The practice is to submit the record to a judge of the Supreme Court, who exam-

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U. S. 111. Adverse judgments upon rights or titles claimed under authority exercised under the general government may thus be reviewed. Carson *v.* Dunham, 121 U. S. 421. Mining claims and infringements of letters patents and copyrights necessarily involve Federal laws and questions. Cons. W. G. M. Co. *v.* Champion M. Co., 62 Fed. Rep. 945; Walter A. Wood H. Co. *v.* Minneapolis E. H. Co., 61 id. 256; Haggin *v.* Lewis, 66 id. 199.

When a Federal question is necessarily involved in the decisions of a State court, it need not appear affirmatively in its opinion or in the record that that question was raised and decided. Kaukauna W. P. Co. *v.* Green Bay & M. Canal Co., 142 U. S. 254. The judgment of the highest State court must have been final, not merely interlocutory. Farnsworth *v.* Montana, 129 U. S. 104; McCollum *v.* Howard, 154 U. S. 577. Decisions by the State court relating to its own practice, as that amendments of the record must be made before the end of the term, will be followed by the U. S. Supreme Court, and are not a denial by a State of the equal protection of the law to individuals. Fielden *v.* Illinois, 143 U. S. 452. A point once decided by the U. S. Supreme Court is not a Federal question. Kansas *v.* Bradley, 26 Fed. Rep. 289. Under the U. S. Rev. Stats. 709, the jurisdiction of the Supreme Court depends upon the question presented, and not upon the parties' citizenship. French *v.* Hopkins, 124 U. S. 524; McKenna *v.* Simpson, 129 U. S. 506.

The decision of a State court construing the laws of the Territory from which that State was formed will be followed by a Federal court, when there are no cogent

Supreme Court appellate jurisdiction. It will be sufficient, if it be apparent that the case, in point of law, involved one of the questions on which the appellate jurisdiction is made to depend by the 25th section of the Judiciary Act of 1789, and that the state court must have virtually passed upon it. (*c*) But the

(*c*) Craig *v.* State of Missouri, 4 Peters, 410. In Crowell *v.* Randell, 10 Peters, 368, the Supreme Court reviewed all the cases on the appellate jurisdiction of the court from the state courts; and it was decided, that to give the court appellate jurisdiction, two things must have occurred, and be apparent in the record, or by necessary inference from it: (1.) that some one of the questions stated in the 25th section of the Judiciary Act of 1789 *did arise* in the court below, and (2.) that a decision was actually made thereon by the same court in the manner required by the section. If both of these do not appear on the record, the appellate jurisdiction fails. 12 Peters, 507; Ocean Ins. Co. *v.* Polleys, 13 Peters, 157; Coons *v.* Gallager, 15 Peters, 18, S. P. See also Conklin's Treatise (2d ed.), 26.

ines whether the case upon the face of the record will justify the allowance of the writ. Twitchell *v.* Commonwealth, 7 Wall. 321; Gleason *v.* Florida, 9 Wall. 779.

See, as to what is a cause or suit, *ante*, 297, n. (*d*). A petition for a writ of *habeas corpus*, duly presented, is one. *Ex parte* Milligan, 4 Wall. 2, 112. So is a proceeding instituted in a state court by submitting an agreed statement of facts without any compulsory process. Aldrich *v.* Ætna Co., 8 Wall. 491. But when a district judge was authorized by act of Congress to adjudicate on certain claims, which were to be paid if the Secretary of the Treasury should, on a report of the evidence, deem it advisable, it was held that the judge acted as a commissioner, and no appeal lay. United States *v.* Ferreira, 13 How. 40; *Ex parte* Zellner, 9 Wall. 244, 247; United States *v.* Circuit Judges, 3 Wall. 673. See the similar decision as to the Court of Claims as formerly regulated, *ante*, 297, n. 1.

As to what is a final judgment, see 316, n. 1.

reasons for disregarding it. Capital Bank *v.* Barnes County School District No. 26, 63 Fed. Rep. 938. And if a Territory is admitted as a State pending an appeal to the U. S. Supreme Court from the Territorial court, and later the State's highest court reaches an opposite result on the same question, the latter decision will be followed on the appeal. Stutsman County *v.* Wallace, 142 U. S. 293. *Contra*, as to the binding effect of a State decision overruling an earlier one. National F. & P. Works *v.* Oconto Water Co., 63 Fed. Rep. 1006. But a Federal court cannot originally entertain a bill for the review and rehearing of a suit brought in a State court. Graver *v.* Faurot, 64 Fed. Rep. 241. It is only by removal that a Federal circuit court can revise the action of a State court of equity. Sharp *v.* Whiteside, 19 Fed. Rep. 156.

A Federal Court cannot restrain a criminal prosecution by a State under an unconstitutional State statute, or a city ordinance which contravenes the United States Constitution. Minneapolis &c. Ry. Co. *v.* Milner, 57 Fed. Rep. 276; Yick Wo *v.* Crowley, 26 id. 207. Under the U. S. Rev. Stats. § 1979, criminal proceedings threatened under an unconstitutional State law, may be enjoined, if their avowed object is to obstruct the plaintiff in the pursuit of a lawful business under the Interstate Commerce Law. M. Schandler B. Co. *v.* Welch, 42 Fed. Rep. 561; Donald *v.* Scott, 67 id. 854.

court has been so precise upon this point, that in *Miller* v. *Nicholls*, (*d*) notwithstanding it was believed that an act of Congress, giving the United States priority in cases of insolvency, had been disregarded, yet, as the fact of insolvency
* did not appear upon record, the court decided that they * 327 could not take jurisdiction of the case. In the exercise of their appellate jurisdiction, the Supreme Court can only take notice of questions arising on *matters of fact appearing upon the record;* and in all cases where jurisdiction depends on the party, it is the party named in the record. (*a*)

8. Its Appellate Jurisdiction exists, though a State be a Party. (*x*) — The appellate jurisdiction may exist, though a state be a party, and it extends to a final judgment in a state court, on a case arising under the authority of the Union. The appellate powers of the federal judiciary over the state tribunals was again, and very largely, discussed in the case of *Cohens* v. *Virginia;* (*b*) and the constitutional authority of the appellate jurisdiction of the Supreme Court was vindicated with great strength of argument and clearness of illustration. The question arose under an act of Congress instituting a lottery in the District of Columbia, and the defendant below was criminally prosecuted for selling tickets in that lottery, contrary to an act of the legislature of Virginia. Judgment was rendered against him, in the highest court of the state in which the cause was cognizable, though he claimed the protection of the act of Congress. A writ of error was brought upon that judgment into the Supreme Court of the United States, on the ground that the prosecution drew in question the validity of the statute in Virginia, as being repugnant to a law of the United States, and that the decision was in favor of the state law. It was made a great point in the case, whether the Supreme Court had any jurisdiction.

The court decided, that its appellate jurisdiction was not excluded by the character of the parties, one of them being a state, and the other a citizen of the state. Jurisdiction was given to the courts of the Union in two classes of cases. * In * 328

(*d*) 4 Wheaton, 311.

(*a*) Governor of Georgia *v.* Madrazo, 1 Peters, 110; Hickie *v.* Starke, ib. 98; Fisher *v.* Cockerell, 5 id. 248.

(*b*) 6 Wheaton, 264.

(*x*) See *infra*, 351, n. (*x*).

the first, their jurisdiction depended on the character of the cause, whoever might be the parties; and, in the second, it depended entirely on the character of the parties, and it was unimportant what might be the subject of controversy. The general government, though limited as to its objects, was supreme with respect to those objects. It was supreme in all cases in which it was empowered to act. A case arising under the Constitution and laws of the Union was cognizable in the courts of the Union, whoever might be the parties to that case. The sovereignty of the states was limited or surrendered, in many cases, where there was no other power conferred on Congress than a constructive power to maintain the principles established in the Constitution. One of the instruments by which that duty might be peacefully performed was the judicial department. It was authorized to decide *all cases* of every description, arising under the Constitution, laws, and treaties of the Union; and from this general grant of jurisdiction, no exception is made of those cases in which a state may be a party. It was likewise a political axiom, that the judicial power of every well-constituted government must be coextensive with the legislative power, and must be capable of deciding every judicial question which grows out of the Constitution and laws. The most mischievous consequences would follow, from the absence of appellate jurisdiction over a state court, where a state was a party, for it would prostrate the government and laws of the Union at the feet of every state. The powers of the government could not be executed by its own means, in any state disposed to resist its execution by a course of legislation. If the courts of the Union could not correct the judgments of the state courts, inflicting penalties under state laws, upon individuals executing the laws of the Union, each member of the confederacy would possess a *veto* on the will of the whole. No government ought to be so defective in its organization as not to contain within itself the means of
* 329 securing the execution of its own laws. If * each state was left at liberty to put its own construction upon the constitutional powers of Congress, and to legislate in conformity to its own opinion, and enforce its opinion by penalties, and to resist or defeat, in the form of law, the legitimate measures of the Union, it would destroy the Constitution, or reduce it to the imbecility of the old confederation. To prevent such mischief

and ruin, the Constitution of the United States, most wisely and most clearly, conferred on the judicial department the power of construing the Constitution and laws in every case, and of preserving them from all violation from every quarter, so far as judicial decisions could preserve them.

The case before the court was one in which jurisdiction depended upon the character of the cause, as it was a case arising under the law of the Union. It was not an ordinary case of a controversy between a state and one of its citizens, for there the jurisdiction would depend upon the character of the parties. The court concluded, that the appellate power did extend to the case, though a state was a party, because it was a case touching the validity of an act of Congress, and the decision of the state court was against its validity; and in all cases arising under the Constitution, laws, and treaties of the Union, the jurisdiction of the court may be exercised in an appellate form, though a state be a party.

The court observed, that the amendment to the Constitution, declaring that the judicial power was not to be construed to extend to any suit in law or equity commenced or prosecuted against a state by individuals, did not apply to a writ of error, which was not a suit against a state, within the meaning of the Constitution; and the jurisdiction of the Supreme Court, in cases arising under the Constitution, laws, and treaties of the Union, may be exercised by a writ of error brought upon the judgment of a state court. The United States are one nation and one people, as to all cases and powers given by the Constitution, and the judicial power * must be competent not only to decide on the * 330 validity of the constitution or law of a state, if it be repugnant to the Constitution or to a law of the United States, but also to decide on the judgment of a state tribunal enforcing such unconstitutional law. The federal courts must either possess exclusive jurisdiction in all cases affecting the Constitution and laws and treaties of the Union, or they must have power to revise the judgments rendered on them by the state tribunals. If the several state courts had final jurisdiction over the same cases, arising upon the same laws, it would be a hydra in government, from which nothing but contradiction and confusion could proceed. Nothing can be plainer than the proposition, that the Supreme Court of the nation must have

power to revise the decisions of local tribunals on questions which affect the nation, or the most important ends of the government might be defeated, and we should be no longer one nation for any efficient purpose. The doctrine would go to destroy the great fundamental principles on which the fabric of the Union stands. (*a*)[1]

We have now finished the review of the most important points that have arisen in the jurisprudence of the United States, on the subject of the original and appellate jurisdiction of the Supreme Court. So far as the powers of that court, under the Constitution, and under the 25th section of the Judiciary Act of 1789, have been drawn in question, they have been maintained with great success, and with an equal display of dignity and discretion. (*x*)

(*a*) In Williams *v.* Norris and Montgomery *v.* Hernandez, 12 Wheaton, 117, 129, under the 25th section of the Judiciary Act of 1789, c. 20, it was held that the Supreme Court has no appellate jurisdiction, unless the decision in the state court be *against* the right or title set up by the party under the Constitution or statute of the United States, and the title depended thereon; or unless the decision be in *favor* of a state law, when its validity was questioned, as repugnant to the Constitution of the United States, and the right of the party depended upon the state law.

[1] *Ante*, 326, n. 1.

(*x*) The appellate jurisdiction of the Supreme Court was materially affected by the Act of March 3, 1891, ch. 517 (26 St. at L. 826; see also Ibid. 1115), establishing in each circuit a circuit court of appeals, consisting of three judges; which act abolished (by § 4) the previous appellate jurisdiction of the circuit courts; and provided (§ 5) for an appeal from the district or circuit courts direct to the Supreme Court in certain cases. The marshals thereby provided for these courts were abolished by the Act of July 16, 1892 (27 St. at L. 222), which devolved the duties of that office upon the U. S. marshals. See further Rules 36, 37, 38 of the U. S. Supreme Court Rules. These courts were established for the relief of the Supreme Court and for the despatch of business therein, and the above Act had immediate operation, though previous judgments could not be reviewed by them. See *In re* Claasen, 140 U. S. 200; McLish *v.* Roff, 141 U. S. 661; *In re* Woods, 143 U. S. 202; Lau Ow Bew *v.* United States, 144 U. S. 47; 47 Fed. Rep. 641; Lau Ow Bew, petitioner, 141 U. S. 583; Mattingly *v.* N. W. Va. R. Co., 158 U. S. 53; New York, &c. R. Co. *v.* Bennett, 49 Fed. Rep. 598; Baltimore & O. R. Co. *v.* Andrews, 50 id. 728; United States *v.* National Exchange Bank, 53 id. 9.

The question whether the judgment of the circuit court of appeals is final, as provided in the Act of Mar. 3, 1891, § 6, when the jurisdiction is dependent upon diverse citizenship, is determined by the summons and declaration, and not by the subsequent proceedings. Borgmeyer *v.* Idler, 16 S. C. 34. This court may take jurisdiction, although a question is involved which arises under the Federal constitution, if there are also involved other questions sufficient to dispose of the case. Green *v.* Mills, 69 Fed. Rep. 852. It may entertain a motion for a new trial, made

after judgment, after a writ of error to review the judgment has issued from the Supreme Court. Shreve *v.* Cheesman, 69 Fed. Rep. 785; see also Duplex P. Co. *v.* Campbell P. & M. Co., id. 250.

The circuit court in which the suit was tried may issue from its clerk's office a writ of error returnable to the court of appeals. Northern Pacific R. Co. *v.* Amato, 49 Fed. Rep. 881; 144 U. S. 465. This court has no jurisdiction where more than six months intervene between the entry of judgment and the date on which the writ of error is sued out. Union Pac. Ry. Co. *v.* Colorado Eastern Ry. Co., 54 Fed. Rep. 22; Coulliette *v.* Thomason, 50 id. 787. As to the binding effect of this court's decisions upon the circuit court see Norton *v.* Wheeler, 57 Fed. Rep. 927; Macon *v.* Georgia P. Co., 60 id. 781; Edison Electric Light Co. *v.* Bloomingdale, 65 id. 212.

The decision of this court on a writ of error to the final judgment of the Circuit Court is not final when the jurisdiction of the latter court depends solely on the fact that the defendant is a corporation created by Act of Congress, and consequently the suit arises under a Federal statute; the effect being to extend the appellate jurisdiction of the Supreme Court to such cases where the matter in controversy exceeds $1,000. Northern Pacific R. Co. *v.* Amato, 144 U. S. 465. The United States can appeal to the Court of Appeals from the Circuit Court's adverse judgment in the suit of a clerk of the district court to recover his fees under the Act of Mar. 3, 1887. United States *v.* Morgan, 64 Fed. Rep. 4. When a plea to the jurisdiction of the circuit court is overruled, there must be a final judgment or decree upon the merits before the question of jurisdiction can be reviewed by writ of error or appeal; then that question alone may be taken to the Supreme Court upon a certificate from the lower court; or the whole case be brought before the circuit court of appeals, which may, in its discretion, certify the question of jurisdiction to the Supreme Court. McLish *v.* Roff, 141 U. S. 661; Columbus Watch Co. *v.* Robbins, 148 U. S. 266; Cincinnati H. & D. R. Co. *v.* McKeen, 149 U. S. 259; Maynard *v.* Hecht, 151 U. S. 324; United States *v.* Jahn, 155 U. S. 109; Baltimore & O. R. Co. *v.* Meyers, 62 Fed. Rep. 367; Fabre *v.* Cunard S. Co., 59 id. 500; Barling *v.* Bank of British North America, 50 id. 260; Farmers' & M. State Bank *v.* Armstrong, 49 id. 600; The Alliance, 70 id. 273.

Under § 5 of the act of 1891, providing for appeals and writs of error from the district or circuit courts to the Supreme Court, an appeal which is within the jurisdiction of the Supreme Court is not within the jurisdiction of the circuit court of appeals. McLish *v.* Roff, 141 U. S. 661; Chicago, &c., Ry. Co. *v.* Evans, 58 Fed. Rep. 433; Hastings *v.* Ames, 68 id. 726. See Carey *v.* Houston, &c., Ry. Co., 150 U. S. 170; Aspen M. & S. Co. *v.* Billings, id. 31; Mason *v.* Pewabic M. Co., 153 U. S. 361; *In re* Lehigh Min. & Manuf. Co., 156 U. S. 322; United States *v.* Swan, 65 Fed. Rep. 647.

Under that section, in cases involving the constitutional validity of a Federal statute, an appeal lies direct to the Supreme Court, although taken after the Act went into effect. Horner *v.* United States, 143 U. S. 570.

The circuit courts of appeals have power, by § 11 of the Act of March 3, 1891, to amend a writ of error, and may thus amend by sealing the writ with its seal. Cotter *v.* Ala. G. S. R. Co., 61 Fed. Rep. 747. Under §§ 4–6 of that Act *habeas corpus* proceedings in the district courts are now reviewed by the circuit court of appeals. United States *v.* Fowkes, 53 Fed. Rep. 13. An appeal to this court may now be taken in any injunction proceeding. 28 St. at L. 666.

LECTURE XVI.

OF THE JURISDICTION OF THE FEDERAL COURTS IN RESPECT TO THE COMMON LAW, AND IN RESPECT TO PARTIES.

It has been a subject of much discussion whether the courts of the United States have a common-law jurisdiction, and, if any, to what extent.

1. **Common-law Jurisdiction in Criminal Cases.**(x) — In the case of the *United States* v. *Worrall*, (a) in the Circuit Court at Phila-

(a) 2 Dallas, 384.

(x) The government of the United States has no general authority deduced from sovereignty, with respect to the personal or social rights or relations of citizens, but only such authority as is conferred by the Constitution. *In re* Burrus, 136 U. S. 586. That government has no inherent common-law prerogatives. *In re* Barry, 136 U. S. 597; 42 Fed. Rep. 113; Swift *v.* Philadelphia & R. R. Co., 64 Fed. Rep. 59; 58 id. 858; but see 29 Am. L. Rev. 134. The U. S. Supreme Court, possessing only the powers conferred upon it, cannot review questions of general or local law. United States *v.* Thompson, 93 U. S. 586; Poppe *v.* Langford, 104 U. S. 770.

In the criminal law there are no common-law offences against the United States. United States *v.* Britton, 110 U. S. 199, 206; United States *v.* Eaton, 144 U. S. 677; *In re* Greene, 52 Fed. Rep. 104. But there is a peace of the United States; and a person who assaults a judge of the United States while in the discharge of his duties violates that peace, and in such case the U. S. marshal stands in the same relation thereto as the sheriff of a county stands to the peace of a State. *In re* Neagle, 135 U. S. 1, 69. Common-law proceedings for contempt are not subject to the right of trial by jury, and are "due process of law" within the 14th Amendment. Eilenbecker *v.* District Court, 134 U. S. 31. The Federal courts have the power, not immediately derived from statute, to punish contempts as incidental to the exercise of judicial functions. *Ex parte* Terry, 128 U. S. 289; *Ex parte* Robinson, 19 Wall. 505, 510. And the impeachment of a judge of a Federal court, which is a criminal trial, is not limited to statutory offences under the acts of Congress. See 16 Am. L. Rev. 798, 816.

The U. S. Supreme Court has no general authority to review on error or appeal the criminal judgments of the circuit courts. *Ex parte* Yarbrough, 110 U. S. 651. Suits to recover penalties under the revenue laws are of a *quasi*-criminal nature, though civil actions in form; in them the case must be proved beyond a reasonable doubt, and the defendant cannot be re-

delphia, the defendant was indicted and convicted of an attempt to bribe the commissioner of the revenue; and it was contended, on the motion in arrest of judgment, that the court had no jurisdiction of the case, because all the judicial authority of the federal courts was derived, either from the Constitution, or the acts of Congress made in pursuance of it, and an attempt to bribe the commissioner of the revenue was not a violation of any constitutional or legislative prohibition. Whenever Congress shall think any provision by law necessary to carry into effect the constitutional powers of the government, it was said, they may establish it, and then a violation of its sanctions will come within the jurisdiction of the circuit courts, which have exclusive cognizance of all crimes and offences cognizable under the authority of the United States. Congress had provided by law for the punishment of various crimes, and even for the punishment of bribery itself, in the case of a judge, an officer of the customs, or an officer of the excise; but in the case of the commissioner of the revenue, * the act of Congress did not create * 332 or declare the offence. The question then fairly and directly presented itself, what was there to render it an offence arising under the Constitution or laws of the United States, and cognizable under their authority? A case arising under a law must mean a case depending on the exposition of the law, in respect to something which the law prohibits or enjoins; and if it were sufficient, in order to vest a jurisdiction to try a crime or sustain an action, that a federal officer was concerned and

quired to give or produce evidence against himself. Boyd *v.* United States, 116 U. S. 616; Lees *v.* United States, 150 U. S. 476; *Re* Strouse, 1 Sawyer, 605; Stanwood *v.* Green, 2 Abb. U. S. 184. Allegations of an offence against the United States, which is not so in fact, deprive a U. S. commissioner of jurisdiction to examine the accused, when there are no other facts in the case than those contained in the affidavit upon which he was arrested. *Ex parte* Perkins, 29 Fed. Rep. 900.

The Federal jurisdiction of crimes is based primarily upon the theory of an offence committed against the United States and its laws. It does not preclude a concurrent indictment and trial by the State when, as in the case of making and uttering counterfeit money, the same act violates both Federal and State laws. See *In re* Loney, 134 U. S. 372; People *v.* Welch, 141 N. Y. 266. A person convicted of crime in a Federal court can be sentenced to imprisonment in a State penitentiary only under the express authority by a statute, and then only for more than one year, and at hard labor. *In re* Bonner, 151 U. S. 242; *In re* Mills, 135 U. S. 263; *Ex parte* Friday, 43 Fed. Rep. 916; United States *v.* Cobb, id. 570.

affected by the act, a source of jurisdiction would be opened, which would destroy all the barriers between the judicial authorities of the states and the general government. Though an attempt to bribe a public officer be an offence at common law, the Constitution of the United States contains no reference to a common-law authority. Every power in the Constitution was matter of definite and positive grant, and the very powers that were granted could not take effect until they were exercised through the medium of a law. Though Congress had the power to make a law which would render it criminal to offer a bribe to the commissioner of the revenue, they had not done it, and the crime was not recognized either by the legislative or constitutional code of the Union.

In answer to this view of the subject, it was observed, that the offence was within the terms of the Constitution, for it arose under the law of the United States, and was an attempt by bribery to obstruct or prevent the execution of the laws of the Union. If the commissioner of the revenue had accepted the bribe, he would have been indictable in the courts of the United States; and, upon principles of analogy, the offence of the person who attempted it must be equally cognizable in those courts. The prosecution against *Henfield*, for serving on board a French privateer against the Dutch, was the exercise of a common-law power, applied to an offence against the law of nations, and a breach of a treaty, which provided no specific penalty for such a case.

The court were divided in opinion on this question. In the opinion of the circuit judge, an indictment at common
* 333 * law could not be sustained in the Circuit Court. It was admitted, that Congress were authorized to define and punish the crime of bribery; but as the act charged as an offence in the indictment had not been declared by law to be criminal, the courts of the United States could not sustain a criminal prosecution for it. The United States, in their national capacity, have no common law, and their courts have not any common-law jurisdiction in criminal cases, and Congress have not provided by law for the offence contained in the indictment; and until they defined the offence, and prescribed the punishment, he thought the court had not jurisdiction of it.

The district judge was of a different opinion, and he held that the United States were constitutionally possessed of a common-

law power to punish misdemeanors, and the power might have been exercised by Congress in the form of a law, or it might be enforced in a course of judicial proceeding. The offence in question was one against the well-being of the United States, and from its very nature cognizable under their authority.

This case settled nothing, as the court were divided; but it contained some of the principal arguments on each side of this nice and interesting constitutional question.

In the case of *The United States* v. *Burr*, which arose in the Circuit Court of Virginia, in 1807, the Chief Justice of the United States declared, (*a*) that the laws of the several states could not be regarded as rules of decision in trials for offences against the United States, because no man could be condemned or prosecuted in the federal courts on a state law. The expression, *trials at common law*, used in the 34th section of the Judiciary Act, was not applicable to prosecutions for crimes. It applied to civil suits, as contradistinguished from criminal prosecutions, and to suits at common law, as contradistinguished from those which came before * the court sitting as a court of equity and admiralty. * 334 He admitted, however, that when the Judiciary Act, sec. 14, authorized the courts to issue writs not specially provided for by statute, but which were agreeable *to the principles and usages of law*, it referred to that generally recognized and long-established law, which formed the *substratum* of the laws of every state.

The case of *The United States* v. *Hudson & Goodwin* (*a*) brought this great question in our national jurisprudence for the first time before the Supreme Court of the United States. The question there was, whether the Circuit Court of the United States had a common-law jurisdiction in cases of libel. The defendants had been indicted in the Circuit Court in Connecticut, for a libel on the President of the United States, and the court was divided on the point of jurisdiction. A majority of the Supreme Court decided, that the circuit courts could not exercise a common-law jurisdiction in criminal cases. (*b*) Of all

(*a*) Opinion delivered September 3, 1807, and reported by Mr. Ritchie.

(*a*) 7 Cranch, 32.

(*b*) S. P. *infra*, 361, United States *v.* Bevans, United States *v.* Wiltberger, also *infra*, 362; and United States *v.* Mackenzie & Gansevoort, District Court, New York, January 11, 1843. In the states of Ohio and Louisiana, it is understood to be held

the courts which the United States, under their general powers, might constitute, the Supreme Court was the only one that possessed jurisdiction derived immediately from the Constitution. All other courts created by the general government possessed no jurisdiction but what was given them by the power that created them, and could be vested with none but what the power ceded to the general government would authorize them to confer; and the jurisdiction claimed in that case has not been conferred by any legislative act. When a court is created, and its operations confined to certain specific objects, it could not assume a more extended jurisdiction. Certain implied powers must necessarily result to the courts of justice from the nature of their institution,

but jurisdiction of crimes against the state was not one of
* 335 them. * To fine for contempt, to imprison for contumacy,

to enforce the observance of orders, are powers necessary to the exercise of all other powers, and incident to the courts, without the authority of a statute. But to exercise criminal jurisdiction in common-law cases was not within their implied powers, and it was necessary for Congress to make the act a crime, to affix a punishment to it, and to declare the court which should have jurisdiction.

The general question was afterwards brought into renewed discussion, in the Circuit Court of the United States for Massachusetts, in the case of *The United States* v. *Coolidge.* (*a*) Notwithstanding the decision in the case of *The United States* v. *Hudson & Goodwin*, the court in Massachusetts thought the question, in consequence of its vast importance, entitled to be reviewed and again discussed, especially as the case in the Supreme Court had been decided without argument, and by a majority only of the court. In this case, the defendant was indicted for an offence committed on the high seas, in forcibly rescuing a prize which had been captured by an American cruiser. The simple question was, whether the Circuit Court had jurisdiction to punish offences against the United States, which had not been previously defined, and a specific punishment affixed by statute. The judge who presided in that court did not think it necessary to consider the broad question, whether the United States, as a sovereign power, had

that there is no common-law indictable offence, and that every indictable offence must be grounded upon some statute.

(*a*) 1 Gallison, 488.

entirely adopted the common law. He admitted that the courts of the United States were courts of limited jurisdiction, and could not exercise any authorities not confided to them by the Constitution and laws made in pursuance of it. But he insisted that when an authority was once lawfully given, the nature and extent of that authority, and the mode in which it should be exercised, must be regulated by the rules of the common law, and that if this distinction was kept in sight, it would dissipate the whole difficulty and obscurity of the subject.

* It was not to be doubted that the Constitution and * 336 laws of the United States were made in reference to the existence of the common law, whatever doubts might be entertained as to the question, whether the common law of England, in its broadest sense, including equity and admiralty as well as legal doctrines, was the common law of the United States. In many cases, the language of the Constitution and laws would be inexplicable without reference to the common law; and the existence of the common law is not only supposed by the Constitution, but it is appealed to for the construction and interpretation of its powers.

It was competent for Congress to confide to the circuit courts jurisdiction of all offences against the United States; and they have given to it exclusive cognizance of most crimes and offences cognizable under the authority of the United States. The words of the 11th section of the Judiciary Act of 1789 were, that the circuit courts should have "exclusive cognizance of all the crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct." This means all crimes and offences to which, by the Constitution of the United States, the judicial power extends, and the jurisdiction could not be given in more broad and comprehensive terms. To ascertain what are crimes and offences against the United States, recourse must be had to the principles of the common law, taken in connection with the Constitution. (*a*) Thus, Congress had provided for the punishment of murder, manslaughter, and perjury, under certain

(*a*) Judge Wilson, in his charge to a grand jury in the Circuit Court of the United States, in Virginia, in 1791, observed, that we must recur to the common law for the definition and description of many crimes against the United States. See Wilson's Works, iii. 371–377.

circumstances, but had not defined those crimes. The
* 337 explanation of them must be sought in and * exclusively governed by the common law; and upon any other supposition, the judicial power of the United States would be left in its exercise to arbitrary discretion. In a great variety of cases, arising under the laws of the United States, the will of the legislature cannot be executed unless by the adoption of the common law. The interpretation and exercise of the vested jurisdiction of the courts of the United States, as, for instance, in suits in equity and in causes of admiralty and maritime jurisdiction, and in very many other cases, must, in the absence of positive law, be governed exclusively by the common law.

There are many crimes and offences, such as offences against the sovereignty, the public rights, the public justice, the public peace, and the public police of the United States, which are cognizable under its authority; and in the exercise of the jurisdiction of the United States over them the principles of the common law must be applied, in the absence of statute regulations. Treason, conspiracies to commit treason, embezzlement of public records, bribery, resistance to judicial process, riots and misdemeanors on the high seas, frauds and obstructions of the public laws of trade, and robbery and embezzlement of the mail of the United States, are offences at common law, and when directed against the United States they are offences against the United States, and, being offences, the circuit courts have cognizance of them, and can try and punish them upon the principles of the common law. The punishment must be fine and imprisonment, for it is a settled principle, that where an offence exists to which no specific punishment is affixed by statute, fine and imprisonment is the punishment. The common law is then to be referred to, not only as the rule of decision in criminal trials in the courts of the United States, but in the judgment or punishment; and by common law he meant the word in its largest sense, as including the whole system of English jurisprudence.

* 338 * It was accordingly concluded that the circuit courts had cognizance of all offences against the United States, and what those offences were depended upon the common law applied to the powers confided to the United States, and that the circuit courts, having such cognizance, might punish by fine and imprisonment, where no punishment was specially provided

by statute. The admiralty was a court of extensive criminal, as well as civil, jurisdiction; and offences of admiralty jurisdiction were exclusively cognizable by the United States, and were offences against the United States, and punishable by fine and imprisonment, where no other punishment was specially prescribed.

This case was brought up to the Supreme Court, but it was not argued. A difference of opinion still existed among the members of the court, and, under the circumstances, the court merely said, that they did not choose to review their former decision in the case of *The United States* v. *Hudson & Goodwin*, or draw it in doubt. (*a*) The decision was for the defendant, and, consequently, against the claim to any common-law jurisdiction in criminal cases.[1]

These jarring opinions and decisions of the federal courts have not settled the general question as to the application and influence of the common law, upon clear and definite principles; and it may still be considered, in civil cases, as open for further consideration. The case of *Hudson & Goodwin* decided that the United States courts had no jurisdiction given them by the Constitution or by statute, over libels; and the case of *Worrall* decided that they had no jurisdiction in the case of an attempt to bribe a commissioner of the revenue. If that were so, the common law certainly could not give them any. The cases were therefore very correctly decided upon the principle assumed by the court. But the subsequent case of *Coolidge* did not fall within that principle, because the offence there charged * was * 339 clearly a case of admiralty jurisdiction, and the courts of the United States would seem to have had general and exclusive jurisdiction over the case. Mr. Du Ponceau, in his "Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States," has ably examined the subject, and shed strong light on this intricate and perplexed branch of the national jurisprudence. He pursues the distinction origi-

(*a*) 1 Wheaton, 415; [United States *v.* Hall, 98 U. S. 343; United States *v.* Reese, 92 U. S. 214.]

[1] United States *v.* Barney, 5 Blatchf. 294; United States *v.* Wilson, 3 Blatchf. 535; United States *v.* Ramsay, Hempst. 481; Pennsylvania *v.* Wheeling Bridge Co., 13 How. 518.

nally taken in the Circuit Court in Massachusetts, and maintains that we have not, under our federal government, any common law, considered as *a source of jurisdiction;* while, on the other hand, the common law, considered merely as the *means* or *instrument* of exercising the jurisdiction, conferred by the Constitution and laws of the Union, does exist, and forms a safe and beneficial system of national jurisprudence. The courts cannot derive their *right to act* from the common law. They must look for that right to the Constitution and law of the United States. But when the general jurisdiction and authority is given, as in cases of admiralty and maritime jurisdiction, *the rules of action* under that jurisdiction, if not prescribed by statute, may and must be taken from the common law, when they are applicable, because they are necessary to give effect to the jurisdiction. (*a*)

The principle assumed by the courts in the cases of *Worrall* and of *Hudson & Goodwin* is considered to be a safe and sound principle. The mere circumstance that the party injured by the offence under prosecution was an officer of the government of the United States does not give jurisdiction; for neither the Constitution, nor the judicial acts founded upon it, gave the federal courts a general jurisdiction in criminal cases, affecting the officers of government, as they have in cases affecting public ministers

and consuls. Because an officer was appointed under the
* 340 Constitution, * that would not *of itself* render all cases in

which they were concerned, or might be affected, cases arising under the Constitution and laws, and cognizable by the judiciary. Such a wide construction would be transferring legislative power to the judiciary, and invest it with almost unlimited jurisdiction; for where is the act that might not, in some distant manner, be connected with the Constitution or laws of the United States? It rests alone in the discretion of Congress to throw over the persons and character of the officers of the government, acting in their official stations, a higher protection than that afforded by the laws of the states; and when laws are made for that purpose, the federal courts will be charged with the duty of executing them.

This appears to be sound doctrine, and to be deduced from the cases which have been mentioned. There is much weight

(*a*) Cui jurisdictio data est, ea quoque concessa esse videntur, sine quibus jurisdictio explicari non potest. Dig. 2. 1. 2.

undoubtedly due to the argument of the Circuit Court of Massachusetts; and an attempt to bribe an officer of the government, or to libel an officer of the government, in relation to his official acts, would seem to be an offence against that government. They tend directly to weaken or pervert the administration of it; and if it once be admitted that such acts amount to an *offence against the United States*, they must of course be cognizable under its authority, and belong to the jurisdiction of the circuit courts. The great difficulty and the danger is, in leaving it to the courts to say *what is an offence against the United States*, when the law has not specifically defined it. The safer course undoubtedly is, to confine the jurisdiction in criminal cases to *statute offences* duly defined, and to cases within the *express* jurisdiction given by the Constitution. The admiralty jurisdiction of the federal courts is derived expressly from the Constitution; and criminal cases belonging to that jurisdiction by the common law, and by the law of nations, might well have been supposed to be cognizable in the admiralty courts, without any statute authority. If the common law be a rule of decision in the exercise of the * lawful jurisdiction of the federal courts, why ought * 341 it not to apply to criminal as well as to civil cases, and upon the same principle, when jurisdiction is clearly vested? If Congress should, by law, authorize the district or circuit courts to take cognizance of attempts to bribe an officer of the government in the exercise of his official trust, and should make no further provision, the courts would, of course, in the description, definition, and prosecution of the offence, be bound to follow those general principles and usages which are not repugnant to the Constitution and laws of the United States, and which constitute the common law of the land, and form the basis of all American jurisprudence. Though the judiciary power of the United States cannot take cognizance of offences at common law, unless they have jurisdiction over the person or subject-matter given them by the Constitution or laws made in pursuance of it; yet, when the jurisdiction is once granted, the common law, under the correction of the Constitution and statute law of the United States, would seem to be a necessary and a safe guide, in all cases, civil and criminal, arising under the exercise of that jurisdiction, and not specially provided for by statute. Without such a guide, the courts would be left to a dangerous discretion, and

to roam at large in the trackless field of their own imaginations. (*a*)[1]

(*a*) *Military and naval crimes and offences*, committed while the party is attached to, and under the immediate authority of, the army or navy of the United States, and in actual service, are not cognizable under the *common-law* jurisdiction of the courts of the United States. They are not included in the Judiciary Act of 24th September, 1789. They are cognizable in the military and naval courts-martial instituted under the acts of Congress. The circuit and district courts of the United States have no criminal jurisdiction but what is expressly conferred upon them by statute. United States *v.* Hudson, 7 Cranch, 32; United States *v.* Bevans, 3 Wheaton, 336; Washington, J., in Houston *v.* Moore, 5 Wheaton, 29; Sergeant's Constitutional Law, 131 (1st ed.); *vide supra*, 334, and *infra*, 362, 363, 364. It seemed, however, to be left as an unsettled question, in the case of The United States *v.* Mackenzie, *infra*, 363, [note,] whether the military and naval courts of the United States, and the courts of civil jurisdiction, had *concurrent* powers in questions of the above nature, under the acts of Congress. If they had, an acquittal by a court-martial would be a *bar* to any criminal proceeding in any other court, for no person is to be put in jeopardy twice for the same offence. The better opinion in that case would also be, that a prosecution, instituted and pending before a naval tribunal, would be a good plea in *abatement* of any prosecution subsequently instituted in a national civil court of criminal jurisdiction; for it would be unjust, absurd, and impracticable to have a trial for the

[1] A plea of *autrefois acquit*, by a general court-martial, under the act of Congress of March 3, 1863, § 30, is no defence to an indictment for murder under the laws of a state. State *v.* Rankin, 4 Coldw. (Tenn.) 145. (*x*)

It seems proper to insert here the famous case as to military commissions. During the rebellion, one Milligan, a citizen of the United States resident in Indiana, who was neither a prisoner of war nor in the military service of the United States, was arrested at his home by order of General Hovey, brought before a military commission, tried, and sentenced to be hanged. On petition for *habeas corpus*, the judges of the Circuit Court were divided in opinion, but the Supreme Court held that inasmuch as the court knew judicially that the authority of the United States was unopposed, and its courts were open in Indiana, the military commission had no jurisdiction of the case. As to whether Congress could have given the commission jurisdiction the judges were divided. *Ex parte* Milligan, 4 Wall. 2.

(*x*) The sentence of a court martial cannot be reviewed by *habeas corpus*. Johnson *v.* Sayre, 158 U. S. 109. The jurisdiction of a court-martial may always be inquired into on *habeas corpus*, but a writ of prohibition will not lie to correct errors of law within its jurisdiction. Dynes *v.* Hoover, 20 How. 65; Barrett *v.* Hopkins, 2 McCrary, 129; Smith *v.* Whitney, 116 U. S. 167. Nor, if the court-martial has jurisdiction, can its proceedings be collaterally reviewed by *habeas corpus* in the civil courts. *In re* Davison, 22 Blatch. 473; *In re* McVey, 11 Sawyer, 25; *In re* White, 17 Fed. Rep. 723; *In re* Zimmerman, 30 id. 176. Upon the general charge of "conduct prejudicial to good order and military discipline," and the specified charge of homicide, before a court-martial, a plea of former acquittal by a civil court is a defence going to the merits and not to the jurisdiction. United States *v.* Maney, 61 Fed. Rep. 140.

2. Common-law Jurisdiction in Civil Cases. — The Supreme Court of the United States, in *Robinson* v. *Campbell*, (*b*) went far

same crime going on at the same time in two distinct co-ordinate tribunals, under the same government. The one that first takes cognizance of the case attaches to itself, of course, exclusive jurisdiction. See *infra*, ii. 122–125. The sounder doctrine, however, is, that the act of Congress of April 23, 1800, c. 33, creating a naval code of martial law for the trial of crimes and offences committed in the naval service, withdrew the cognizance of crimes in the naval service from courts of civil jurisdiction, and placed them *exclusively* in courts-martial, acting under a distinct and peculiar code, and which Lord Mansfield termed "a sea military code, which the wisdom of ages had formed." That act of Congress specified particular crimes cognizable by naval courts-martial, and also declared, that all crimes committed by persons belonging to the navy, and not therein specified, should be punished "according to the laws and customs in such cases at sea." The opinions of Lord Mansfield and Lord Loughborough, in Johnstone *v.* Sutton, 1 T. R. 548, contain principles which go far, by their masterly strength, to establish the necessity and justice of the exclusive jurisdiction of the military tribunals, in cases of crimes committed in the naval service; for it is in that service that commanders must act "upon delicate suspicions — upon the evidence of their own eye; — that they must give desperate commands; — that they must require instantaneous obedience; — and a military tribunal is capable of feeling all these circumstances." He further observes, that "where a man is charged with an offence against the articles, or where the articles are silent, against the usages of the navy, he can only be tried by a court-martial." The 4th section of the act of Congress of March 3, 1825, c. 276, commonly called the Crimes Act, seems to be essentially a repetition of the 8th section of the act of Congress of April 30, 1790, c. 36, and that provision did not apply to the navy of the United States, for it withheld that *express jurisdiction* to the courts of the United States which the cases already cited would seem to require. We would have expected some express jurisdiction given to the civil courts over crimes at sea in the United States navy, after the enactment of the naval code of 1800, and the specific provisions therein for the punishment of crimes committed in the navy, by naval courts-martial, if such had been the policy and intention of the law. Not only a sound construction of the statute law, but the discipline and efficiency of the naval military service, strongly sustain this conclusion. It is not a question susceptible of doubt, that Congress may, under the Constitution, confer upon courts-martial in the army and navy the trial and punishment of crimes, capital and otherwise, for they are authorized "to make rules for the government and regulation of the land and naval forces;" and cases "arising in the land and naval forces" are excepted from the provision, that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury." *Military* law is a system of regulations for the government of the armies in the service of the United States, authorized by the act of Congress of April 10, 1806, and known as the *articles of war*. And *naval* law is a similar system for the government of the navy, under the act of Congress of April 23, 1800. But *martial* law is quite a distinct thing, and is founded on paramount necessity, and proclaimed by a military chief. In the case of Captain Mackenzie, above alluded to, the subject of jurisdiction was again brought before Judge Betts, holding the Circuit Court of the United States in New York, March 20, 1843 (United States *v.* Mackenzie, 1 N. Y. Legal Observer, 371); and, after a powerful

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(*b*) 3 Wheaton, 212; 10 id. 159, s. p.

towards the admission of the existence and application of the common law to civil cases in the federal courts. The Judiciary Act of 1789 had declared (*c*) that the laws of the several states, except where the Constitution, treaties, or statutes of the Union otherwise required, should be regarded as rules of decision *in trials* at common law in the courts of the United States, in cases where they applied. (*d*)[1] The subsequent act of May 8, 1792, for regulating processes in the courts of the United * 342 States, (*e*) confirmed * "the forms of writs, executions, and other processes, except their style, and the forms and modes of proceeding then used in suits at common law in the federal courts, and declared that the modes of proceeding in suits in equity should be according to the principles and usages of courts of equity." But all these forms and modes were to be "subject to such alterations and additions as the said courts respectively should, in their discretion, deem expedient, or to such regulations as the Supreme Court of the United States should think proper from time to time to prescribe to any circuit or district court concerning the same."(*a*)[2](*x*) Under those pro-

discussion, he instructed and charged the grand jury, that the jurisdiction of the naval court-martial was exclusive, and that the civil tribunals had no jurisdiction in the case of Captain Mackenzie, then on trial in the harbor of New York, before a naval court-martial, on a charge of murder on the high seas, on board the United States sloop-of-war Somers, by hanging three of the crew for mutiny.

(*c*) Act of 24th September, 1789, c. 20, sec. 34.

(*d*) This provision was inapplicable to the *practice* of the national courts, and only furnishes a rule to guide them in the formation of their judgments. In the case of Swift *v.* Tyson, 16 Peters, 1, it was decided that the statute only extended to the statutes and permanent local usages of a state, and the construction thereof adopted by the local tribunals, and to rights and titles to real estates, and to other matters immovable and intra-territorial in their nature and character. It did not extend to contracts, or other instruments of a commercial nature.

(*e*) Ch. 36, sec. 2.

(*a*) The act of Congress of May 19, 1828, c. 68, rendered the forms of mesne process, except the style and the forms and modes of proceeding in the federal courts

[1] *Infra*, 342, n. 1.

[2] *Rules of Decision.* — The Supreme Court is bound by the decision of a state court, in a case not re-examinable by the former, that a tax is valid under the state constitution, Provident Institution *v.* Massachusetts, 6 Wall. 611; Hamilton Co. *v.* Massachusetts, ib. 632; see Ran-

(*x*) The Federal courts follow the decisions of the highest court of a State in questions concerning merely the constitution and laws of that State; or where the course of those decisions, whether founded on statute or not, have become rules of property within the State; also in regard to rules of evidence in actions at law; and

visions, the court declared, in the case last referred to, that the remedies in the federal courts, at common law and in equity, were

in those states admitted into the Union since September 29, 1789, conformable to the supreme courts of law and equity in those states; and declared that writs of execution and other final process in the federal courts should, except as to style, be the same in each state as were then (May, 1828) used in the courts of such states, and with power in the federal courts, in their discretion, to alter their final process so far as to conform it to the future changes in that process in the state courts. The practice of the supreme courts of the state *in use in September*, 1789, was adopted, subject to alterations, by the federal courts. 1 Paine, 428, 429; Wayman *v.* Southard, 10 Wheaton, 1, 31, 32, 50; Bank of the United States *v.* Halstead, 10 Wheaton, 51; 1 Peters C. C. 1; Beers *v.* Haughton, 9 Peters, 329, 359–361. These modes and forms of proceeding remain unaffected by subsequent *state regulations* on the subject, for the act of Congress did not adopt prospectively such alterations as the states might afterwards make. Lane *v.* Townsend, Ware, 286; Springer *v.* Foster, 1 Story, 601. Such parts only of the laws of a state as are applicable to the Courts of the United States are adopted by the Process Act of Congress. *A penalty is not adopted*, being one given against a sheriff in default. Gwin *v.* Broedlove, 2 How. 29. Mr. Justice Story doubted

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dall *v.* Brigham, 7 Wall. 523; and it has said that it would follow, in cases arising in different states, the interpretations of similar statutes by the respective state courts, although inconsistent with each other, Christy *v.* Pridgeon, 4 Wall. 196; [Erie Railway Co. *v.* Pennsylvania, 21 Wall. 492, 497;] and that when the highest court of a state reverses its former decisions, the Supreme Court would follow the latest settled adjudications, Leffingwell *v.* Warren, 2 Black, 599; Blossburg & Corning R. R. *v.* Tioga R. R., 5 Blatchf. 387; Smith *v.* Shriver, 3 Wall. Jr. 219. But it declined to follow the latest when contracts had been made on the strength of earlier decisions the other way, which agreed with the opinion of the Supreme Court as well as with that of sixteen state courts, *post*, 419, n. 1.; Gelpcke *v.* City of Dubuque, 1 Wall. 175 (see Riggs *v.* Johnson County, 6 Wall. 166); and at last, in Butz *v.* Muscatine, 8 Wall. 575, the Supreme Court overruled a construction of a state law by the state courts, although there were no state decisions in accordance with their view: *post*, 419, n. 1; and it was said to be immaterial

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as to the common law of the State, and its local laws and customs, when established by repeated decisions. Conn. Mut. Life Ins. Co. *v.* Cushman, 108 U. S. 51; Bucher *v.* Cheshire R. Co., 125 U. S. 555; Detroit *v.* Osborne, 135 U. S. 492; St. Louis *v.* Rutz, 138 U. S. 226, 242; Snell *v.* Chicago, 152 U. S. 191; Israel *v.* Arthur, id. 355; Michigan *v.* Flint, &c. R. Co., id. 363; Hazard *v.* Vermont & C. R. Co., 17 Fed. Rep. 753; Myers *v.* Reed, id. 401; Cleaver *v.* Traders' Ins. Co., 40 id. 711; Ames *v.* Union Pac. Ry. Co., 64 id. 165. Substantially conclusive effect is given to the State decisions upon the construction of State statutes as affecting title to real estate within the State. Gormley *v.* Clark, 134 U. S. 338, 348; Lauriat *v.* Stratton, 11 Fed. Rep. 107; Edwards *v.* Davenport, 20 id. 756. So as to the organization of corporations. Mooney *v.* Humphrey, 12 Fed. Rep. 612. And of the powers of a State's political and municipal organizations. Claiborne County *v.* Brooks, 111 U. S. 400; Norton *v.* Shelby County, 118 U. S. 425; Meriwether *v.* Muhlenburg County Court, 120 U. S. 354. Rulings of the State courts

to be, not according to the practice of state courts, "but according to the principles of common law and equity, as distinguished and

whether Congress possessed constitutional authority tc adopt, *prospectively*, state legislation on any given subject. 3 Sumner, 369. When, therefore, the State of Tennessee, by act, in 1820, allowed lauds sold on execution to be redeemed on certain terms, it was held that lands thereafter sold on execution under federal process were not redeemable under the provisions of the statute, for state legislation cannot interfere with the process of the federal courts. Polk *v.* Douglass, 6 Yerger, 209; Ross *v.* Duval, 13 Peters, 45, S. P. The federal courts follow the decisions of the state courts on the construction of state laws, unless they come in conflict with the Constitution or laws of the United States. 10 Wheaton, 159; 1 Paine, 564. They follow, also, those statutes of the several states which prescribe rules of evidence in civil cases, in trials at common law. M'Neil *v.* Holbrook, 12 Peters, 84. The state laws which are made rules of decision in the federal courts are those which apply to *rights* of person and property. United States *v.* Wonson, 1 Gallison, 18; Mayer *v.* Foulkrod, 4 Wash. 349. See also *infra*, iv. 278, note. State laws *limiting* actions and executions on judgments are

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whether the case came there from the Supreme Court of the state or from the Circuit Court. [So by a decision that a state law has not been passed in accordance with the state constitution. Town of South Ottawa *v.* Perkins, 94 U. S. 260; Post *v.* Supervisors, 105 U. S. 667. So, generally, by construction of state constitutions and statutes. Fairfield *v.* County of Gallatin, 100 U. S. 47; Davie *v.* Briggs, 97 U. S. 628 (St. of Lim.). The Supreme Court follows the law as declared by the state court at the time when the rights accrued. Taylor *v.* Ypsilanti, 105 U. S. 60. — B.]

When the question is to be determined by common-law rules only, the decisions of the state courts are not binding: as, with regard to the construction of a deed, Foxcroft *v.* Mallett, 4 How. 353; or to that of a private act, Williamson *v.* Berry, 8 How. 495; or as to liability for a nuisance, Chicago *v.* Robbins, 2 Black, 418; or on a question of equity law, Neves *v.* Scott, 13 How. 268; *infra*. See further, Gloucester Ins. Co. *v.* Younger, 2 Curt. 322. [Federal courts are not bound by state decisions on questions depending upon commercial law or upon general common-law principles. Oates *v.* National

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upon questions of commercial or general law are not binding upon the Federal courts. See Bucher *v.* Cheshire R. Co., 125 U. S. 555, 583; Pleasant Township *v.* Ætna Life Ins. Co., 138 U. S. 67; Western U. T. Co. *v.* Cook, 61 Fed. Rep. 624; Cairo &c. Ry. Co. *v.* Brevoort, 62 id. 129; Forepaugh *v.* Delaware, &c. R. Co., 46 Legal Int. 507; 24 W. N. C. 385. Thus, the decision of the highest State court controls the Federal courts upon the construction and effect of a State statute regulating assignments for creditors: Union Nat. Bank *v.* Kansas City Bank, 136 U. S. 223; or upon the statute of frauds. Moses *v.* Nat. Bank, 149 U. S. 298. As to the effect of other State decisions relating to State statutes, see also United States *v.* Stanford, 69 Fed. Rep. 25; *In re* The Jarnecke Ditch, id. 161; Central Trust Co. *v.* East Tenn. &c. Ry. Co., id. 353; Barber *v.* Pittsburgh, &c. Ry. Co., id. 501; Sanford *v.* Poe, id. 546. A Federal court is not bound by a State decision as to what are public uses under the right of eminent domain: Bradley *v.* Fallbrook Ir. District, 68 Fed. Rep. 948; Marchant *v.* Penn. R. Co., 153 U. S. 380; or on any matters of general law, Harrison *v.* Hartford F. Ins. Co., 67 Fed. Rep. 298. A single

defined in that country, from which we derived our knowledge of those principles." (*b*)

rules of property, and become rules of decision in the federal courts. Ross *v.* Duval, 13 Peters, 45. By act of Congress of August 23, 1842, c. 188, the Supreme Court has power to prescribe, regulate, and alter the forms of process in the district and circuit courts, the forms of pleading in suits at common law, or in admiralty, or in equity, and of taking testimony and of entering decrees, and generally to regulate the whole practice of the courts. The *rules of practice* in admiralty cases, on the instance side of the District Court, were established in pursuance of the act of 23d August, 1842, c. 188. See those rules in 3 N. Y. Legal Observer, 357. With respect to the common law as a part of federal jurisprudence, the Supreme Court declared, in Wheaton *v.* Donaldson, 8 Peters, 658, that there could not be a common law of the United States. Each of the states has its local usages, customs, and common law. There was no principle which pervades the Union, and has the authority of law, that is not embodied in the Constitution and laws of the Union. The common law could be made a part of our federal system only by legislative adoption, and when a common-law right is asserted, the courts look to the state in which the controversy originated.

(*b*) Though there be no equity state courts, that does not prevent the exercise of equity jurisdiction in the courts of the United States; they adopt and follow the equity jurisprudence existing in England. The District Court of Louisiana has accordingly equity powers, and it is bound to proceed in equity causes according to the principles, rules, and usages which belong to the courts of equity, as contradistinguished from courts of common law. Gaines *v.* Relf, 15 Peters, 9; Lorman *v.* Clarke, 2 McLean, 568, 571.

Bank, 100 U. S. 239; Railroad Co. *v.* National Bank, 102 U. S. 14. In Town of Pana *v.* Bowler, 107 U. S. 529, the Supreme Court, while assuming that they would be bound to follow the decision of the Illinois court, that certain bonds issued under the law of that state were irregularly issued and void, yet held that they were not bound to follow it to the extent of holding them void as against a *bona fide* purchaser for value, a question of commercial law being here involved. Myrick *v.* Michigan Central R. R. Co., 107 U. S. 102. United States courts recognize and protect rights given by state statutes. Dennick *v.* Railroad Co., 103 U. S. 11; Brine *v.* Insurance Co., 96 U. S. 627; Orvis *v.* Powell, 98 U. S. 176. Where the United States courts have jurisdiction, they exercise an independent judgment, unless some rule has become established by state decisions. Hence the

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decision in the State court, if it is not conclusive there, as upon the construction of a will in an ejectment suit, is not conclusive upon a Federal court, though entitled to weight as a precedent. Barber *v.* Pittsburgh, &c. Ry. Co., 69 id. 501. And if a rule of property is unsettled by later discisions of the State court, the Federal court is not fettered, but may use its own judgment. Chisolm *v.* Caines, 67 id. 285; National F. & P. Works *v.* Oconto Water Co., 68 id. 1006.

If a State constitution or statute, as interpreted and applied by the highest court of the State, does not violate any right secured by the Federal Constitution, that construction will be accepted as conclusive upon the question when carried to the U. S. Supreme Court. U. S. Rev. Stats. § 721; Louisville, N. O. & T. Ry. Co. *v.* Mississippi, 133 U. S. 590; Baltimore Traction Co. *v.* Baltimore Belt R. Co., 151 U. S. 137; Southern Pacific R. Co. *v.* Orton, 32 Fed. Rep. 457; Beebe *v.*

In this view of the subject, the common law may be cultivated as part of the jurisprudence of the United States. In its im-

Supreme Court refused to follow a state decision construing a statute which was not rendered until after judgment was given in the Circuit Court. Burgess *v.* Seligman, 107 U. S. 20. See cases cited. — B.]

Rules of Practice under the former Acts. — That state laws cannot *proprio vigore* affect the process of the courts of the United States, see further, The Mayor *v.* Lord, 9 Wall. 409; Catherwood *v.* Gapete, 2 Curt. 94; Matter of Hopkins, ib. 567; Matter of Freeman, ib. 491; Duncan *v.* Darst, 1 How. 301; New England Screw Co. *v.* Bliven, 3 Blatchf. 240; Pomeroy *v.* N. Y. & N. H. R. R. Co., ib. 120; Goodyear *v.* Providence Rubber Co., 2 Fisher, 499; *ante*, 248, n. 1. But a law allowing a party to a suit to testify on his own behalf is a rule of decision and not of practice, and must be followed. Dibblee *v.* Furniss, 4 Blatchf. 262. On the other hand, the statute of limitations of a state does not apply to an action for the infringement of a patent, Collins *v.* Peebles, 2 Fisher, 541; Parker *v.* Hallock, ib. 543; *contra,* Parkes *v.* Hawk, ib. 58; Parker *v.* Hall, ib. 62; and state laws of set-off do not affect cases in the United States courts, Watkins *v.* United States, 9 Wall. 759, 765.

As to equity, see 346, note 1. The jurisdiction and rules of decision in equity are the same in every state, for the reason stated in note (*b*); and it is no objection to the jurisdiction that there is a remedy under the local law. Dodge *v.* Woolsey, 18 How. 331, 347; Noonan *v.* Lee, 2 Black, 499; Barber *v.* Barber, 21 How. 582; Cropper *v.* Coburn, 2 Curt. 465; Hunt *v.* Danforth, ib. 592. But where there is no jurisdiction, according to the principles of the English Chancery (see last-cited cases), the objection is one by which the court is bound. Parker *v.* Winnipiseogee Lake Cotton & Woollen Co., 2 Black, 545; Wright *v.* Ellison, 1 Wall. 16, 22; Hipp *v.* Babin, 19 How. 271. And although by state laws there is no distinction between cases at law and in equity, and although the forms of proceedings and practice in the state courts have been adopted in the United States courts, if the plaintiff's claim be a legal one, he cannot have merely equitable relief. Bennett *v.* Butterworth, 11 How. 669; Jones *v.* McMasters, 20 How. 8; Shuford *v.* Cain, 1 Abb. U. S. 302. A decision of a state court involving only general principles of equity is not binding on the Supreme Court. Neves *v.* Scott, 13 How. 268.

Powers not judicial, exercised by the chancellor merely as the representative of the sovereign, and by virtue of the king's

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Louisville, &c. R. Co., 39 id. 481; see also Carroll County *v.* Smith, 111 U. S. 556; Gage *v.* Pumpelly, 115 U. S. 454; Yick Wo *v.* Hopkins, 118 U. S. 356; Heath *v.* Wallace, 138 U. S. 573; McElvaine *v.* Brush, 142 U. S. 155. This rule applies even when a similar statute is differently construed in another State. Bauserman *v.* Blunt, 147 U. S. 647; May *v.* Tenney, 148 U. S. 60; Randolph *v.* Quidnick Co., 135 U. S. 457. It applies conclusively to State statutes of limitations. Bauserman *v.* Blunt, 147 U. S. 647; Balkam *v.* Woodstock Iron Co., 154 U. S. 177. It does not apply when the State judgment under review involves the question whether want of notice deprived a party of his property without due process of law. Scott *v.* McNeal, 154 U. S. 34. It applies even when the decision of the State court is of later date than that of the Federal court. Tomes *v.* Barney, 35 Fed. Rep. 112; Leighton *v.* Young, 52 id. 439.

proved condition in England, and especially in its improved and varied condition in this country, under the benign influence of an expanded commerce, of enlightened justice, of republican principles, and of sound philosophy, the common law has become a code of matured ethics and enlarged civil wisdom, admirably adapted to promote and secure the freedom and happiness of social life. It has proved to be a system replete with vigorous and healthy principles, eminently conducive to the growth of civil liberty; and it is in no instance disgraced by such a slavish political maxim as that with which the Institutes of Justinian are introduced. (*c*) It is the common jurisprudence of the United States, and was brought with them as *colonists *343 from England, and established here, *so far* as it was adapted to our institutions and circumstances. It was claimed by the Congress of the united colonies, in 1774, as a branch of those "indubitable rights and liberties to which the respective colonies are entitled."(*a*) It fills up every interstice, and occupies every wide space which the statute law cannot occupy. Its principles

(*c*) Quod principi placuit, legis habet vigorem. Inst. 1, 2, 6.

(*a*) Declaration of Rights of October 14, 1774; Journals of Congress, i. 28.

prerogative as *parens patriæ*, are not possessed by the circuit courts. Fontain *v.* Ravenel, 17 How. 369, 384.

The Practice Act of June 1, 1872, § 5, provides that the practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts of the United States shall conform, as near as may be, to those existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, except that the rule of evidence under the laws of the United States and as practised in the courts thereof are not altered. Section 6 gives remedies by attachment or other process against the property of the defendant in common-law causes in the circuit and district courts similar to those given under state laws in the courts of the state where the United States court is held; and the circuit and district courts may from time to time, by general rules, adopt such state laws as may be in force on the matter. There are like provisions as to execution, &c. There are many other important provisions, especially as to criminal pleading and practice. [The Practice Act of 1872 (Rev. St. § 914) does not abolish the distinction between legal and equitable remedies, even though the state law may have done so. La Mothe Manufacturing Co. *v.* National Tube Works Co., 15 Blatchf. 432. Van Arsden *v.* Morton, 99 U. S. 378; Thompson *v.* Railroad Companies, 6 Wall. 134. Nor does it extend to questions of evidence. Connecticut Mutual Life Ins. Co. *v.* Schaefer, 94 U. S. 457. And wherever Congress has provided a specific method of procedure, of course that governs. Easton *v.* Hodges, 7 Biss. 324; Sage *v.* Tanszky, 6 Cent. L. J. 7. For further limitations of the operation of the statute, see Newcomb *v.* Wood, 97 U. S. 581. — B.]

may be compared to the influence of the liberal arts and sciences; *adversis perfugium ac solatium præbent; delectant domi non impediunt foris; pernoctant nobiscum, peregrinantur, rusticantur.* To use the words of the learned jurist, to whom I have already alluded,(*b*) "We live in the midst of the common law, we inhale it at every breath, imbibe it at every pore; we meet with it when we wake and when we lay down to sleep, when we travel and when we stay at home; and it is interwoven with the very idiom that we speak; and we cannot learn another system of laws without learning, at the same time, another language."

The jurisdiction of the federal courts *ratione personarum*, and depending on the relative character of the litigant parties, has been the subject of much judicial discussion. The Constitution gives jurisdiction to the federal courts of all suits between aliens and citizens, and between resident citizens of different states, (*c*) and we have a series of judicial decisions on that subject. If the case arises under the Constitution, laws, or treaties of the Union, it is immaterial who may be parties, for the subject-matter gives jurisdiction; and if it arises between aliens and citizens, or between citizens of different states, it is immaterial what may be the nature of the controversy, for the character of the parties gives jurisdiction.

(*b*) Du Ponceau on Jurisdiction, 91. See also 1 Story's Comm. on the Constitution, 140, 141; ii. 264–268. The learned commentator, in the volume last cited, ably, and, in my opinion, satisfactorily contends that the common law, in the absence of positive statute law, regulates, interprets, and controls the powers and duties of the court of impeachments under the Constitution of the United States; and though the common law cannot be the foundation of a jurisdiction not given by the Constitution and laws, that jurisdiction, when given, attaches, and is to be exercised according to the rules of the common law. Were it otherwise there would be nothing to exempt us from an absolute despotism of opinion and practice.[1]

(*c*) Lessee of Butler *v.* Farnsworth, 4 Wash. 101.

[1] Professor Theodore W. Dwight, in an able article in 6 Am. Law Reg. N. S. 257, maintains the view that the Constitution only adopts impeachment as a mode of procedure, and that there can be no impeachment except for a violation of a law of Congress, or for the commission of a crime named in the Constitution. On another page (641) of the same volume Mr. Justice Lawrence, of Ohio, presents the opposite view, which was acted upon, as is well known, in framing the articles against President Johnson. See points and authorities submitted by the same author, Johnson's Trial. See also the arguments of counsel in that case on the one side and the other.

3. Jurisdiction when an Alien is a Party. (*x*) — In *Bingham* v. *Cabot*, (*d*) the Supreme Court held, that it was necessary to set forth the citizenship of the respective * parties, or *344 the alienage, when a foreigner was concerned, by positive averments, in order to bring the case within the jurisdiction of the Circuit Court; and that if there was not a sufficient allegation for that purpose on record, no jurisdiction of the suit would be sustained. The same doctrine was maintained in *Turner* v. *Enrille*, (*a*) and in *Turner* v. *The Bank of North America*; (*b*) and it was declared, that the Circuit Court was a court of limited jurisdiction, and had cognizance only of a few cases specially circumstanced, and that the fair presumption was, that a cause was without its jurisdiction till the contrary appeared. Upon that principle the rule was founded, making it necessary to set forth, upon the record of the Circuit Court, the facts or circumstances which gave jurisdiction, either expressly or in such manner as to render them certain by legal intendment. It is necessary, therefore, where the defendant appears to be a citizen of one state, to show, by averment, that the plaintiff is a citizen of some other state, or an alien; or, if the suit be upon a promissory note, by the indorsee, to show that the original payee was so; for it is his description, as well as that of the indorsee, which gives the jurisdiction. But an alien cannot sue a citizen in the Circuit Court of the United States, if the latter be at the time a resident in a foreign country, notwithstanding he has property in the district which might be attached. No compulsory process, under the Judiciary Act of 1789, lies against a person who is not at the time an inhabitant of, or is not found in the district in which the process issues. This goes to exclude from the federal courts the proceeding by foreign attachment under the local laws of the states. (*c*)

(*d*) 3 Dallas, 382. (*a*) 4 Dallas, 7. (*b*) 4 Dallas, 8.
(*c*) Picquet *v.* Swan, 5 Mason, 35; Toland *v.* Sprague, 12 Peters, 300.

(*x*) The description of the plaintiff positively appear in the pleadings or other parts of the record, and the absence of jurisdiction in the circuit court will be noticed by the Supreme Court, though not suggested by the parties. An averment that parties "reside" in a certain State, or that a partnership is "of" that State, throughout the record as a "citizen of London, England," is insufficient as an allegation of alienage. Stuart *v.* Easton, 156 U. S. 46.

See *supra* 302, notes. The alienage or citizenship of parties must distinctly and

4. Jurisdiction between Citizens of Different States. — The Judiciary Act of 1789, sec. 11, gives jurisdiction to the Circuit Court when an alien is a party; and it was decided in *Mossman* v. *Higginson*, (*d*) that the jurisdiction was confined to the case of suits between citizens and foreigners, and did not extend * 345 to suits between alien and alien; and * that if it appeared on record that the one party was an alien, it must likewise appear affirmatively that the other party was a citizen. So, again, in *Course* v. *Stead*, (*a*) [1] it was decided to the same effect. The principle is, that it must appear upon the record, that the character of the parties supports the jurisdiction; and the points in that

(*d*) 4 Dallas, 12.

(*a*) 4 Dallas, 22. The omission of the above averments, or any other requisite to give jurisdiction, is matter of substance, and not cured by verdict, nor amendable after verdict. 1 Paine, 486, 594; Jackson *v.* Twentyman, 2 Peters, 136.

[1] Prentiss *v.* Brennan, 2 Blatchf. 162; Rateau *v.* Bernard, 3 Blatchf. 244. So the court has no jurisdiction when all the parties, as well plaintiffs as defendants, are citizens of states other than that in which the suit is brought. Kelly *v.* Harding, 5 Blatchf. 502. See Merserole *v.* Union Paper Collar Co., 6 Blatchf. 356. And when some of the parties to a bill for partition, being citizens of the District of Columbia, made a *merely colorable* conveyance to a citizen of a state, it was held not to give the court jurisdiction. Barney *v.* Baltimore, 6 Wall. 280. See Jones *v.* League, 18 How. 76; Smith *v.* Kernochen, 7 How. 198; Starling *v.* Hawks, 5 McL. 318. [See Williams *v.* Nottawa, 104 U. S. 209; Hawes *v.* Oakland, ib. 450.] But it was admitted that if the conveyance had really transferred the interest, although made for the avowed purpose of enabling the court to entertain jurisdiction of the case, it would have accomplished that purpose, 6 Wall. 288; and it was so held in Osborne *v.* Brooklyn City R. R., 5 Blatchf. 366; Newby *v.* Oregon C. R. Co., 3 Am. Law Times, 127.

or there "does business," is insufficient to show citizenship in such State. Grace *v.* American Central Ins. Co., 109 U. S. 278; Börs *v.* Preston, 111 U. S. 252; Mansfield, C. & L. M. Ry. Co. *v.* Swan, id. 379; Continental Ins. Co. *v.* Rhoads, 119 U. S. 237; Cameron *v.* Hodges, 127 U. S. 322; Denny *v.* Pironi, 141 U. S. 121; Wolfe *v.* Hartford Life Ins. Co., 148 U. S. 389; Horne *v.* George H. Hammond Co., 155 U. S. 393. So, in the Federal Courts, where a corporation is regarded as a citizen of the State by which it is created, it is not sufficient to aver that it is "citizen," or "is doing business in" a particular State. Lafayette Ins. Co. *v.* French, 18 How. 404; Lonergan *v.* Illinois Cent. R. Co., 55 Fed. Rep. 550; Muller *v.* Dows, 94 U. S. 444; National S. S. Co. *v.* Tugman, 106 U. S. 118; Kansas Pac. Ry. Co. *v.* Atchison, 112 U. S. 414; Brock *v.* North Western Fuel Co., 130 U. S. 341; Everhart *v.* Huntsville College, 120 U. S. 223; Timmons *v.* Elyton Land Co., 139 U. S. 378; 36 Cent. L. J. 333.

Federal suits involving the validity of State taxes do not depend upon the citizenship of parties. United States Express Co. *v.* Allen, 39 Fed. Rep. 712.

case were reasserted in *Montalet* v. *Murray*, (*b*) and in *Hodgson* v. *Bowerbank*, (*c*) and in *Sullivan* v. *The Fulton Steamboat Company*. (*d*) In *Maxfield* v. *Levy*, (*e*) the question of jurisdiction, arising from the character of the parties, was discussed in the Circuit Court in Pennsylvania, and the court animadverted severely upon an attempt to create a jurisdiction by fraud, contrary to the policy of the Constitution and the law. The suit was an ejectment between citizens of the same state, to try title to land; and, to give jurisdiction to the Circuit Court, a deed was given, collusively, and without any consideration, to a citizen of another state, for the sole purpose of making him a nominal plaintiff, in order to give the federal court jurisdiction. The court dismissed the suit, and observed, that the Constitution and laws of the United States had been anxious to define, by precise boundaries, and preserve with great caution, the line between the judicial authority of the Union and that of the individual states. No contrivance to defeat the law of the land, and create jurisdiction by fraud, could be tolerated. (*f*) But if a citizen of one state thinks proper to change his domicile, and remove with his family to another state, not colorably, but permanently, and with a *bona fide* intention to *reside* there, * even * 346 though his object was to avail himself of the jurisdiction of the federal courts, he becomes instantly a citizen of the other state, and may sue as such in the courts of the United States. (*a*)

The doctrine in the original case of *Bingham* v. *Cabot* was again

(*b*) 4 Cranch, 461. (*c*) 5 Cranch, 303.

(*d*) 6 Wheaton, 450; Dodge *v.* Perkins, 4 Mason, 435, s. p.

(*e*) 4 Dallas, 330. This case was repudiated by Mr. Justice Story, in Briggs *v.* French, 2 Sumner, 257, as being erroneously decided.

(*f*) The same doctrine was held by Judge Washington, in Hurst *v.* McNeil, 1 Wash. 70, 83. But in Briggs *v.* French, 2 Sumner, 251, it was pointedly condemned; and the judge held, that a conveyance of land by a citizen of one state to a citizen of another, for the purpose of enabling the latter to maintain a suit on it in the courts of the United States, vested a legal title, and a stranger not claiming under either of the parties had no right to inquire into the motive of the conveyance.

(*a*) Lessee of Cooper *v.* Galbraith, 3 Wash. 546; Case *v.* Clark, 5 Mason, 70; Catlett *v.* Pacific Ins. Co., 1 Paine, 594. In Briggs *v.* French, 2 Sumner, 251, it was held, that it was sufficient to give jurisdiction to the federal courts, that a citizen of one state had really, and not merely nominally, removed from one state to another, though his motive might have been to prosecute a suit in the courts of the United States. It was sufficient if the plaintiff was *in fact* a citizen of one state and the defendant of another. The motive of the removal was not to be inquired into.

confirmed in *Abercrombie* v. *Dupuis*, (*b*) with some symptoms of reluctance; and it would seem that the court was not entirely satisfied with the precise limits in which their jurisdiction had been circumscribed and embarrassed by their predecessors. But in *Strawbridge* v. *Curtiss*, (*c*) the limitation of the federal jurisdiction was considered as being still more close and precise. The Supreme Court declared, that where the interest was joint, and two or more persons were concerned in that interest, as joint plaintiffs or joint defendants, each of them must be competent to sue, or liable to be sued, in the federal courts; and the suit was dismissed in that case, because some of the plaintiffs and defendants were citizens of the same state. (*d*) [1] The next case that arose on this subject was whether a corporation was a citizen within the meaning of the Constitution, and could sue in the federal courts in consequence of its legal character; and it was decided in the cases of *The Hope Insurance Company* v. *Board-*

(*b*) 1 Cranch, 343. (*c*) 3 Cranch, 267.

(*d*) But the Circuit Court of the United States is not deprived of its jurisdiction arising from the character of the party, by joining with an alien or citizen of another state *a mere nominal party*, who does not possess the requisite character. 5 Cranch, 303; 8 Wheaton, 451; 1 Paine, 410. It has likewise been adjudged, that as the courts of Louisiana do not proceed according to the rules of the common law, but of the civil law, a suit may be brought in the federal courts by a resident alien against one or two obligors, bound severally as well as jointly, who reside in Louisiana, *though the other obligor resides in another state.* The rule in chancery and in the civil law is, that if the court can make a decree according to justice and equity between the parties before them, that decree shall not be withheld because a party out of its jurisdiction is not made a defendant, although he must have been united in the suit had he been within the reach of the process of the court. This was the principle of that decision. Breedlove *v.* Nicolet, 7 Peters, 413. See also Harrison *v.* Uraun, 1 Story, 64. And now, by act of Congress of February 28, 1839, c. 36, if there be several defendants, and any one or more of them is not an inhabitant of, or not found in, the district where the suit is brought, and does not voluntarily appear, the court may entertain jurisdiction, and proceed against the parties properly before it.

[1] The act mentioned at the end of note (*d*) does not enable the Circuit Court to make a decree in a suit in the absence of a party whose rights must necessarily be affected by such decree. On the other hand, it had been determined before the act was passed, that the non-joinder, for want of jurisdiction, of parties merely formal, or necessary, but without whom the court could proceed to a decree and do complete and final justice to the parties before it, was not fatal. So the act seems to be hardly more than declaratory in equity cases. Barney *v.* Baltimore, 6 Wall. 280; Shields *v.* Barrow, 17 How. 130; Coiron *v.* Millaudon, 19 How. 113. See also Drake *v.* Goodridge, 6 Blatchf. 151.

man, and of *The Bank of the United States* v. *Deveaux*, (*e*) that a corporation aggregate was not, in its corporate capacity, a citizen, and that its right to litigate in the federal courts depended upon the character of * the individuals who com- * 347 pose the body politic, and which character must appear by proper averments upon the record. (*a*) [1] But a corporation aggregate, composed of citizens of one state, may sue a citizen of another state in the Circuit Court of the United States. If any of the stockholders are citizens of the same state with the defendant, the federal courts have no jurisdiction. And the rule relative to suits originally instituted in the courts of the United States, requiring all the individuals composing the respective parties to possess the requisite character to give the court jurisdiction, applies equally to suits removed from the state courts. (*b*)

(*e*) 5 Cranch, 57, 61 ; Bank of Augusta *v.* Earle, 13 Peters, 519 ; Wood *v.* Hartford Fire Insurance Co., 13 Conn. 202, s. p.

(*a*) In Breithaupt *v.* The Bank of Georgia, 1 Peters, 238, it was there held that a bill, to give jurisdiction, must state that the stockholders were citizens of Georgia.

(*b*) Ward *v.* Arredondo, 1 Paine, 410 ; Bank of Cumberland *v.* Willis, 3 Sumner, 472. But the very inconvenient and narrow doctrine contained in the cases of Strawbridge *v.* Curtiss, 3 Cranch, 367, Bank of the United States *v.* Deveaux, 5 Cranch, 84, and Comm. & R. R. Bank of Vicksburg *v.* Slocomb, 14 Peters, 60, was reviewed and overruled in the Louisville Railroad Co. *v.* Letson, in 2 How. 497. It was there held, that a *corporation* created and doing business in a state was an *inhabitant* of the state, capable of being treated as a *citizen*, for all purposes of suing and being sued, although some of the members of the corporation were not citizens of the state in which the suit was brought, and although the state itself might be a member of the corporation. This was a very important and salutary decision, and reinstated the federal courts in their essential jurisdiction in cases of suits between citizens of different states. The act of Congress of 28th February, 1839, gave aid to this decision, it being considered in its language and construction as an enlargement of jurisdiction in respect to the character of the parties.

[1] The rule has now taken the form of a legal fiction. For while a suit by or against a corporation is considered to be brought by or against its members, they are conclusively presumed, for purposes of jurisdiction, to be citizens of the state in which the body was incorporated. Railway Co. *v.* Whitton, 13 Wall. 270, 284 ; Ohio & Mississippi R. R. *v.* Wheeler, 1 Black, 286 ; Covington Drawbridge Co. *v.* Shepherd, 20 How. 227 ; Marshall *v.* Balt. & Ohio R. R., 16 How. 314 ; Lafayette Ins. Co. *v.* French, 18 How. 404 ; Insurance Co. *v.* Francis, 11 Wall. 210 ; Pennsylvania *v.* Quicksilver Co., 10 Wall. 553 ; Express Co. *v.* Kountze, 8 Wall. 342 ; [Muller *v.* Dows, 94 U. S. 444.]

On this principle it is held that a suit may be brought by a national bank organized and located in one state against a citizen of another in the Circuit Court sitting in the latter state. Manufacturers' N. Bank *v.* Baack, 2 Abbott, U. S. 232, explaining a *dictum* in Kennedy *v.* Gibson, 8 Wall. 498, 506.

With respect to the question on the peculiar right of the Bank of the United States to sue in the federal courts, it was decided, in reference to the first Bank of the United States, that no right was conferred on that bank by its act of incorporation to sue in those courts. It had only the ordinary corporate capacity to sue and be sued; and being an invisible, artificial being, a mere legal entity, and not a citizen, its right to sue must depend upon the character of the individuals of which it is composed. The Constitution of the United States supposed apprehensions might exist, that the tribunals of the states would not administer justice as impartially as those of the nation, to parties of every description, and, therefore, it established national tribunals for the decision of controversies between aliens and a citizen, and between citizens of different states. The persons whom a corporation represents may be aliens or citizens, and the controversy is between persons suing by their corporate name for a corporate right, and the individual defendant. Where the members of the corporation are aliens or citizens of a different state from the opposite party, they * 348 come * within the reason and terms of the jurisdiction of the federal courts. The court can look beyond the corporate name, and notice the character of these members, who are not considered, to every intent, as placed out of view, and merged in the corporation. Incorporated aliens may sue a citizen, or the incorporated citizens of one state may sue a citizen of another state, in the federal courts, by their corporate name, and the controversy is substantially between aliens and a citizen, or between the citizens of one state and those of another. In that case, the president, directors, and company of the Bank of the United States averred, that they were citizens of Pennsylvania, and that the defendants were citizens of Georgia; and this averment, not traversed or denied, was sufficient to sustain the suit in the Circuit Court. In suits by the Bank of the United States, of 1816, such an averment is not necessary, because the act incorporating the bank (*a*) authorizes it to sue and be sued in the Circuit Court of the United States, as well as in the state courts. Without such an express provision, it would have been difficult for the Bank of the United States ever to have sued in the federal courts, if the fact of citizenship of all the members was to be scrutinized, for there were probably few or no states which had not some stock-

(*a*) Act of Congress April 10, 1816, sec. 7.

holder of the bank a resident citizen. (*b*) It was indispensable for Congress to provide specially for a jurisdiction over suits in which the bank was concerned, or no jurisdiction could well have been sustained. It was truly observed, by the Supreme Court, that if the Bank of the United States could not sue a person who was a citizen of the same state with any one of its members, in the circuit courts, this disability would defeat the power.

A trustee who holds the legal interest is competent to * sue in right of his own character as a citizen or alien, as * 349 the case may be, in the federal courts, and without reference to the character or domicile of his *cestui que trust*, unless he was created trustee for the fraudulent purpose of giving jurisdiction. (*a*) This rule equally applies to executors and administrators, who are considered as the real parties in interest; but it does not apply to the case of a general assignee of an insolvent debtor, and he cannot sue in the federal courts, if his assignor could not have sued there. The 11th section of the Judiciary Act will not permit jurisdiction to vest by the assignment of a *chose in action* (cases of foreign bills of exchange excepted), unless the original holder was entitled to sue; and whether the assignment was made by the act of the party, or by operations of law, makes no difference in the case. An executor or administrator is not an assignee, within the meaning of the 11th section of the Judiciary Act. (*b*) [1]

(*b*) Osborn *v.* United States Bank, 9 Wheaton, 738; United States Bank *v.* Planters' Bank, 9 Wheaton, 904.

(*a*) Chappedelaine *v.* Dechenaux, 4 Cranch, 306, 308; Brown *v.* Strode, 5 Cranch, 303. See also 5 Cranch, 91, and Childress *v.* Emory, 8 Wheaton, 642. If the nominal plaintiff and the real defendant be citizens of the state, yet if the party for whose use the suit was brought was a citizen of another state, the Circuit Court of the United States has jurisdiction. Brown *v.* Strode, *supra;* McNutt *v.* Bland, 2 How. 9.

(*b*) Sere *v.* Pitot, 6 Cranch, 332; Mayer *v.* Foulkrod, 4 Wash. 349. But it is adjudged that a note payable to A, or bearer, may be sued in the federal courts, in his own name, and that the 11th section of the Judiciary Act does not apply. Bullard *v.* Bell, 1 Mason, 243; Halsted *v.* Lyon, 2 McLean, 226. So the holder of a negotiable note, payable to the maker's own order, and indorsed, may sue the maker

[1] *What is a chose in action within the section?* The act speaks of "any suit to recover the *contents* of any promissory note or other *chose in action* in favor of an assignee." In Bushnell *v.* Kennedy, 9 Wall. 387, 393, it is said to be hard to reconcile Sere *v.* Pitot with later judgments, and the Chief Justice inclines to the view that the restriction of the 11th section applies only to rights of action

With respect to the District of Columbia, and to the territorial districts of the United States, they are not *states*, within the sense of the Constitution and of the Judiciary Act, so as to enable a citizen thereof to sue a citizen of one of the states in the federal courts. However extraordinary it might seem to be, that the courts of the United States, which were open to aliens, and to the citizens of every state, should be closed upon the inhabitants of those districts, on the construction that they were not citizens of a *state*, yet, as the court observed, this

in the federal courts, though the holder be a citizen of another state; for the right passes not by *assignment*, but to bearer by delivery. Towne *v.* Smith, 9 Law Rep. 12; [1 Woodb. & M. 115.] [By statute March 3, 1875, 18 St. at L. 470, the exception in the original act is made to apply to "promissory notes negotiable by the law merchant and bills of exchange." Since this statute, an assignee may sue on a claim not founded in contract without regard to the citizenship of his assignor. Van Bokkelen *v.* Cook, 5 Saw. 587. — B.]

founded on contracts which contain within themselves some promise or duty to be performed, and not to those arising out of some wrongful act or neglect of duty to which the law attaches damages (citing Barney *v.* Globe Bank, 2 Am. Law Reg. N. S. 229). He even intimates that the restriction might well have been limited to written promises to pay money, upon which an assignee could sue without using the name of the assignor. [In Corbin *v.* County of Black Hawk, 105 U. S. 659, it was held that a suit to compel specific performance of a contract fell within the corresponding section of the Revised Statutes (§ 629). — B.]

A case not within this clause is replevin brought to recover bank-notes *in specie*, which lies, if the plaintiff has the requisite citizenship, although the assignor is of the same state with the defendant. Deshler *v.* Dodge, 16 How. 622. So a suit to recover possession of mortgaged premises; but not one to enforce the payment of the debt by sale or decree against the mortgagor. Ib. 631, citing Smith *v.* Kernochen, 7 How. 198; Sheldon *v.* Sill, 8 How. 441. See further, Weems *v.* George, 13 How. 190.

As to parties, the general rule is that to be a party for the purpose of jurisdiction, it is necessary to be one upon record, and it may be doubted whether the exception mentioned above in note (*a*) extends beyond the case of bonds given to an officer in his official capacity. The decided cases are of that nature. Hull *v.* Hutchinson, 14 How. 586.

An equitable assignee of a claim to an account is within the clause. Wilkinson *v.* Wilkinson, 2 Curt. 582; *ante*, 302.

In addition to the cases given in note (*b*) above, the restriction does not apply to bonds payable in blank or to bearer. White *v.* Vermont & Mass. R. R., 21 How. 575; Thomson *v.* Lee County, 3 Wall. 327. [Town of Thompson *v.* Perrine, 106 U. S. 589; Township of Chickaming *v.* Carpenter, ib. 663; City of Lexington *v.* Butler, 14 Wall. 282.] And an indorsee may sue his immediate indorser, although he could not have maintained an action against the maker. *Post*, 350; Coffee *v.* Planters' Bank of Tennessee, 13 How. 183.

The assignee of a chose in action must show affirmatively that the action might have been maintained by the assignor if no assignment had been made. Bradley *v.* Rhines, 8 Wall. 393.

was a subject for legislative, and not for judicial, consideration.(*c*)[2]

* If the jurisdiction of the Circuit Court between citizens * 350 of different states has once vested, it is not devested by a subsequent change of domicile of one of the parties, and his removal into the same state with the adverse party, *pendente lite*. (*a*) The jurisdiction depends upon the state of things at the time the action was brought. So, an indorsee of a note, who resides in one state, may sue his immediate indorser, who resides in another state, though that immediate indorser and the maker be residents of the same state. The indorsement is a new contract between the parties to the record, quite distinct from the original note. (*b*)

5. Jurisdiction when a State is interested. — The case of *Osborn* v. *The Bank of the United States* (*c*) brought into view important principles touching the constitutional jurisdiction of the federal courts, where a state claimed to be essentially a party. The court decided, that the circuit courts had lawful jurisdiction, under the act of Congress incorporating the national bank, of a bill in equity brought by the bank for the purpose of protecting it in the exercise of its franchises, which were threatened to be invaded under a law of the State of Ohio; and that as the state itself could not be made a party defendant, the suit might be maintained against the officers and agents of the state who were intrusted with the execution of such laws.

As the amendment to the Constitution prohibited a state to be made a party defendant by individuals of other states, the court felt the pressure and difficulty of the objection, that the state of Ohio was substantially a party defendant, inasmuch as the process of the court in the suit acted directly upon the state, by restraining its officers from executing the law of the state. The direct

(*c*) The term *state*, in the sense of the Constitution, applies only to the members of the American confederacy, and does not extend to a *territory* of the United States. Seton *v.* Hanham, R. M. Charlton, (Ga.) 354; Hepburn *v.* Ellzey, 2 Cranch, 445; Corporation of New Orleans *v.* Winter, 1 Wheaton, 91; [*ante*, 326, n. 1.]

(*a*) Morgan *v.* Morgan, 2 Wheaton, 290; Clarke *v.* Matthewson, 12 Peters, 164.

(*b*) Young *v.* Bryan, 6 Wheaton, 146; Mollan *v.* Torrance, 9 Wheaton, 537; [Coffee *v.* Planters' Bank of Tennessee, 13 How. 183.]

(*c*) 9 Wheaton, 738.

[2] Barney *v.* Baltimore, 6 Wall. 280; *ante*, 345, n. 1. Compare Miners' Bank *v.* Iowa, 12 How. 1; Scott *v.* Jones, 5 How. 343, cited *ante*, 326, n. 1.

interest of the state in the suit was admitted, but the objection, if it were valid, would go, in its consequences, completely * 351 to destroy the powers of * the Union. If the federal courts had no jurisdiction, then the agents of a state, under an unconstitutional law of the state, might arrest the execution of any law of the United States. A state might impose a fine or penalty on any person employed in the execution of any law of the Union, and levy it, by a ministerial officer, without the sanction even of its own courts. All the various public officers of the United States, such as the carrier of the mail, the collector of the revenue, and the marshal of the district, might be inhibited, under ruinous penalties, from the performance of their respective duties. And if the courts of the United States cannot rightfully protect the agents who execute every law authorized by the Constitution, from the direct action of state agents in the collection of penalties, they could not rightfully protect those who execute any law. The court insisted, that there was no such deplorable failure of jurisdiction, and that the federal judiciary might rightfully protect those employed in carrying into execution the laws of the Union from the attempts of a particular state, by its agents, to resist the execution of those laws. It may use preventive proceedings, by injunction or otherwise, against the agents or officers of the state, and authorize proceedings against the very property seized by the agent; and the court concluded, that a suit brought against individuals, for any cause whatever, was not a suit *against a state*, in the sense of the Constitution. The Constitution contemplated a distinction between cases in which a state was interested, and those in which it was a party; and to be a party for the purpose of jurisdiction, it is necessary to be one upon record. (*x*)

(*x*) The rule that a government cannot be sued without its consent applies only to suits of individuals, and not to suits between different governments. United States *v.* Texas, 143 U. S. 621; see 18 Am. L. Rev. 814. Jurisdiction conferred by statute upon the Federal courts over certain cases against the United States includes the power to render judgment against the United States. United States *v.* Davis, 12 U. S. App. 47. A State cannot be sued, without its consent, in a Federal circuit court by one of its citizens on the ground that the suit arises under the U. S. Constitution and laws. Hans *v.* Louisiana, 134 U. S. 1; McGahey *v.* Virginia, 135 U. S. 662; Pennoyer *v.* McConnaughy, 140 U. S. 1.

The Eleventh Amendment, providing that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or

The Constitution only intended a party on record, and to be shown in the first instance by the simple inspection of the record, and that is what is intended in all cases where jurisdiction depends upon the party.(*a*)[1]

(*a*) In the case of McNutt *v.* Bland, 2 How. 9, it was decided that a citizen of another state might sue a citizen of Mississippi, in the Circuit Court of the United States, though he sued in the name of the nominal plaintiff or trustee, who was also a citizen of Mississippi, *provided he was the party in interest.* Mr. Justice Daniel dis-

[1] The opinion of Mr. Justice Daniel mentioned in note (*a*) seems to state the general rule, and the exception is in the case of bonds given to an officer in his official capacity, *ante*, 349, n. 1.

prosecuted against" a State, includes not only suits brought against a State by name, but those against its officers or agents, when the State, though not named, is in substance the real defendant. United States *v.* Beebe, 127 U. S. 338, 344; Hagood *v.* Southern, 117 U. S. 52; Poindexter *v.* Greenhow, 114 U. S. 270; Marye *v.* Parsons, id. 325, 330; Louisiana *v.* Steele, 134 U. S. 230; North Carolina *v.* Temple, id. 22; New Hampshire *v.* Louisiana, 108 U. S. 76; Chicago & N. W. Ry. Co. *v.* Dey, 35 Fed. Rep. 866; Sanford *v.* Gregg, 58 id. 620; see *supra* 256, note. *In re* Ayers, 123 U. S. 443, 515, Harlan, J., said in a dissenting opinion: "The result of former decisions is: That a suit against officers of the United States to recover property not legally in their possession, is not a suit against the United States; and that neither a suit against officers of the State to recover property illegally taken by them, in obedience to the statutes of the State, nor a suit brought against state officers to enjoin them from taking, under the command of the State, the property of a tax-payer who has tendered coupons for taxes due to her, were suits against the State within the meaning of the 11th Amendment of the Constitution. And now it is adjudged, in the cases before us, that a suit merely against state officers to enjoin them from bringing actions against tax-payers who have previously tendered tax-receivable coupons is a suit against the State." See also United States *v.* Beebe, 127 U. S. 338, 344; Christian *v.* Atlantic & N. C. R. Co., 133 U. S. 233.

The Eleventh Amendment does not prevent suits against the counties of a State being brought in the Federal courts. Lincoln County *v.* Luning, 133 U. S. 529.

The State must have a direct interest, pecuniary or otherwise, in the suit; and it is not the real party in interest when an injunction is sought, for unreasonableness, against the regulations of its railroad commissioners. Reagan *v.* Farmers' Loan & Trust Co., 154 U. S. 362, 420; see Pennoyer *v.* McConnaughy, 140 U. S. 1. When a State proceeds as plaintiff, the Court of Claims has jurisdiction of its claim against the United States, if it arises upon an act of Congress. United States *v.* Louisiana, 123 U. S. 32; United States *v.* Alabama, id. 39. A suit by a State is subject to the conditions affecting the conduct of suits by ordinary litigants, and, if removed to a Federal court, proceeds in the same manner as a suit between individuals. Abeel *v.* Culberson, 56 Fed. Rep. 329; see Alabama *v.* Burr, 115 U. S. 413; Ames *v.* Kansas, 111 U. S. 449. A writ of error sued out by a State should be dismissed if the State is not a party to the record and refuses to submit to the jurisdiction of the court. South Carolina *v.* Wesley, 155 U. S. 542.

The question of jurisdiction depending upon the character and residence of parties, came again into discussion in the case * 352 of *The Bank of the United States* v. *The Planters'* * *Bank of Georgia*; (*a*) and it was decided that the circuit courts had jurisdiction of suits brought by the Bank of the United States against a state bank, notwithstanding the state itself was a stockholder, together with private individuals who were citizens of the same state with some of the stockholders of the Bank of the United States. It was declared that the state of Georgia was not, as a state, to be deemed a party defendant, though interested as a stockholder in the defence. The state, so far as concerned that transaction, was divested of its sovereign character, and took that of a private citizen; and this principle applies to every case in which the government becomes a partner in any trading company. (*b*)

We have seen how far the courts of the United States have a common-law jurisdiction; and it appears to have been wholly disclaimed in criminal cases; and the true distinction would seem to be, that all federal jurisdiction in civil and criminal cases must be derived from the Constitution and the laws made in pursuance of it; and that when the jurisdiction is vested, the principles of the common law are necessary to the due exercise of that jurisdiction. We have seen likewise, with what caution, and within what precise limits, the federal courts have exercised jurisdiction, in controversies between citizens and aliens, and between citizens of different states. In the next lecture we shall enter upon a particular examination of the powers and claims of the federal courts, relative to admiralty and maritime jurisdiction.

sented, and contended, on the authority of prior decisions, that the jurisdiction depended, not on the situation of the parties concerned in interest, but on the character of the parties appearing on the record.

(*a*) 9 Wheaton, 904; Bank of Kentucky *v.* Wister, 2 Peters, 318, S. P. In this last case it was decided that an incorporated bank was suable, though the whole property and control of the bank belonged to the state incorporating it.

(*b*) Story, J., 11 Peters, 349.

LECTURE XVII.

OF THE DISTRICT AND TERRITORIAL COURTS OF THE UNITED STATES.

THE district courts act as courts of common law, and also as courts of admiralty.

A distinction is made in England between *the instance* and *the prize court* of admiralty. The former is the ordinary admiralty court, but the latter is a special and extraordinary jurisdiction; and although it be exercised by the same person, it is in no way connected with the former, either in its origin, its mode of proceeding, or the principles which govern it. To constitute the prize court, or to call it into action in time of war, a special commission issues, and the court proceeds summarily, and is governed by general principles of policy and the law of nations. This was the doctrine of the English Court of King's Bench, as declared by Lord Mansfield in *Lindo* v. *Rodney*; (*a*) and though some parts of his learned and elaborate opinion in that case do not appear to be very clear and precise on the point concerning the difference in the foundation of the powers of the instance and of the prize court of admiralty, yet I should infer from it that the judge of the English admiralty requires a special commission distinct from his ordinary commission, to enable him, in time of war, to assume the jurisdiction of prize. The practice continues to this day of issuing a special commission, on the breaking out of hostilities, to the commissioners for executing the office of lord high admiral, giving them jurisdiction in prize cases. (*b*)

* The division of the court of admiralty into two courts * 354 is said not to have been generally known to the common lawyers of England before the case of *Lindo* v. *Rodney*; and yet it appears, from the research made in that case, that the prize jurisdiction was established from the earliest periods of the English judicial history. The instance court is the ordinary and

(*a*) Doug. 613, note.

(*b*) *Ex parte* Lynch, 1 Mad. 15.

appropriate court of admiralty, and takes cognizance of the general subjects of admiralty jurisdiction, and it proceeds according to the civil and maritime law. The prize court has exclusive cognizance of matters of prize and matters incidental thereto, and it proceeds to hear and determine according to the course of the admiralty and the law of nations. The distinction between these two courts, or rather between these two departments of the same court, is kept up throughout all the proceedings; and the appeals from the decrees of these two jurisdictions are distinct, and made to separate tribunals. The appeal from the instance court lies to delegates, but from the prize court it lies to the lords commissioners of appeals in prize causes, and who are appointed for that special purpose.

Such is the distinction in England between the instance and the prize court of admiralty; and in the case of *Ex parte Lynch*, (*a*) it was held that the jurisdiction of the admiralty as a prize court did not cease with the war, but extended to all the incidents of prize, and to an indefinite period after the war. It remains to see how far that distinction is known or preserved in the jurisdiction of our district courts.

It is said by a judge who must have been well acquainted with this subject (for he was registrar of a colonial court of admiralty before our Revolution), that this distinction between the instance and the prize court was not known to our admiralty pro-
* 355 ceedings under the * colony administrations. (*a*) In the case of *Jennings* v. *Carson*, (*b*) the District Court of Pennsylvania, in 1792, decided that prize jurisdiction was involved in the general delegation of admiralty and maritime powers, and that Congress, by the Judiciary Act of 1789, meant to convey to the district courts all the powers appertaining to admiralty and maritime jurisdiction, including that of prize. Prize jurisdiction was inherent in a court of admiralty, though it was of course a dormant power until called into activity by the occurrence of war.

But notwithstanding this early decision in favor of the plenary jurisdiction of the district courts as courts of admiralty, there was great doubt entertained in this country, about the year 1793-whether the district courts had jurisdiction under the act of Con-

(*a*) 1 Mad. 15. (*a*) 1 Pet. Adm. 5, 6. (*b*) Ib. 1.

gress of 1789, as prize courts. The District Court of Maryland decided against the jurisdiction, and that decree was affirmed on appeal to the Circuit Court, on the ground that a prize cause was not a civil cause of admiralty jurisdiction, but rested on the *jus belli*, and that there was no prize court in existence in the United States. The same question was carried up to the Supreme Court of the United States in February, 1794, in the case of *Glass* v. *The Sloop Betsey*, (*c*) and was ably discussed. The Supreme Court put an end at once to all these difficulties about jurisdiction, by declaring that the district courts of the United States possessed all the powers of courts of admiralty, whether considered as instance or as prize courts.

In the case of the *Emulous*, (*d*) the Circuit Court in Massachusetts was inclined to think that the admiralty, from time immemorial, had an inherent jurisdiction in prize, because, if we examine the most venerable relics of ancient maritime jurisprudence, we shall find the admiralty in possession of prize jurisdiction, independent of any known special commission. It seems to have always constituted an ordinary, and not an extraordinary, branch of the admiralty powers; * and it is to be observed that Lord Mansfield leaves the point uncertain whether the prize and the instance jurisdictions were coeval in antiquity, or whether the former was constituted by special commission. Be that as it may, the equal jurisdiction of the admiralty in this country, as an instance and as a prize court, is now definitely settled; and if the prize branch of the jurisdiction of the admiralty be not known in time of peace, it is merely because its powers lie dormant, from the want of business to call them into action.[1] *356

There is no pretence of claim, on the parts of courts of common law, to any share in the prize jurisdiction of the courts of admiralty. It is necessarily and completely exclusive; and we will first take a view of the jurisdiction and powers of the district courts in prize cases, and then of their ordinary admiralty jurisdiction. As prize questions are applicable to a state of war, and

(*c*) 3 Dallas, 6; Penhallow *v.* Doane, 3 Dallas, 54, s. p. See also the act of Congress of June 26, 1812, sec. 6.

(*d*) 1 Gall. 563.

[1] See cases cited 357, n. 1. [See United States *v.* Ames, 99 U. S. 35; The City of Panama, 101 U. S. 453, 457.]

are governed chiefly by the rules of the law of nations, and the usages and practices of the maritime powers, I do not propose to enlarge on that subject. My object will be to ascertain the exact jurisdiction of the district court, in all its various powers and complicated character. I shall consider, (1.) Its character as a prize court. (2.) As a court of criminal jurisdiction in admiralty. (3.) The division line between the admiralty and the courts of common law. (4.) Its powers as an instance court of admiralty. (5.) Its jurisdiction as a court of common law, and clothed, also, with special powers.

1. Of the District Court as a Prize Court. — The ordinary prize jurisdiction of the admiralty extends to all captures in war made on the high seas. (*x*) I know of no other definition of prize goods,

said Sir William Scott, in the case of the *Two Friends*, (*a*)

* 357 than that they are goods * taken on the high seas *jure belli*, out of the hands of the enemy. The prize jurisdiction also extends to captures in foreign ports and harbors, and to captures made on land by naval forces, and upon surrenders to naval forces, either solely, or by joint operation with land forces. (*a*) It extends to captures made in rivers, ports, and harbors of the captor's own country. But as to plunder or booty in a mere continental land war, without the presence or intervention of any ships or their crews, Lord Mansfield admitted, in *Lindo* v. *Rodney*, there was no case or authority, or principle, to enable him to bring it within the cognizance of a prize court. (*b*) The prize court extends, also, to all ransom

(*a*) 1 C. Rob. 271.

(*a*) Lindo *v.* Rodney, Doug. 613, note.

(*b*) In the case of Alexander *v.* The Duke of Wellington, 2 Russ. & My. 35, Lord Brougham said, that military prize rests upon the same principles of law as prize at sea, though in general no statute passes with respect to it.

(*x*) A state of war must exist to sustain a libel in prize. The City of Mexico, 28 Fed. Rep. 148. Although an admiralty court does not usually render a decree *in personam* on a libel *in rem*, yet if a clear right to recover against the person is shown, whether the libel *in rem* is sustainable or not, the libellant after decree may introduce the proper allegations *in personam* and proceed thereon. The Zodiac, 5 Fed. Rep. 220; see La Normandie, 58 id. 427; Heney *v.* The Josie, 59 id. 782. The general rules of pleading in admiralty suits *in rem* apply to a suit *in rem* for a forfeiture, founded upon a violation of the internal revenue laws, and brought by the United States, after a seizure of the property on land. Coffey *v.* United States, 116 U. S. 427; 117 U. S. 233.

The "Prize Courts Act, 1894" (57 & 58 Vict. ch. 39) provides as to Prize Courts in the British possessions.

bills upon captures at sea, and to money received as a ransom or commutation, or a capitulation to naval forces alone, or jointly with land forces. (*c*) The federal courts have asserted for the prize courts in this country a jurisdiction equally as ample and extensive as any claimed for them in England.[1] In the case of

(*c*) Ships taken at Genoa, 4 C. Rob. 388; Anthon *v.* Fisher, Doug. 649, note; Maisonnaire *v.* Keating, 2 Gall. 325.

[1] *Prize Jurisdiction.* — United States *v.* Weed, 5 Wall. 62, 69; The Amy Warwick, 2 Sprague, 123; The Hiawatha, Blatchf. Pr. 1; 282 Bales of Cotton, ib. 302; The Anna, ib. 337; The Prize Cases, 2 Black, 635; Jecker *v.* Montgomery, 13 How. 498. See the act of June 30, 1864, c. 174, 13 U. S. St. at L. 306, which does not exhaust the subject, however. There are cases outside of it. The Siren, 1 Lowell, 280. The exclusive jurisdiction in prize of the admiralty was asserted as to captures made on the Mississippi River during the rebellion. United States *v.* 269½ Bales of Cotton, 1 Woolw. 236; 25 Law Rep. 451. But Congress enacted (act of July 2, 1864, c. 225, § 7, 13 U. S. St. at L. 377) that no property seized or taken upon any of the inland waters of the United States by the naval forces thereof should be regarded as maritime prize, but that it should be delivered to the proper officers of the courts, or as provided in that act and the act approved March 12, 1863, 12 U. S. St. at L. 820, as to abandoned and captured property. See the Cotton Plant, 10 Wall. 577.

Private property captured on land by the naval forces has been held not to be maritime prize, subject to the prize jurisdiction of the United States courts, though a proper subject of capture. Mrs. Alexander's Cotton, 2 Wall. 404; *ante*, 91, n. 1; United States *v.* Weed, 5 Wall. 62, 71; United States *v.* 269½ Bales of Cotton, *supra*; [United States *v.* Winchester, 99 U. S. 372.] But the first case was put partly on the act of July 17, 1862; and see 680 Pieces of Merchandise, 2 Sprague, 233; 103 Casks of Rice, Blatchf. Pr. 211; 282 Bags of Cotton, ib. 302, which were decided the other way, on their peculiar circumstances.

It has been said that captures by the army and navy jointly are not distributable in the admiralty apart from statute; and in this country they accrue exclusively to the benefit of the United States. The Siren, 1 Lowell, 280, 283; 13 Wall. 389; [Porter *v.* United States, 106 U. S. 607.]

The English court of admiralty has now jurisdiction of booty and property captured on land by land forces exclusively by St. 3 & 4 Vict. c. 65. Banda & Kirwee Booty, L. R. 1 Ad. & Ec. 109, 129. [See *Re* Banda & Kirwee Booty, 4 L. R. Ad. 436.] See also as to the jurisdiction of the United States court under the Confiscation Act of August 6, 1861, *ante*, 302, n. 1. Union Insurance Co. *v.* United States, 6 Wall. 759; Armstrong's Foundry, ib. 766. See more especially the act of July 17, 1862, c. 195, § 7, 12 U. S. St. at L. 591, which gave a proceeding *in rem* in the district courts, conformable to those in admiralty or revenue cases, against the property of rebels during the late war. In proceedings relating to a seizure on land, when the case is of common-law jurisdiction, it must be tried by jury at the demand of either party. Union Ins. Co. *v.* United States, 6 Wall. 759; Armstrong's Foundry, ib. 766; Miller *v.* United States, 11 Wall. 268, 304; Morris's Cotton, 8 Wall. 507; Confiscation

the *Emulous*, (*d*) though the court gave no opinion as to the right of the admiralty to take cognizance of mere captures made on the land, exclusively by land forces, yet it was declared to be very clear, that its jurisdiction was not confined to captures at sea. It took cognizance of all captures in creeks, havens, and rivers, and also of all captures made on land, where the same had been made by a naval force, or by co-operation with a naval force; and this exercise of jurisdiction was settled by the most solemn adjudications. A seizure may therefore be made in port, in our own country, as prize, if made while the property was water-borne. Had it been landed, and remained on land, it would have deserved consideration; and no opinion was given,

whether it could have been proceeded against as prize,
* 358 under the admiralty jurisdiction, or whether, * if liable to

seizure and condemnation in our courts, the remedy ought not to have been pursued by a process applicable to municipal confiscations.

It is understood in England that the admiralty, merely by its own inherent powers, never exercises jurisdiction as to captures or seizures, as prize, made on shore, without the co-operation of naval forces. (*x*) In the case of the *Ooster Eems*, cited by Sir William Scott, in the case of the *Two Friends*, (*a*) and decided by the highest authority, that of the lords commissioners of appeal, in 1784, it was held, that goods taken on shore as prize, where there had been no act of capture on the high seas, were not to be considered as prize, and that the prize courts had no jurisdiction in such a case. But it is admitted, that if the jurisdiction has once attached, and the goods have been taken at sea, they may be followed on shore by the process of the prize court, and its jurisdiction over them still continues. In this respect, the prize court

(*d*) 1 Gall. 563.

(*a*) 1 C. Rob. 271.

Cases, 7 Wall. 454, 462; *Ex parte* Graham, 10 Wall. 541.

A nice question as to whether cotton picked up at sea was prize or derelict was decided in favor of the former view in Seventy-eight Bales of Cotton, 1 Lowell, 11.

(*x*) A capture made by the army, or by the army and navy operating together, inures exclusively to the benefit of the government, and is not the subject of prize. The Nuestra Señora de Regla, 108 U. S. 92; see United States *v.* Winchester, 99 U. S. 372; United States *v.* Steever, 113 U. S. 747.

seems more extensive, and to hold a firmer jurisdiction, than the instance court; for, as to cases of wreck and derelict, if the goods are once on shore, or landed, the cognizance of the common law attaches. (*b*) [1]

Though the prize be unwarrantably carried into a foreign port, and there delivered by the captors upon security, the prize court does not lose its jurisdiction over the capture, and the questions incident to it. (*c*) So, if the prize be lost at sea, the court may, notwithstanding, proceed to adjudication, and at the instance of the captors or the claimants. (*d*) It has jurisdiction, likewise, though the prize be actually lying within a foreign neutral territory. This is the settled law of the prize jurisdiction, both in England and in this country. The principle is, that the possession of the captor, though in a neutral country, is considered to be the possession * of his sovereign, and *sub potestate* * 359 *curiæ*. (*a*) But it is admitted, that if possession of the thing seized be actually as well as constructively lost, as by recapture, escape, or a voluntary discharge of the captured vessel, the jurisdiction of the prize court over the subject is lost. Though captured property be unjustifiably or illegally converted by the captors, the jurisdiction of the prize court over the case continues; but it rests in the sound discretion of the court, whether it will interfere in favor of the captors in such cases; and it is equally discretionary in all cases where the disposition of the captured vessel and crew has not been according to duty. (*b*) The prize court may always proceed *in rem*, whenever the prize, or the proceeds of the prize, can be traced to the hands of any person whatever; and this it may do, notwithstanding any stipulation in the nature of bail had been taken for the property. And it is a principle perfectly well settled, and constantly conceded and applied, that prize courts have exclusive jurisdiction, and an enlarged discretion, as to the allowance of freight, damages, expenses, and costs, in all cases of captures, and as to all torts, and personal injuries, and ill treatments, and

(*b*) The Two Friends, 1 C. Rob. 271. (*c*) The Peacock, 4 C. Rob. 185.
(*d*) The Susannah, 6 C. Rob. 48. (*a*) *Vide supra*, 104.
(*b*) The Falcon, 6 C. Rob. 194; The Pomona, 1 Dods. 25; L'Eole, 6 C. Rob. 220; La Dame Cecile, 6 C. Rob. 257; The Arabella and Madeira, 2 Gall. 368.

[1] See The Nassau, 4 Wall. 634; also, *ante*, 357, n. 1.

abuse of power, connected with captures *jure belli;* and the courts will frequently award large and liberal damages in those cases. (*c*)[1]

The prize courts may apply confiscation by way of penalty, for fraud and misconduct, in respect to property captured * 360 * as prize, and claimed by citizens or neutrals. (*a*) They may decree a forfeiture of the rights of prize against captors guilty of gross irregularity or fraud, or any criminal conduct; and, in such cases, the property is condemned to the government generally. (*b*)

2. Criminal Jurisdiction of the Admiralty. — The ordinary admiralty and maritime jurisdiction, exclusive of prize cases, embraces all civil and criminal cases of a maritime nature; and though there does not seem to be any difficulty or doubt as to the proper jurisdiction of the prize courts, there is a great deal of unsettled discussion respecting the civil and criminal jurisdiction of the District Court as an instance court, and possessing, under the Constitution and Judiciary Act of 1789, admiralty and maritime jurisdiction.

The act of Congress (*c*) gives to the district courts, exclusive of the state courts, and concurrently with the circuit courts, cognizance of all crimes and offences cognizable under the authority of the United States, and committed within their districts, or upon the high seas, where only a moderate corporal punishment,

(*c*) Le Caux *v.* Eden, Doug. 594; The Amiable Nancy, 1 Paine, 111; Chamberlain *v.* Chandler, 3 Mason, 243, 244. Probable cause of seizure is a sufficient excuse in the case of captures *jure belli*, and as to marine torts generally, or the exercise of belligerent rights to a limited extent under statute provisions. The Palmyra, 12 Wheaton, 1.

(*a*) The Johanna Tholen, 6 C. Rob. 72; Oswell *v.* Vigne, 15 East, 70.

(*b*) Case of the George, 1 Wheaton, 408; 2 Wheaton, 278, s. c. [A prize court determines only the question of prize or no prize. It determines nothing as to the title. Cushing *v.* Laird, 107 U. S. 69. — B.]

(*c*) Act of September 24, 1789, sec. 9 and 11.

[1] The Jane Campbell, Blatchf. Pr. 101; and see cases cited *ante*, 156, n. 2. The District Court, moreover, may hear and determine all questions respecting claims arising after the capture of the vessel. Thus, where a vessel which had been captured by a United States war steamer and which was in charge of a prize crew, wrongfully sunk another, and was afterwards libelled by the government, condemned and sold, it was held that the owners of the sunken vessel and cargo should be paid out of the proceeds before they were distributed. The Siren, 7 Wall. 152. See The Davis, 10 Wall. 15; Case *v.* Terrell, 11 Wall. 199, 201.

or fine or imprisonment, is to be inflicted. This is the ground of the criminal jurisdiction of the district courts; and it is given to them as district courts; and as it includes the minor crimes and offences committed on the high seas, and cognizable in the courts of admiralty under the English law, the district courts may be considered as exercising the criminal jurisdiction of a court of admiralty in those cases. The Constitution of the United States declares, that the judicial power of the Union shall extend to all cases of admiralty and maritime jurisdiction; and it has been supposed (*d*) that the federal courts might, without *any statute, and under this general delegation of admi- *361 ralty powers, have exercised criminal jurisdiction over maritime crimes and offences. But the courts of the United States have been reluctant to assume the exercise of any criminal jurisdiction, in admiralty cases, which was not specially conferred by an act of Congress. In the case of *The United States* v. *M'Gill*, (*a*) the defendant was indicted and tried in the Circuit Court in Philadelphia, for murder committed on the high seas, and the jurisdiction of the court was much discussed. One of the judges observed, that he had often decided that the federal courts had a common-law jurisdiction in criminal cases; but he considered that the crime charged (a mortal stroke having been given on the high seas, and the death in consequence of it happening on land) was not a case of admiralty and maritime jurisdiction within the meaning of the Constitution, or of the English admiralty law; and the prisoner, on account of this defect of jurisdiction, was acquitted. The other judge of the court gave no opinion, whether that case was one of admiralty and maritime jurisdiction, upon the general principles of the admiralty and maritime law; and he confined himself to the 8th section of the penal act of Congress of April 30, 1790, c. 9; and the case charged was not, by that act, within the jurisdiction of the Circuit Court.

Afterwards, in the case of *The United States* v. *Bevans*, (*b*) the Supreme Court, on a case certified from the Massachusetts circuit, decided that, even admitting that the United States had exclusive jurisdiction of all cases of admiralty and maritime jurisdiction, and admitting that a murder committed on the

(*d*) Du Ponceau on Jurisdiction, 59-61.
(*a*) 4 Dallas, 426. (*b*) 3 Wheaton, 336.

waters of a state where the tide ebbs and flows was a case of admiralty and maritime jurisdiction, yet Congress had not, by the 8th section of the act of 1790, c. 9, "for the punishment of certain crimes against the United States," conferred on the courts of the United States jurisdiction over * 362 * such murder. The act confined the federal jurisdiction to murder and other crimes and offences committed on the high seas, or in any river, harbor, basin, or bay, out of the jurisdiction of any particular state; and the murder in question was committed on board of a ship of war of the United States in Boston harbor, and within the jurisdiction of Massachusetts. There was no doubt of the competency of the powers of Congress to confer such a jurisdiction in the case of a crime committed on board of a ship of war of the United States, wherever the ship might be; but no such power had, to that extent, been as yet exercised by Congress; and it must have followed of course, in that case, that the state courts had jurisdiction of the crime at common law, for it was committed within the territory of the state. (*a*) It was admitted to be a clear point, that the state courts had cognizance of crimes and offences committed upon tide waters, in the bays and harbors within their respective territorial jurisdictions. And in the case of *United States* v. *Wiltberger*, (*b*) it was decided that the courts of the United States had no jurisdiction of the crime of manslaughter committed by the master upon one of the seamen, on board a merchant vessel of the United States, lying at anchor in the river Tigris, within the empire of China, because the act of Congress of the 30th of April, 1790, c. 9, sec. 12, did not reach such a case, and was confined to the crime committed on the high seas. Upon the principle of that decision, the offender could not be judicially punished, except by the Chinese government; and it

(*a*) In official opinions communicated to the executive government in 1812 and 1814, it was considered to be a clear point, that for grave crimes committed *within the jurisdictional limits of the United States*, on board national vessels of war, the trial and punishment did not belong to naval courts-martial, but to the ordinary courts of law. Op. Att-Gen. i. 114, 120. But the act of Congress of April 23, 1800, c. 33, "for the better government of the navy of the United States," art. 21, declared that the crime of murder, when committed by any officer, seaman, or marine, belonging to any public ship or vessel of the United States, *without* the territorial jurisdiction of the same, might be punished with death, by the sentence of a court-martial.

(*b*) 5 Wheaton, 76. See also the case of the United States *v.* Davis, 2 Sumner, 482.

was said, upon the argument of the case, that China disclaimed the jurisdiction. The law was defective upon this point, and a remedy was provided by the act of Congress of 3d of March, 1825, c. 67, sec. 5, which declared, that if any offence shall be committed on board of any vessel belonging to a citizen of the United States, while lying in a foreign port or place, by any one of the crew or a passenger, on any other person belonging to the ship, or on any other passenger, the offence shall be *cognizable in the circuit courts of the United States, *363 equally as if it had been committed on board of such vessel on the high seas, provided that if the offender shall be tried, and acquitted or convicted in the foreign state, he shall not be subject to another trial here. The act provided also for the punishment of many other crimes against the United States, committed upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States. But the crimes in any river, bay, &c., to be cognizable, must be committed out of the jurisdiction of any particular state, except it be conspiracies to defraud insurers; and it further provided, that the act was not to deprive the state courts of jurisdiction over the same offences. As the state courts have jurisdiction of offences committed within arms of the sea, creeks, havens, basins, and bays, within the ebb and flow of the tide, *and within the body of a county*, the jurisdiction of the circuit courts of the United States was not extended by the statute to those cases. (*a*) [1] (*x*)

(*a*) United States *v.* Grush, 5 Mason, 290. In the case of the United States *v.* Davis & Hanlon, in the Circuit Court of the United States for the District of New York, and of the United States *v.* Jackson (2 N. Y. Legal Observer, 3, 35), it was held that the federal courts have no jurisdiction under the act of Congress of April, 1790, of the crime of larceny, committed on board of an American vessel lying in the

[1] Complaints against any master, officer, or mariner of any vessel of citizens of the United States, for any offence, not capital or otherwise infamous, against any law of the United States for the protection of persons or property engaged in commerce or navigation, may be summarily tried by the district judge on the report of the district attorney. Act of June 11, 1864, c. 121, § 2, 13 U. S. St. at L. 124; *ante*, 304, n. 1.

(*x*) Under the U. S. Rev. Stats. § 5346, the Federal courts have jurisdiction of an assault with a dangerous weapon committed on the open unenclosed waters of the great lakes, such waters being "high seas." United States *v.* Rodgers, 150 U. S. 249, Gray and Brown, J.J. dissenting. This jurisdiction does not, however, ex-

It appears from these cases, that though the general cognizance of all cases of admiralty and maritime jurisdiction, as given by the Constitution, extends equally to the criminal and civil juris-

port of Savannah, in Georgia, nor if committed within the local jurisdiction of any foreign power. It would have been otherwise if committed on board the vessel on the high seas. The acts of Congress of April 30, 1790, c. 9, and of March 3, 1825, c. 67, are not sufficiently precise on the subject of the criminal jurisdiction of the admiralty over crimes committed on the high seas. The 8th, 9th, 10th, 11th, and 12th sections of the act of 1790 provided for the punishment of murder, robbery, and other capital and inferior offences, committed on the high seas "by any person or persons," without confining the provision specifically to American citizens or American vessels; and yet, under that statute, it has been adjudged that robbery, committed by a foreigner on the high seas, on board of a vessel belonging exclusively to subjects of a foreign state, was not piracy within that statute, nor punishable by the courts of the

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tend to a crime committed on the Great Lakes within state boundaries, either by virtue of Rev. Stats. § 5346, or the Act of Congress of Sept. 4, 1890 (26 St. at L. 424) which extends the criminal jurisdiction of the U. S. circuit and district courts over the great lakes and their connecting waters. United States *v.* Peterson, 64 Fed. Rep. 145; see *Ex parte* Byers, 32 id. 404; United States *v.* Beyer, 31 id. 35; United States *v.* Beacham, 29 id. 284; United States *v.* Rogers, 46 id. 1; *In re* Garnett, 141 U. S. 1.

The power of Congress to punish for manslaughter on the navigable waters of the United States is founded on the commerce clause of the Constitution, but not necessarily its power to regulate the procedure in admiralty. United States *v.* Beacham, 29 Fed. Rep. 284; The Tolchester, 42 id. 180. Navigable waters of the United States include rivers and lakes which of themselves, or by uniting with other waters, form a continued highway on which international or interstate commerce may be carried on, but not lakes or rivers wholly within a State and having no navigable outlet into another State or nation. The Daniell Ball, 10 Wall. 557; Miller *v.* New York, 109 U. S. 385; United States *v.* Burlington &c. Ferry Co., 21 Fed. Rep. 331.

Both the act and the death must have occurred upon the high seas to constitute murder there. Ball *v.* United States, 140 U. S. 118. The limits of Federal jurisdiction being confined to the district, civil process does not run to the outer verge of the three-mile zone of water, at least when this zone of water is not by State or Federal statute made a part of the State or district. The Hungaria, 41 Fed. Rep. 109. But if a U. S. war vessel has seized a vessel under orders of the government within the limits of Alaska, the courts will assume jurisdiction as thus determined by the government's orders. United States *v.* The Kodiak, 53 Fed. Rep. 126.

The U. S. Rev. Stats. § 5576, as to guano islands is constitutional; it does not assume to extend the admiralty jurisdiction over land, but merely extends the Federal legislation as to offences upon the high seas to like offences upon guano islands appertaining to the United States. Jones *v.* United States, 137 U. S. 202.

By the Act of Aug. 13, 1888 (25 St. at L. 433) the circuit courts have exclusive cognizance of all crimes cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offences cognizable by them, and in civil actions persons are not to be arrested in one district for trial in another.

diction of the admiralty, as known to the English and maritime law when the Constitution was adopted; yet that without a particular legislative provision in the case, the federal courts do not

United States. United States *v.* Palmer, 3 Wheaton, 610; and see *supra*, 186, 187. By the same statute, the punishment of malicious maiming on the high seas is expressly confined to the offence committed in an American public or private vessel. Under the 9th section of the act of Congress of March 3, 1825, *to provide more effectually for the punishment of certain crimes, &c.*, any offence, such as plundering shipwrecked property, *whether below or above high-water mark*, is punishable as within the jurisdiction of the federal courts. United States *v.* Coombs, 12 Peters, 72. The 4th, 7th, and 8th sections of the act of 1825 are general as to murder, rape, and other specified crimes, and they apply, according to the terms of them, "to any person or persons," without defining the character of the vessel on board of which the crime may be committed. But the 6th section of the act of 1825, respecting robbery on the high seas, confines the jurisdiction to the offence committed on board of an American vessel, and so does the 22d section, respecting assaults with intent to commit a felony; while, on the other hand, by the 23d section, a conspiracy on the high seas to destroy any vessel with intent to injure the underwriters is made felony, and the section is general, and applies to all persons.

It is difficult to understand exactly what was intended by this diversity of language in different sections, being general in one and specific in another, so far as those various sections have not been construed or defined by judicial decisions. We may safely say, that so far as any crime committed upon the high seas, no matter by whom or where, amounts to piracy within the purview of the law of nations, there can be no doubt of the jurisdiction of the circuit courts of the United States. (See *supra*, 186, 187.) But where the crime has not attained that "bad eminence," then the jurisdiction can only, upon proper principles, attach to crimes committed by American citizens upon the high seas, or to crimes committed in or upon an American vessel on the high seas. If the American citizen commits the crime on the high seas, on board of a foreign vessel, the personal jurisdiction over the citizen, in that case, if it exist at all, must be concurrent with the jurisdiction of the foreign government to which the vessel belongs, or by whose subjects it is owned. Under the 8th section of the act of April 30, 1790, if an offence be committed on board of a foreign vessel by a citizen of the United States, or on board of a vessel of the United States by a foreigner, or by a citizen or foreigner on board of a piratical vessel, it is cognizable by the courts of the United States. United States *v.* Holmes, 5 Wheaton, 412. The act of 1825 enlarged the jurisdiction of the federal courts to offences on board of American vessels by any of the American crew, in all places and waters where the tide ebbs and flows. The act of 1835 extended the jurisdiction not only to offences on the high seas, but on any other waters within the admiralty and maritime jurisdiction of the United States. United States *v.* Lynch, 2 N. Y. Legal Observer, 51; United States *v.* Roberts, ib. 99. In the case of the United States *v.* Mackenzie & Gansevoort, in the New York Circuit Court, January 11, 1843, it was declared, that if the Crimes Act of March 3, 1825, c. 276, was to be considered as giving the circuit and district courts *concurrent* jurisdiction with courts-martial over offences committed on board ships of war, yet that the proviso in the 11th section showed that the powers of courts-martial were not abrogated or suspended, and that it was doubtful whether the courts of civil jurisdiction were under the necessity of exercising their jurisdiction. The court refused, in that case, to interfere by process, and interrupt the naval court of inquiry

exercise criminal jurisdiction as courts of admiralty over maritime offences. In the case of *The United States* v. *Coolidge*, (*b*) it was insisted that the admiralty was a court of extensive criminal jurisdiction, and that offences of admiralty jurisdiction were exclusively cognizable by the United States; and that a marine tort on the high seas, as, for instance, the forcible rescue of a prize, was punishable by the admiralty, in the absence of
* 364 positive law, by fine and imprisonment. The * decision of the Supreme Court was otherwise; (*a*) and it seems now to be settled, that the federal courts, as courts of admiralty, are to exercise such criminal jurisdiction as is conferred upon them expressly by acts of Congress, and that they are not to exercise any other. The United States courts have no unwritten *criminal* code to which resort can be had as a source of jurisdiction. They have none but what is conferred by Congress, and this principle extends as well to admiralty and maritime as to common-law offences. (*b*) This limitation does not, however, apply to private prosecutions in the District Court, as a court of admiralty or prize court, to recover damages for a marine tort. Such cases are cognizable in the admiralty, by virtue of its general

then sitting upon the case. Afterwards, the same court, on further and more elaborate discussion and consideration, declared that the Circuit Court had no jurisdiction in the case. See *supra*, 341, n. (*a*).

The act of Congress of March 3, 1835, c. 40, sec. 1 and 2, punishes revolt and mutiny, or attempts at the same, by any of the crew of any American vessel on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, by fine and imprisonment, according to the nature and aggravation of the offence; and reduces the same from the grade of a capital offence. On the other hand, the act renders the master and other officers of any such vessel, at any such place, indictable, and punishable by fine and imprisonment, if without any justifiable cause, and from malice, hatred, or revenge, they beat, wound, or imprison any of the crew, or inflict any cruel and unusual punishment upon them. See Abbott on Shipping, 5th Am. ed., Boston, 1846, pp. 246 to 253. The substance is given in the notes by the learned editor, of the several acts of Congress relative to crimes and offences committed on the high seas. The principal acts on that subject are those of April 30, 1790, c. 36; 3d March, 1825, c. 276, and March 3, 1835, c. 40. The English law is more penal, and the statute of 11 & 12 Wm. III. c. 7, makes the crime of revolt, or endeavors to create a revolt, or to lay violent hands on his commander, piracy and robbery. Regina *v.* M'Gregor, 1 Carr. & Kir. 429.

(*b*) 1 Gall. 488.

(*a*) 1 Wheaton, 415.

(*b*) United States *v.* Hudson & Goodwin, 7 Cranch, 32; United States *v.* Coolidge, 1 Wheaton, 415; United States *v.* Bevans, 3 id. 336; United States *v.* Wiltberger, 5 id. 76. The jurisdiction of the Supreme Court is pointed out by the Constitution; but the powers of the inferior courts are regulated by statute, and they have no powers but such as the statute gives them. Smith *v.* Jackson, 1 Paine, 453.

admiralty jurisdiction, and so it was held in the case of the *Amiable Nancy*. (*c*)

The civil jurisdiction of the English admiralty is according to the forms of the civil law, and before a single judge; but the criminal jurisdiction, in which all maritime felonies are tried, is in the court of admiralty sessions, before commissioners of oyer and terminer, being the judge of the court of admiralty, and three or four associates. It has cognizance of all crimes and offences committed at sea, or on the coasts, out of the body of a county; and in that court the proceedings are by indictment and trial by jury, according to the course of the common law. (*d*)

(*c*) 3 Wheaton, 546. So it is a well-established principle of the maritime law, that owners are responsible in the admiralty for the torts of their masters, in acts relative to the service of the ship, and within the scope of their employment. [The State Rights, Crabbe, 22;] Abbott on Shipping, pp. 398, 399; Sherwood *v.* Hall, 3 Sumner, 131. It was held in Chamberlain *v.* Chandler, 3 Mason, 242, that the admiralty had jurisdiction of personal torts and wrongs committed on a passenger on the high seas, by the master of the ship, whether the torts were by direct force, as trespasses, or were consequential injuries. So, in Plummer *v.* Webb, 4 Mason, 380, it was held that a father or master might sue in the admiralty for wages earned by maritime service, and for torts committed on the high seas, as in the abduction of a minor or apprentice, *per quod servitium amisit*. If the tortious act happens in port, but is a continuing injury from sea, or if there be a trespass at sea upon property, and continued upon land, it becomes a maritime tort of admiralty jurisdiction. The courts of admiralty may award consequential damages in cases of marine tort, Betsey Caines, 2 Hagg. Adm. 28; and courts of common law have also jurisdiction, concurrently with the instance court of admiralty, in cases of marine trespass, free from the question of prize, Percival *v.* Hickey, 18 Johns. 257; Wilson *v.* Mackenzie, 7 Hill (N. Y.), 95. The admiralty can take jurisdiction of a suit for *damages* in the nature of a breach of a maritime contract, even though the ship did not enter on the voyage. Abbott on Shipping, pt. 4, c. 4, sec. 2; case of the City of London, in the Adm., Nov. 1839 [1 W. Rob. 88.] See Curtis's Treatise on Seamen, pp. 300, 356. But if a tort be committed by a master on one of the crew *on shore*, or in a *foreign port*, in the course of the voyage, it is a case of common-law jurisdiction, and the admiralty cannot draw to it a tort on shore, though it be a *gravamen*, mixed up with a tort on the high seas. Adams *v.* Haffards, 20 Pick. 127. The admiralty, says Mr. Justice Story, does not claim any jurisdiction over torts, except maritime torts committed on the high seas, or on waters within the ebb and flow of the tide. Where those waters are *within the body of a county*, the learned judge would seem to differ from the courts of common law, for they deny the admiralty jurisdiction in the latter case. The objection to the admiralty jurisdiction does not apply in the case of tide waters in foreign countries, where the distinction of counties is unknown. Thomas *v.* Lane, 2 Sumner, 9, 10.

(*d*) 4 Blackst. Comm. 269. [In Reg. *v.* Keyn, 2 Ex. D. 63, it is held that the territorial criminal jurisdiction of England does not extend beyond low-water mark. The whole subject is reviewed at length in several of the opinions delivered. See also Smith Adm. Law & Practice (2d ed.). Stat. 41 & 42 Vict. c. 73, provides that the jurisdiction of the admiral shall extend to one marine league from the shore. — B.]

The criminal jurisdiction of the English admiralty received its present modification by the act of 28 Henry VIII. c. 15; but it had a very extensive criminal jurisdiction, coeval with the first existence of the court. It proceeded by indictment, and
* 365 * petit jury, before, and independent of, the statute of Henry VIII.; and all criminal offences cognizable by the admiralty, and not otherwise provided for by positive law, are punishable by fine and imprisonment. (*a*) The better opinion, however, is, that the ancient common law or primitive criminal jurisdiction of the English admiralty has become obsolete, and has not been in exercise for the last one hundred years; and that no offence of a criminal nature can be tried there, which does not fall within the jurisdiction specially conferred by the statute of Henry VIII. (*b*) There is, therefore, a very strong precedent for the doctrine of the Supreme Court of the United States, which refuses to the federal courts any criminal jurisdiction in admiralty cases, not derived from statute. And to whatever extent the criminal jurisdiction of the admiralty may extend, the Judiciary Act of 1789 provides that the trial of all issues in fact in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.

3. Limits of the Admiralty Jurisdiction. — There has existed a very contested question, and of ancient standing, touching the proper division or boundary line between the jurisdiction of the courts of common law and the courts of admiralty. The admiralty jurisdiction in England originally extended to all crimes and offences committed upon the sea, and in all ports, rivers, and arms of the sea, as far as the tide ebbed and flowed. Lord Coke's doctrine was, (*c*) that the sea did not include any navigable waters within the body of a county; and Sir Matthew Hale supposed, (*d*) that prior to the statute of 35th Edw. III. the common law and the admiralty exercised jurisdiction
* 366 concurrently * in the narrow seas, and in ports and havens within the ebb and flow of the tide. Under the statutes of 13 R. II. c. 5, and 15 R. II. c. 3, excluding the admiralty jurisdiction in cases arising upon land or water within the body of a

(*a*) 4 C. Rob. 74, note.

(*b*) 2 Bro. Civ. and Adm. Law, Appendix, No. 3; Opinion of Law Officers of the Crown, ib.

(*c*) 4 Inst. 135.

(*d*) 2 Hale, P. C. c. 3.

county, except in cases of murder and mayhem, there have been long and vexatious contentions between the admiralty and the common-law courts. On the sea-shore the common-law jurisdiction is bounded by low-water mark where the main sea begins; and between high and low water mark, where the sea ebbs and flows, the common law and the admiralty have a divided or alternate jurisdiction. (*a*)

With respect to the admiralty jurisdiction over arms of the sea, and bays and navigable rivers, where the tide ebbs and flows, there has been great difference of opinion, and great litigation, in the progress of the English jurisprudence. On the part of the admiralty it has been insisted, that the admiralty continued to possess jurisdiction in all ports, havens, and navigable rivers, where the sea ebbs and flows below the first bridges. This seemed also to be the opinion of ten of the judges at Westminster, on a reference to them in 1713. (*b*) On the part of the common-law courts it has been contended that the bodies of counties comprehended all navigable rivers, creeks, ports, harbors, and arms of the sea, which are so narrow as to permit a person to discern and attest upon oath anything done on the other shore, and as to enable an inquisition of the facts to be taken. (*c*) In *the case of *Bruce*, (*a*) in 1812, all *367 the judges agreed, that the common law and the admiralty had a concurrent jurisdiction in bays, havens, creeks, &c., where ships of war floated. (*x*) The high seas mean the waters of the

(*a*) 1 Blackst. Comm. 112; Constable's Case, 5 Co. 106, 107; Finch's L. 75; Barber *v.* Wharton, 2 Lord Raym. 1452; 2 East, P. C. 803; 4 Blackst. Comm. 268; The King *v.* Forty-nine Casks of Brandy, 3 Hagg. Adm. 257. The jurisdiction of the admiralty subsists when the shore is covered with water, and the jurisdiction of the common law when the land is left dry. The Pauline, 2 C. Rob. 358.

(*b*) Cited in Andrew, 232.

(*c*) King *v.* Soleguard, Andrew, 231; the resolution of the judges in 1632, cited in 2 Bro. Civ. and Adm. Law, 78; Stanton, J., Fitz. Abr. Corone, 399, 8 Edw. II.; 4 Inst. 140; Hawkins, P. C. b. 2, c. 9, sec. 14; 2 East, P. C. 804; 5 Wheaton, 106, note; Com. Dig. tit. Adm. E. 7, 14; Bacon's Abr. tit. Adm. A.; United States *v.* Grush, 5 Mason, 290.

(*a*) 2 Leach's Crown Cases, 1093, case 353, 4th ed.

(*x*) The jurisdiction of the English Admiralty extends over British vessels, not only when sailing on the high seas, but also in foreign rivers below bridges, where great ships go, and within the ebb and flow of the tide. The Queen *v.* Anderson, L. R. 1 C. C. 161; The Queen *v.* Carr, 10 Q. B. D. 76. The English admiralty jurisdiction does not include a claim for injuries received by a seaman on an English

ocean without the boundary of any county, and they are within the exclusive jurisdiction of the admiralty up to high-water mark when the tide is full. The open ocean which washes the sea-coast is used in contradistinction to arms of the sea enclosed within the *fauces terræ*, or narrow headlands and promontories: and under this head is included rivers, harbors, creeks, basins, bays, &c., where the tide ebbs and flows. They are within the admiralty and maritime jurisdiction of the United States; but if they are within the body of a county of any particular state, the state jurisdiction attaches. (*b*)

(*b*) Hale, Hist. P. C. i. 424; ib. ii. 13, 18, 54; 3 Inst. 113; Constable's Case, 5 Co. 106 *a*; Lord Hale, Harg. L. T. c. 4, p. 10; United States *v.* Grush, 5 Mason, 290. In the United States District Court for Connecticut, January 7, 1840, in the case of Gedney *v.* Schooner L'Amistad, the judge held that a vessel on tide waters, off shore, within Montauk Point, and five miles from it, and eighteen miles from New London, and half a mile from Long Island shore, and not in any known harbor, was on *the high seas*, and within the admiralty jurisdiction. The high seas imported the open ocean without the *fauces terræ*. The Schooner Harriet, 1 Story, 259. In the case of the Public Opinion, 2 Hagg. Adm. 398, it was held that the admiralty had not jurisdiction of a case arising in the Humber, twenty miles from the sea, but within the flux and reflux of the tide, because it was *infra corpus comitatus*. But in the Northern District Court of the United States in New York, in the case of Van Santwood *v.* The Boat John B. Cole, in 1846, it was decided that a contract to be performed on board of a canal-boat at Albany, being within the ebb and flow of the tide on the navigable Hudson, for the delivery of a cargo of flour in New York, was a maritime contract, relating to the business of navigation and trade, and within the admiralty jurisdiction. The New York Legal Observer for October, 1846.

In Thomas *v.* Lane, 2 Sumner, 1, in the case of a libel for a maritime tort, it was admitted that the admiralty had no jurisdiction over torts, except those that were maritime or committed on the high seas, or on waters *within the ebb and flow of the tide*, and that the courts of common law denied the jurisdiction, if the waters are *within the body of the county*. It was held, however, to be a clear point, that the exception did not apply to *tide waters in foreign countries*, and that the admiralty jurisdiction attached to torts on such waters, but the libel must aver that the trespass was on tide water in a foreign port, and it cannot be taken by intendment. It was doubted in the case of United States *v.* Davis, 2 Sumner, 482, whether a place at Raiatea, one of the Society Islands, within a coral reef, covered at high and uncovered at low water, was to be deemed the high seas, so as to confer criminal jurisdiction; for a place may at high water be the high seas, and at low water strictly part of the land, as in the case of the sea-shore, according to the doctrine in Constable's Case, 5 Co. 106 *a*. It was

vessel within the body of a county of England. See The Egyptian Monarch, 36 Fed. Rep. 773. But under the English statutes the Admiralty has jurisdiction of a claim for collision in the Great North Holland Canal, which is foreign inland water: The Diana, Lush. 539; and of a collision in a dock connected with the Thames by channels provided with gates and locks. The Queen *v.* Judge of City of London Court, 8 Q. B. D. 609.

The extent of the jurisdiction of the district courts, as courts of admiralty and maritime jurisdiction, was very fully examined,

expressly held, in the cases of United States *v.* Ross, 1 Gall. 624, and in United States *v.* Pirates, 5 Wheaton, 184, that a vessel lying in an open roadstead, within a marine league of the shore, was *upon the high seas*, under the 8th section of the act of 30th April, 1790, c. 9, sec. 8, so as to give jurisdiction to the courts of the United States. The high seas in that act mean any waters on the sea-coast which are without the boundaries of low-water mark. And yet again it was held, in the case of The United States *v.* Robinson, 4 Mason, 307, that an offence committed in a bay entirely land-locked and enclosed by reefs was not committed on the high seas. The cases are so conflicting, that it seems impossible to arrive at any definite conclusions on the subject.

It seems to be conceded that the admiralty has an established jurisdiction to award *damages for torts*, or personal wrongs, done on the high seas; and that waters within the ebb and flow of the tide, and which lie within the body of a county, are not, in England, within the admiralty jurisdiction, Coke's 4th Inst. 134; 2 Brown's Civ. and Adm. Law, 111; The Nicolaas Witzen, 3 Hagg. Adm. 369; but that in the United States all tide waters, though within the body of a county, are within the admiralty jurisdiction, and torts committed on such waters are cognizable in the admiralty. See Curtis's Treatise on Seamen, p. 362, and the cases there cited. Nay, if the tort be one continued act, though commencing on land, and be consummated on tide water, the admiralty has cognizance of it. Plummer *v.* Webb, 4 Mason, 383, 384; Steele *v.* Thatcher, Ware, 91. It is admitted, however, that the courts of common law have in this country concurrent jurisdiction over mariners' contracts, and in cases of tort committed upon the high seas. But as these courts are not competent to give a remedy *in rem*, the remedy is a personal suit.

In the case of the steamboat Black Hawk, decided in the District Court for the Northern District of New York (Conkling's Treatise, 2d ed. p. 350, note), it was held that seizures made on the St. Lawrence, far above tide waters, as at Ogdensburgh and on Lake Ontario, for infractions of the navigation laws of the United States, were cases of admiralty jurisdiction. The learned judge put the decision on the ground of uniform practice for half a century duly acquiesced in; but he admitted with great candor that the jurisdiction on the admiralty side of the court might reasonably be questioned, though it was not for that court, under the extraordinary sanction given to the practice, to renounce it. In Wyman *v.* Hurlburt, 12 Ohio, 81, the court waived the question whether the great lakes, above the ebb and flow of the tides, were subject to the jurisdiction of the courts of admiralty. But now, by act of Congress of February 26, 1845, c. 20, the district courts have the same jurisdiction in matters of contract and tort, concerning steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and employed in business of commerce and navigation between ports and places in different states and territories, upon the lakes and navigable waters connecting said lakes, as is now exercised and possessed by the said courts in cases of like steamboats and other vessels employed in navigation and commerce upon the high seas, or tide waters within the admiralty and maritime jurisdiction of the United States. The maritime law of the United States, as far as the same is or may be applicable thereto, shall constitute the rule of decision in such suits, in the same manner and to the same extent, and with the same equities as it now does in cases of admiralty and maritime jurisdiction, with saving of the right of trial by jury, and of a concurrent remedy at common law in competent cases. [*Post*, 369, n. 1.]

and with great ability and research, by the Circuit Court of the United States for Massachusetts, in the insurance case of *De Lovio* v. *Boit.* (*c*) It was maintained, that in very early periods the admiralty jurisdiction in civil cases extended to all maritime causes and contracts, and in criminal cases to all torts and offences, as well in ports and havens within the ebb and flow of the tide, as upon the high seas; and that the English admiralty was formed upon the same common model, and was coextensive in point of jurisdiction with the maritime courts of the other commercial powers of Europe. It was shown, by an exposition of the ancient cases, that Lord Coke was mistaken, in his attempt to confine the ancient jurisdiction of the admiralty to the high seas, and to exclude it from the narrow tide waters, and * 368 * from ports and havens. The court agreed with the admiralty civilians, that the statutes of 13 R. II. and 15 R. II. and 2 H. IV. did not curtail this ancient and original jurisdiction of the admiralty, and that, consistently with those statutes, the admiralty might exercise jurisdiction over torts and injuries upon the high seas, and in ports within the ebb and flow of the tide, and in great streams below the first bridges; and also over all maritime contracts, as well as over matters of prize and its incidents. It appeared, from an historical review of the progress of the controversy for jurisdiction, which lasted for two centuries, between the admiralty and the courts of common law, that the latter, by a silent and steady march, gained ground, and extended their limits, until they acquired concurrent jurisdiction over all maritime causes, except prize causes, within the cognizance of the admiralty. The common-law doctrine was, that the sea, *ex vi termini*, was without the body of any county; but that all ports and havens, and all navigable tide waters, where one might see from one land to the other what was doing, were within the body of the county, and under the exclusive jurisdiction of the common-law courts. On the sea-shore or coast, high and low water mark determine what was parcel of the sea, and what was the line of division between the admiralty and the courts of law; and it was held that it ought to be so considered, by parity of reason, where the tide ebbs and flows, in ports and havens; and that the admiralty jurisdiction extends to all tide waters in ports and havens, and rivers beneath the first bridges. It was admitted,

(*c*) 2 Gall. 398.

however, that the common law originally had jurisdiction on the high seas, concurrent with the admiralty; and that in cases manifestly within the admiralty jurisdiction, both civil and criminal, the common law now claimed concurrent jurisdiction.

The result of the examination in that case was, that the jurisdiction of the admiralty, until the statutes of Richard II., extended to all maritime contracts, and to all torts, injuries, and offences on the high seas, and in ports and *havens, as far *369 as the ebb and flow of the tide; that the common-law interpretation of those statutes abridged this jurisdiction to things wholly and exclusively done upon the sea, but that the interpretation was indefensible upon principle, and the decisions founded upon it inconsistent; that the admiralty interpretation of those statutes did not abridge any of its ancient jurisdiction, and *that* interpretation was consistent with the language and intent of the statutes, and analogous reasoning, and public convenience. It was considered that the decisions at common law on this subject were not entitled to outweigh the decisions of the great civilians of the admiralty. The vice-admiralty courts in this country, under the colonial governments, exercised a most ample jurisdiction, to the extent now claimed, over all maritime contracts, and over torts and injuries, as well in ports as upon the high seas; and the Constitution of the United States, when it conferred not only admiralty but *maritime* jurisdiction, added that word *ex industria*, to remove every latent doubt. This large and liberal construction of the admiralty powers of the district courts, and their extension to all maritime contracts, torts, (*x*) and

(*x*) Torts committed on the high seas are within the jurisdiction of the admiralty without regard to the nationality of the vessels or of the parties. The Noddleburn, 28 Fed. Rep. 855; 30 id. 142; United States *v.* Lewis, 36 id. 449; Bernhard *v.* Creene, 3 Sawyer, 230; The Mecca, [1895] P. 95. As to the jurisdiction of the district courts over the navigable waters of Alaska, see *In re* Cooper, 143 U. S. 472; Kie *v.* United States, 27 Fed. Rep. 351. As to jury trials, see The Empire, 19 Fed. Rep. 558; The Erie Belle, 20 id. 63; The J. W. French, 13 id. 916. Apart from statute or treaty the district court has a discretion to accept or decline jurisdiction of an admiralty suit for a maritime tort committed at sea, when brought between foreigners or against a foreign vessel. The Noddleburn, 30 Fed. Rep. 142; Neptune Steam Nav. Co. *v.* Sullivan Timber Co., 37 id. 159; Chubb *v.* Hamburg-Am. Packet Co., 39 id. 431; The City of Carlisle, id. 807; Camille *v.* Couch, 40 id. 176; Tracey *v.* The Walter D. Wallet, 66 id. 1011. If jurisdiction is taken, the law to be applied in such cases is the general maritime law as administered in the country in which the suit is brought. The Belgenland, 114 U.

injuries, was recommended by the general equity and simplicity of admiralty proceedings, and the policy and wisdom of that code

S. 355. A maritime lien may be enforced against the vessel of a foreign corporation for necessary repairs and supplies furnished in the port of enrolment. The Havana, 64 Fed. Rep. 496.

The following are maritime torts: Negligence of the owner resulting in a boiler-explosion causing injury to a seaman, Grimsley *v.* Hankins, 46 Fed. Rep. 400; negligence of the master causing personal injury to a seaman: The A. Heaton, 43 id. 592; The H. S. Pickands, 42 id. 239; see The Egyptian Monarch, 36 id. 773.

The wrongful arrest of deserting seamen at the master's request is not a maritime tort. Bain *v.* Sandusky Trans. Co., 60 Fed. Rep. 912.

Contributory negligence on the part of one employed in loading a vessel and injured by its negligence does not necessarily preclude a recovery, but the damages may be divided. The Max Morris, 137 U. S. 1, 12; see 32 Cent. L. J. 138. Loss of life is not the subject of an admiralty suit *in rem*, when the local law creates no lien. The Corsair, 145 U. S. 335; The Alaska, 130 U. S. 201; 33 Fed. Rep. 107; The Harrisburg, 119 U. S. 199; see Jones *v.* The St. Nicholas, 49 Fed. Rep. 671; The City of Norwalk, 55 id. 98; Nelson *v.* The Premier, 59 id. 797. But damages allowed by a state statute for negligence causing death on navigable waters within the State may be recovered on a libel *in personam*. The Car Float No. 16, 61 Fed. Rep. 364; The City of Norwalk, 55 id. 98; Nelson *v.* The Premier, 59 id. 797.

The admiralty courts have no jurisdiction of a suit for injuries suffered by a seaman upon a wharf from the improper method of discharging the cargo, although loss of wages is incidentally involved in the damages. The Mary Garrett, 63 Fed. Rep. 1009. A claim for bad treatment of an American seaman serving on a Norwegian vessel, is not within the U. S. admiralty statutes. Williams *v.* The Welhaven, 55 Fed. Rep. 80. Such courts cannot, after judgment, order a vessel, which has been released on bond, to be rearrested. The Hattie Bell, 65 Fed. Rep. 119.

When injury is caused by a collision between a vessel and a bridge, or wharf, &c., the jurisdiction of admiralty is determined by the locality of the thing injured. Northwestern U. P. Co. *v.* Atlee, 2 Dillon, 479; 21 Wall. 389; Johnson *v.* Chicago Elevator Co., 119 U. S. 388; Boston *v.* Crowley, 38 Fed. Rep. 202; Assante Charleston Bridge Co., 40 id. 765; Hill *v.* Chosen Freeholders, 45 id. 260; Oregon City Trans. Co. *v.* Columbia St. Bridge Co., 53 id. 549; The Professor Morse, 23 id. 803; Greenwood *v.* Westport, 60 id. 560; Anderson *v.* The Mary Garrett, 63 id. 1009; Price *v.* The Belle of the Coast, 66 id. 62. See The Zeta, [1893] A. C. 468; 10 Law Quart. Rev. 113. Hence an injury to a person upon a wharf by a cause of injury proceeding from a vessel is not within the admiralty jurisdiction, but an injury to a person on the vessel caused by a piece of timber, &c., sent from the wharf, is within such jurisdiction. Ibid.; Hermann *v.* Port Blakely Mill Co., 69 Fed. Rep. 646. Flood waters are not within admiralty cognizance; hence, a building on land temporarily submerged by such waters and injured by a vessel is not within the admiralty jurisdiction. The Arkansas, 5 McCrary, 364.

Where the case is within admiralty cognizance, the District Court may decide the questions involved, and a writ of prohibition will not lie, but where the tort is not a maritime tort, a writ of prohibition will lie, especially if the want of jurisdiction appears on the face of the proceedings. Smith *v.* Whitney, 116 U. S. 167; *Ex parte* Phenix Ins. Co., 118 U. S. 610, 625.

In the admiralty, a commissioner's

of maritime law, which had embodied the enlightened reason of the civil law, and the customs and usages of the maritime nations, and regulates, by its decisions, the commercial intercourse of mankind. (*a*) [1]

(*a*) Judge Story stated, in this case, that all civilians and jurists agreed that maritime contracts included, among other things, charter-parties, affreightments, marine hypothecations, contracts for marine service in the building, repairing, supplying, and navigating ships, contracts between part owners of ships, contracts and quasi-contracts, respecting averages, contributions, and of missions and policies of insurance. He said that admiralty courts of other foreign countries had exercised jurisdiction over policies of insurance as maritime contracts.

[1] *Admiralty Jurisdiction of the United States.* — The Supreme Court has since decided in accordance with Judge Story's opinion, Insurance Co. *v.* Dunham, 11 Wall. 1; and that and other cases show that the admiralty and maritime jurisdiction of the United States is not limited by the restraining statutes or the judicial prohibitions of England. Ib. p. 24; Waring *v.* Clarke, 5 How. 441; New Jersey S. N. Co. *v.* Merchants' Bank, 6 How. 344; The Magnolia, 20 How. 296; The Commerce, 1 Black, 574; The Belfast, 7 Wall. 624, 640. [In *Ex parte* Easton, 95 U. S. 68, it is laid down: (1.) That the jurisdiction in admiralty of the United States courts is not limited by that of England. (2.) That it does not extend to all cases which would fall within it by the civil law and the usage of continental nations. (3.) That its nature and extent is to be determined by the decisions of the Supreme Court, and by the usages existing in the States when the Constitution was adopted. The Lottawanna, 21 Wall. 558. — B.]

In The Hine, 4 Wall. 555, 569, Mr. Justice Miller declared it to be settled that the admiralty jurisdiction to which the power of the federal judiciary is by the Constitution declared to extend, is not limited to tide water, but covers the entire navigable waters of the United States; and that the jurisdiction of admiralty causes arising on the interior waters of the United States, other than the lakes and their connecting waters, is conferred by the Judiciary Act of Sept. 24, 1789, § 9, stated *ante*, 304, and more fully *post*, 372, in the text. A little later, in The

findings of fact may be reversed if clearly erroneous. The Cayuga, 59 Fed. Rep. 483. Upon an appeal the findings of the district judge upon conflicting evidence will not be disturbed unless clearly against the weight of evidence. The Albany, 48 Fed. Rep. 565; The Alijandro, 56 id. 621. But the circuit court's findings of fact are conclusive on an appeal. The Louisville *v.* Halliday, 154 U. S. 657; The S. S. Wilhelm, 59 Fed. Rep. 169. Unless the proofs are in writing, the circuit court of appeals will not review the facts on an appeal in admiralty from the district court. The Philadelphian, 60 Fed. Rep. 423. That court, on an appeal, tries the case *de novo*. Pettie *v.* Boston Towboat Co., 49 Fed. Rep. 464. That court is not within the Act of Feb. 16, 1875, which limits the Supreme Court, on an appeal in admiralty, to a review of the circuit court's findings on questions of law only. The State of California, 49 Fed. Rep. 172. As to the joinder of suits *in rem* and *personam*, see The Normandie, 40 Fed. Rep. 590; The Baracoa, 44 id. 102; The Clatsop Chief, 8 id. 163; The Monte A., 12 id. 331; The Alida, id. 343.

This enlarged extension of the civil jurisdiction of the admiralty, as declared in the Circuit Court in Massachusetts, remains

Eagle, 8 Wall. 15, 25, it was laid down that since the decision of The Genesee Chief, 12 How. 443, the admiralty jurisdiction of the district courts upon the great lakes and their connecting waters also must be regarded as conferred upon them by the same act. The act of 1845, *ante*, 367, n. (*b*), was passed when the jurisdiction under the Judiciary Act was supposed to be limited to tide waters, and when this was decided by the Supreme Court to be a wrong view of the law, and that the test was navigability, not the ebb and flow of the tide, it followed that the act of 1845 was inoperative to extend the jurisdiction, and if it affected it at all must restrict it, contrary to the intent of the act. It was pronounced not to have the latter effect in The Eagle (contrary to the doctrine of Allen *v.* Newberry, 21 How. 244, and the *dicta* in The Hine and Genesee Chief). See also Insurance Co. *v.* Dunham, 11 Wall. 1, 26.

Navigability within the meaning of these decisions is navigability in fact, and those rivers are said to be navigable which are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel may be conducted in the customary mode. The Daniel Ball, 10 Wall. 557, 563. [The jurisdiction was held to extend to a navigable canal in The Steamer Oler, 2 Hugh. 12; The Avon, 1 Brown Adm. 170. Comp. The Canal Boat E. M. McChesney, 8 Ben. 150; 15 Blatchf. 183. See The Montello, 11 Wall. 411, 20 Wall. 430, where it is assumed that a river must be navigable in its natural state to be a part of the navigable waters of the United States. — B.]

The jurisdiction as to tort is said to depend entirely on locality, and torts committed on navigable waters are cognizable in the admiralty courts. The Bel-

fast, 7 Wall. 624, 637; The Commerce, 1 Black, 574, 579. See Insurance Co. *v.* Dunham, 11 Wall. 1, 25; and below in this note. [Where the injury is suffered on land, though the instrument inflicting it is on navigable water, the admiralty has no jurisdiction. The Schooner Maud Webster, 8 Ben. 547; The Neil Cochran, 1 Brown Adm. 162; The Ottawa, ib. 356; A vessel does not cease to be within the admiralty jurisdiction when moored to a wharf. She is still water-borne, and not a part of the land. Leathers *v.* Blessing, 105 U. S. 626. The test of whether a vessel is of such a nature as to be within the admiralty jurisdiction is found in the object for which it is intended and the purpose for which it is used. If these be for commercial navigation, it is within the jurisdiction, no matter what its form or build, or its propelling power. The General Cass, 1 Brown Adm. 334; Gastrel *v.* A Cypress Raft, 2 Woods, 213; A Raft of Cypress Logs, 1 Flip. 543. See Cope *v.* Vallette Dry Dock, 10 Fed. Rep. 142. And it seems that the nature of the subject-matter alone may be sufficient to give jurisdiction, though there be neither a maritime tort or contract. Grigg *v.* The Clarissa Ann, 2 Hugh. 89. A marine tort includes injuries arising from negligence as well as from positive tortious acts. Leathers *v.* Blessing, 105 U. S. 626; Holmes *v.* Or. & Cal. Ry. Co., 6 Saw. 262. An attachment of goods is sufficient to give jurisdiction where defendant is out of the district. Atkins *v.* Disintegrating Co., 18 Wall. 272. — B.]

With regard to contracts, it is well settled that jurisdiction does not depend upon their having been made upon the sea, nor, it would seem, upon the fact that they are to be performed upon navigable waters, Insurance Co. *v.* Dunham, 11 Wall. 1, 26, stated *supra* (a point in

to be discussed, and definitively settled, in the Supreme Court. It has been subsequently and frequently asserted in the circuit

doubt, perhaps, before that case, Belfast, *supra*), but upon the subject-matter of the contract; if that is maritime the contract is maritime. Among the contracts which have been considered maritime are those for marine insurance, Insurance Co. *v.* Dunham, *supra;* for the carriage of passengers on navigable waters, The Moses Taylor, 4 Wall. 411; see also The Pacific, 1 Blatchf. 569; charter-party, affreightment, wharfage, &c., as mentioned below in this note. But it seems to be the prevailing opinion that a contract to build a ship is not a maritime contract. People's Ferry Co. *v.* Beers, 20 How. 393, as explained in Morewood *v.* Enequist, 23 How. 491, 494, and 11 Wall. 28. See also Cunningham *v.* Hall, 1 Cliff. 43; Young *v.* The Orpheus, 2 Cliff. 29, 38; The Norway, 3 Benedict, 163, 165. The case of stevedore's service is thought doubtful in The Circassian, 1 Benedict, 209.

The original jurisdiction in admiralty exercised by the district courts by virtue of the act of 1789 *is exclusive* not only of other federal courts, but of the state courts also. The Hine, 4 Wall. 555, 569. [Comp. Studley *v.* Baker, 2 Low. 205.] It is not a remedy in the common-law courts which is saved by the clause in § 9, stated *post*, 372, *ante*, 304, n. (*b*), but a common-law remedy. The Moses Taylor, 4 Wall. 411, 412; The Belfast, 7 Wall. 624, 644. [Comp. Baird *v.* Daly, 57 N. Y. 236.] If there is a common-law remedy, it may be pursued at the election of the suitor in the state courts, or in the Circuit Court if his residence permits. The Belfast, *supra;* Leon *v.* Galceran, 11 Wall. 185, 191; [United States *v.* Schoonmaker, 102 U. S. 118.] See also a masterly article by Mr. Dana, 5 Am. Law Rev. 581, on the history of the admiralty jurisdiction, at pp. 617, 620, from which much assistance has been derived in revising this note. Taylor *v.* Carryl, 20 How. 583, 598; *post* 377, n. (*c*) and 1.

A proceeding *in rem* to enforce a maritime lien is not, however, a common-law remedy, and if a state statute purports to give such a remedy in a common-law court it is invalid for that purpose. 7 Wall. 644. On this ground it has been held that state courts have no jurisdiction to enforce a lien for breach of a contract to carry a passenger by steam on the Pacific Ocean by proceedings *in rem* under a state law, The Moses Taylor, 4 Wall. 411; nor of similar proceedings for a collision on the Mississippi River, The Hine, 4 Wall. 555; nor of similar proceedings to enforce a lien for breach of a contract between citizens of a state for the carriage of merchandise from one port to another within the same state over navigable waters, The Belfast, 7 Wall. 624.

A maritime lien is the foundation of a proceeding *in rem*. The Bold Buccleugh, 7 Moore, P. C. 267, 284; The Rock Island Bridge, 6 Wall. 213; Castrique *v.* Imrie, L. R. 4 H. L. 414, 447. See The Maggie Hammond, 9 Wall. 435. And whenever a maritime lien arises, the injured party may proceed, whether for a breach of a maritime contract or a maritime tort, either *in rem* or *in personam*, at his election. The Belfast, 7 Wall. 624, 642; Leon *v.* Galceran, 11 Wall. 185, 192. And the same rule seems to apply to some matters not strictly belonging either to contract or tort, such as salvage, jettison, or general average. The Eagle, 8 Wall. 15, 23.

Taking this in connection with the rule above stated as to jurisdiction over torts, it has been held that the United States courts have jurisdiction of proceedings *in rem* for a collision *infra corpus comitatus*, The Commerce, 1 Black, 574; The Belfast, 7 Wall. 624, 637; The Brooklyn, 2 Benedict, 547; or in foreign waters, and

and district courts. Thus, in *Plummer* v. *Webb*, (*b*) the jurisdiction of the admiralty over all maritime contracts, upon the

(*b*) 4 Mason, 380.

it is said that in these cases, as in others, the American law will generally be applied. The Eagle, 8 Wall. 15, 22. See further, as to maritime torts, Phil., Wil. & Balt. R. R. *v.* Phil. & H. Steam T. Co., 23 How. 209; The Slavers (Reindeer), 2 Wall. 384; Barnett *v.* Luther, 1 Curt. 434. [The lien given by maritime law is a proprietary right, enforceable in any jurisdiction, and is not defeated by a sale of the vessel to a *bona fide* purchaser, or by anything except proceedings *in rem*. The Avon, 1 Brown Adm. 170; The Champion, ib. 520. See The City of Mecca, 6 P. D. 106. — B.]

To give some other instances, the United States courts have jurisdiction of similar proceedings for general average contributions. Dupont de Nemours *v.* Vance, 19 How. 162; The Eagle, 8 Wall. 15, 23. But when, as has been determined by the Supreme Court in certain cases mentioned in the notes to shipping in the third volume, *post*, the lien depends on possession, if possession is given up without reserve there can be no proceeding *in rem*. Bags of Linseed, 1 Black, 108, 113. See The Eddy, 5 Wall. 481, 494. And it has been held that in some cases, *e. g.* for contribution in general average, the admiralty jurisdiction *in personam* was gone also. Cutler *v.* Rae, 7 How. 729; 8 How. 615.

The jurisdiction also extends to similar proceedings for salvage, The Centurion, Ware, 477; A. D. Patchin, 1 Blatchf. 414; Gates *v.* Johnson, 21 Law Rep. 279 (as to seizures, see Taylor *v.* Carryl, 20 How. 583); for torts or breaches of contract by carriers of passengers on navigable waters, The Moses Taylor, 4 Wall. 411; Steamboat New World, 16 How. 469; Pacific, 1 Blatchf. 569; for contracts of charter-party or affreightment to be performed on navigable waters, The Belfast, 7 Wall. 624, 637; The Eddy, 5 Wall. 481; Morewood *v.* Enequist, 23 How. 491; N. J. Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344; Carpenter *v.* Schooner Emma Johnson, 1 Cliff. 633; Church *v.* Shelton, 2 Curt. 271; The Hardy, 1 Dillon, 460; although made and to be performed abroad by a foreign ship, Maggie Hammond, 9 Wall. 435; for contracts of wharfage, Kelsey *v.* The Kate Tremaine, 4 Am. L. T., U. S. Courts R. 92; and to libels by mariners for their wages earned on navigable waters entirely within one state. The Sarah Jane, 1 Lowell, 203, 2 Am. Law Rev. 455.

The existence of a maritime lien, and consequently of a proceeding *in rem* in the admiralty, has been denied against bridges, The Rock Island Bridge, 6 Wall. 213; canal boats fit only for canal navigation, &c., Ann Arbor, 4 Blatchf. 205; Jones *v.* Coal Barges, 3 Wall. Jr. 53; Hendrick Hudson, 3 Benedict, 419. Compare The General Cass, 5 Am. L. T. 12. (*x*)

The much-debated question as to the

(*x*) The following are within the admiralty jurisdiction: A dredge and her scows treated as one craft: Evans *v.* The Starbuck, 61 Fed. Rep. 502; Aitcheson *v.* The Endless Chain Dredge, 40 id. 253; The Alabama, 22 id. 449; there being, however, no joint lien on different scows and dredges for the entire price of services rendered to them separately: The Columbus, 65 id. 430; a bath-house built on boats and designed for navigation and transportation: Tebo *v.* New York, 61 id. 692; a steam ferry-boat plying across a river or harbor: Murray *v.* The F. B. Nimack, 2 id. 86; a dismantled steamer made into a pleasure tow-boat: The City

doctrine of the case *of *De Lovio* v. *Boit*, was declared, *370 and it was considered, that, inasmuch as courts of admiralty act as courts of equity and administer justice upon the same principles, and with equal safety, maritime contracts were suitable objects of such a jurisdiction; and especially as such contracts require a liberal interpretation and enlarged good faith, and the application of a comprehensive equity. So in *Steele* v. *Thatcher*, and *Drinkwater* v. *The Brig Spartan*, in the District Court for Maine, the doctrine in *De Lovio* v. *Boit* was explicitly recognized as sound. (*a*) It was declared to have been before the public for

(*a*) Ware, 91, 149.

enforcement in admiralty of liens created by state laws in favor of parties to maritime contracts to whom the general admiralty law does not give such liens is adverted to in the notes to vol. iii. 170, n. 1.

By way of finishing the subject of admiralty jurisdiction, it should be added that it does not extend to the decree of a sale or foreclosure of a ship under a mortgage, Bogart *v.* The John Jay, 17 How. 399; nor to matters of account between partners, Ward *v.* Thompson, 22 How. 330; nor to matters of account between part owners, although the plaintiff was also master and ship's husband, The Larch, 2 Curt. 427. See Kellum *v.* Emerson, ib. 79; Marengo, 1 Lowell, 52, 1 Am. L. Rev. 88. [As to when a United States district court will take jurisdiction in case of a libel against a foreign vessel, or in suits between foreigners, see The Bark Lilian M. Vigus, 10 Ben. 385; Thomassen *v.* Whitwell, 9 Ben. 113; The Hermine, 3 Saw. 80; Bernhard *v.* Creene, ib. 230; The Pawashick, 2 Low. 142. — B.]

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of Pittsburg, 45 id. 699; timbers made into a raft for transit and manned by a pilot, crew, and cook for the voyage: Muntz *v.* A Raft of Timber, 15 id. 555; Seabrook *v.* Raft of Railroad Cross-Ties, 40 id. 596.

The following are not: rough boxes, not manned or enrolled, and used but once or twice for the transportation of coal on a river: Wood *v.* Two Barges, 46 Fed. Rep. 204; a marine pump: Baker *v.* The Big Jim, 61 id. 503; a floating dry-dock: Cope *v.* Vallette Dry-dock, 10 id. 142; Snyder *v.* A Floating Dry-dock, 22 id. 685; a floating pile-driver: Muellerweisse *v.* Pile Driver, 69 id. 1005; a marine railway with one end fastened to the land and the other extending into the water. The Professor Morse, 23 id. 803.

The admiralty jurisdiction of the Federal courts is exclusive and uniform, and State laws providing for maritime liens by proceedings *in rem* are void. United States *v.* Burlington & H. Ferry Co., 21 Fed. Rep. 331; The Menominie, 36 id. 197; Aitcheson *v.* Endless Chain Dredge, 40 id. 253; McCaffrey *v.* The J. G. Chapman, 62 id. 939; The Wm. M. Hoag, 69 id. 742; Eley *v.* The Shrewsbury, id. 1017; Butler *v.* Boston & S. S. Co., 130 U. S. 527; Stewart *v.* Potomac Ferry Co., 5 Hughes, 372. Maritime freight, proceeded against in a State court of equity without jurisdiction, and in the hands of a depositary, may be attached in admiralty to enforce a maritime lien thereon. The Vigilancia, 63 Fed. Rep. 733. So of a vessel in the possession of a receiver. The Willamette Valley, 66 id. 565; see The City of Frankfort, 62 id. 1006.

twelve years, without having its reasoning met, or its conclusions shaken; and it was adjudged that the admiralty had a general jurisdiction over maritime contracts; and the circumstance that the contract was under seal did not affect the jurisdiction, though it was admitted that in England the courts of law would grant a prohibition in such a case. The broad jurisdiction of the American courts of admiralty over all executed maritime contracts (for the jurisdiction is confined to executed contracts (*b*) [1] (*x*), and

(*b*) 3 Mason, 16, 17.

[1] But see The Pacific, 1 Blatchf. 569; *ante*, 369, n. 1. [The following are further examples of contracts held to be maritime in character: (Wharfage) *Ex parte* Easton, 95 U. S. 68; (repairs) Steamer Petrel *v.* Dumont, 28 Ohio St. 602; (raising vessel) The Louisa Jane, 2 Low. 295; (promise to pay average loss) Bark San Fernando *v.* Jackson, 12 Fed. Rep. 341. The following were held not maritime: (Building) Edwards *v.* Elliott, 21 Wall. 532; Steamer Petrel *v.* Dumont, *supra*; (mortgage) Deely *v.* Brigantine Ernest, 2 Hugh. 70. See generally The Eliza Ladd, 3 Saw. 519; The Iosco, 1 Brown Adm. 495; The Vidal Sala, 12 Fed. Rep. 207. — B.]

(*x*) Courts of admiralty act on equitable principles, but they cannot grant injunctions, or order specific performance or reformation of contracts. Watts *v.* Camors, 115 U. S. 353; Paterson *v.* Dakin, 31 Fed. Rep. 682; Marquardt *v.* French, 53 id. 603; Meyer *v.* Pacific Mail S. Co., 58 id. 923; Williams *v.* Providence W. Ins. Co., 56 id. 159; The Eclipse, 135 U. S. 599.

The following contracts are maritime: a docking contract: The Vidal Sala, 12 Fed. Rep. 207; overcharge of freight: Oregon *v.* Pittsburgh & L. A. Iron Co., 55 id. 666; false representations to a passenger, made on land, as to a future voyage: The Normannia, 62 Fed. Rep. 469; an implied contract of the wharfage of a floating boat-house: Woodruff *v.* One Covered Scow, 30 id. 269; contracts of affreightment: The Queen of the Pacific, 61 id. 213; an express or implied contract for wharfage furnished to a foreign vessel: The Dora Mathews, 31 id. 619; a contract to float a vessel landed by a storm far up a beach: Frame *v.* The Ella, 48 id. 569; a contract to pay a fixed amount for salvage in any event: The Roanoke, 50 id. 574; see Sheldrake *v.* The Chatfield, 52 id. 495; a voyage chartered in a vessel not yet built: Dumois *v.* The Baracoa, 44 id. 102; a contract to furnish necessaries or nets for the voyage of a fishing vessel, though not yet launched: The Hiram R. Dixon, 33 id. 297; Lake *v.* The Manhattan, 46 id. 797; breach of contract as to the quality of supplies furnished: Electro-Dynamic Co. *v.* The Electron, 48 id. 689; goods ordered by the owner in the home port: The Glenmont, 34 id. 402; affreightment: The Queen of the Pacific, 61 id. 213; a charter-party, or a bond given to secure performance thereof: Haller *v.* Fox, 51 id. 298; The Alberto, 24 id. 379; a stevedore's claim for loading or unloading a vessel, even in the home port. The Gilbert Knapp, 37 Fed. Rep. 209; The Mattie May, 45 id. 899.

The following contracts are not maritime: Materials or machinery furnished, or work done, in the original construction or equipment of a vessel: The Pacific, 9 Fed. Rep. 120; The Count de Lesseps, 17 id. 460; The Glenmont, 32 id. 703; 34 id.

all cases of a maritime nature, has been equally asserted in the circuit courts of the United States at New York and Philadelphia, founded on the language of the Constitution and the Judiciary Act of 1789. (*c*) This enlarged admiralty cognizance of civil causes was elaborately vindicated, on principles of reason, as well as on the ground of authority, in the case of the *Schooner Tilton.* (*d*) It was there held that the admiralty had jurisdiction of all causes of a maritime nature, inclusive of questions of prize, whether they arose from contracts or from torts. The jurisdiction was clear, in all matters that concerned owners and proprietors of ships, as such. It was observed that suits in the admiralty, touching * property in ships, were either *petitory* * 371 suits, in which the mere title to the property is litigated and sought to be enforced, or they were *possessory* suits, to restore to the owner the possession, which he had under a claim of title. The jurisdiction over both classes of cases was exercised by the

(*c*) The Sloop Mary, 1 Paine, 673; Wilmer *v.* The Smilax, [2 Pet. Adm. 295, n.,] and Davis *v.* Brig Seneca, [Gilp. 10,] in the Circuit Court of the Pennsylvania district.

(*d*) 5 Mason, 465. It is not disputed that courts of admiralty have jurisdiction over charter-parties and maritime contracts generally, but not over preliminary contracts leading thereto. Andrews *v.* Essex F. & M. Ins. Company, 3 Mason, 6; The Schooner Tribune, 3 Sumner, 144.

402; personal loans, not on the ship's credit, though made in a foreign port: Hart *v.* The Advance, 63 id. 142; Brown *v.* The Alliance, id. 726; Gulf City G. & W. Co. *v.* The George Dumois, 66 id. 353; a loan of money, secured by a conveyance or mortgage of a vessel: The C. C. Trowbridge, 14 id. 874: The Ella J. Slaymaker, 28 id. 767; The Katie O'Neil, 65 id. 111; Gray *v.* Proceeds of The Advance, 63 id. 704; fraudulent negotiations inducing the making of a policy of marine insurance: Williams *v.* Providence W. Ins. Co., 56 id. 159; a contract to procure marine insurance: Marquardt *v.* French, 53 id. 603; see Rosenthal *v.* The Louisiana, 37 id. 264; matters of account between part-owners of a vessel: The H. E. Willard, 53 id. 599; 52 id. 387; the lease of a wharf: Upper S. Co. *v.* Blake, 2 App. D. C. 51; storage of grain through the winter on a vessel tied up to a wharf: The Pulaski, 33 id. 383; Norton *v.* The Richard Winslow, 67 id. 259; services of a ship-keeper in the home port: The America, 56 id. 1021; The Sirius, 65 id. 226; a contract for river pilotage under which no services have been performed. The Seven Sons, 69 id. 271.

After the vessel is launched, contracts for equipment or repairs or material are maritime. Before the vessel is launched, they are contracts upon land, and are non-maritime. Globe Iron-Works Co. *v.* The John B. Ketcham, 2d, 100 Mich. 583, holding that a claim for the price of a boiler, smokestack, &c. supplied in building and equipping a steamer before launching, was non-maritime and enforceable in a State court by a proceeding *in rem* under a State statute. See also The Paradox, 61 Fed. Rep. 860; Lake Nav. Co. *v.* Austin El. Supply Co. (Texas), 30 S. W. Rep. 832.

admiralty, until some time after the restoration in 1660, when the courts of law interfered, and claimed the exclusive cognizance of mere questions of title; and the admiralty jurisdiction over petitory suits has been, in England, abandoned for a considerable length of time, though it is constantly upheld as to possessory suits. (*a*) The distinction does not appear to rest on any sound principle, for the question of title is necessarily involved in that of the possession; and it is admitted by the courts of law (*b*) that the admiralty possesses authority to decree restitution of a ship unlawfully withheld by a wrong-doer from the real owner. In the case of illegal captures, and of bottomry, salvage, and marine torts, the admiralty courts in this country inquire into and decide on the rights and titles involved in the controversy; and where they have jurisdiction of the principal matter, it is suitable, and according to the analogies of law, that they should possess it over the incidents.[1] Notwithstanding the English practice to the contrary, the admiralty in this country claim to possess a rightful jurisdiction equally over petitory and possessory suits. (*c*)

(*a*) Haly *v.* Goodson, 2 Meriv. 77; Lord Stowell in the cases of The Aurora, 3 C. Rob. 133, 136; The Warrior, 2 Dods. 288; and The Pitt, 1 Hagg. Adm. 240; 2 Bro. Civ. & Adm. Law, 114, 115.

(*b*) In the matter of Blanchard, 2 Barn. & Cress. 244.

(*c*) The Schooner Tilton, 5 Mason, 465; Ware, Judge, in Ware, 248, S. P. In the case of the Schooner Volunteer and Cargo, 1 Sumner, 551, Mr. Justice Story reasserted, with undiminished confidence, the rightful jurisdiction of the American admiralty over charter-parties and all other maritime contracts, whether made in foreign parts or at home, as matters *juris et de jure*, and that the court might proceed *in rem* where there was a lien, and *in personam* where no such lien existed. He reviewed, with his usual accuracy and spirit, the history of the question of admiralty jurisdiction, as he had already done more at large in De Lovio *v.* Boit. See *supra*, 367. On the other hand, in Bains *v.* The Schooner James and Catharine, 1 Bald. 544, Judge Baldwin held, that admiralty jurisdiction, under the Constitution of the United States, was to be considered as *restrained* by the statutes and common law of England before the Revolution, and as exercised by the state courts before the adoption of the Constitution. It is high time that this vexed question of admiralty jurisdiction under the Constitution of the United States should be put at rest by a final decision in the Supreme Court of the United States. The Court of Appeals in Kentucky, in the case of Case *v.* Woolley, 6 Dana, 21, do indeed consider the question as authoritatively settled by the cases of De Lovio *v.* Boit, Plummer *v.* Webb, Drinkwater *v.* The Brig Spartan, The Steamboat Thomas Jefferson, and Peyroux *v.* Howard, that a civil cause arising where the tide ebbs and flows, *even though it may be within a county*, was

[1] Ward *v.* Peck, 18 How. 267; Taylor *v.* The Royal Saxon, 1 Wall. Jr. 311; The Friendship, 2 Curtis, 426; The Taranto, 1 Sprague, 170. But see The John Jay, 3 Blatchf. 67.

With respect to the criminal jurisdiction of the admiralty, we have already seen that the courts of the United States do not assume any jurisdiction which is not expressly conferred by an act of Congress; and the argument for the extension of the *civil* jurisdiction of the admiralty beyond *the limits *372 known and established in the English law, *at the time of the formation of our Constitution*, is not free from very great difficulty.

It has been made a question, what were the "cases of admiralty and maritime jurisdiction," within the meaning of the Constitution of the United States. It is not in the power of Congress to enlarge that jurisdiction beyond what was understood and intended by it when the Constitution was adopted, because it would be depriving the suitor of the right of trial by jury, which

a case of admiralty or maritime jurisdiction. Mr. Curtis, in his Treatise on the Rights and Duties of Merchant Seamen, pp. 252, 253, 260, concludes his examination of the cases, with the proposition, that all persons on board a vessel engaged in service, and whose service is of a maritime character, and in the business and employment of the vessel, have a present standing in the admiralty, and come within its jurisdiction, and can sue *in personam*, and, where there is a lien, *in rem*.

The jurisdiction of the English admiralty has been enlarged, and doubtful points settled by the statute of 3 & 4 Victoria, c. 68, passed 7th August, 1840. It is entitled "An Act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty of England." The Dean of the Arches is made an assistant judge of the admiralty court, with concurrent authority. Jurisdiction is given over the claims of mortgagees of ships, over all questions as to the title to ownership of any ship or vessel, or the proceeds thereof remaining in the registry, arising in any case of possession, salvage, damage, wages, and bottomry. Jurisdiction is given over all claims and demands in the nature of salvage, for services rendered to, or damages received by, any ship or sea-going vessel, or in the nature of salvage or for necessaries supplied to any ship or sea-going vessel, or in the nature of salvage or for necessaries supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county or upon the high seas at the time. The court may direct issues of fact to be tried by a jury, before a judge of one of the courts of law at Westminster, and the judge of the admiralty is to have the like protection as other judges in the exercise of his jurisdiction. Concurrent jurisdiction over all these subjects and causes of action is retained in the courts of law.

A synopsis of the admiralty jurisdiction *in this country* is stated to contain, 1. Contracts between part owners, petitory and possessory suits; 2. Charter-parties and affreightments; 3. Bottomry and hypothecation; 4. Contracts of material-men; 5. Insurance; 6. Wages; (*x*) 7. Salvage, civil and military; 8. Averages, contributions,

(*x*) An assignment of a shipwright's lien for repairs may be enforced in admiralty. Park *v.* The Hull of the Edgar Baxter, 37 Fed. Rep. 219. So may the assignment, if fairly made, of a mariner's lien for wages. The New Idea, 60 id. 294; The Wm. M. Hoag, 69 id. 742.

is secured to him by the Constitution in suits at common law; and it is well known that in civil suits of admiralty and maritime jurisdiction the proceedings are according to the course of the civil law, and without jury. If the admiralty and maritime jurisdiction of the district courts embraces all maritime contracts, then suits upon policies of insurance, charter-parties, marine hypothecations, contracts for building, repairing, supplying, and navigating ships, and contracts between part owners of ships, must be tried in the admiralty by a single judge, to the exclusion of the trial by jury; and the state courts would be devested, at one stroke, of a vast field of commercial jurisdiction. The words of the Judiciary Act of 1789, sec. 9, are, that the district courts shall have "*exclusive* original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas." But the act adds, by way of qualification to this designation of admiralty jurisdiction, these words, viz., "saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it."[1]

The act of Congress is rather ambiguous in its meaning, and leaves it uncertain whether it meant to consider seizure on tide waters, in ports, harbors, creeks, and arms of the sea, as * 373 cases of admiralty and maritime jurisdiction, or as * cases simply within the cognizance of the district courts; for the expression is *including*, that is, comprehending, either within the cognizance of the court, or within the class of cases of admiralty jurisdiction, all seizures under laws of impost, navigation, and trade, on waters navigable from the sea, by small vessels of ten tons burden. This act has, however, been construed to put a construction upon the words "admiralty and maritime jurisdiction," conformable to the claims of the civilians, and in opposition to the claims of the common-law tribunals; and there is a

and jettisons; 9. Pilotage; 10. Ransom; 11. Surveys; 12. Maritime torts and trespasses. The Jurist, for January, 1841, p. 408. All the above causes of action, except those arising on insurance, ransom, and surveys, now belong to the English court of admiralty.

[1] *Ante*, 369, n. 1.

series of decisions in the Supreme Court of the United States to that effect.

In the case of *The United States* v. *La Vengeance*, (*a*) a French privateer was libelled in the District Court of New York for an attempt to export arms from the United States to a foreign country contrary to law. She was adjudged to be forfeited to the United States. The decree, on appeal to the Circuit Court, was reversed. On a further appeal to the Supreme Court of the United States, it was contended that this was a criminal case, both on account of the manner of prosecution, and the matter charged; and, therefore, that the decree of the District Court was final; and that it ought likewise to have been tried by a jury in the District Court; and that, if it was even a civil suit, it was not a case of admiralty and maritime jurisdiction. To render it such, the cause must arise wholly upon the sea, and not in a bay, harbor, or water within the precincts of any county of a state. But the Supreme Court decided that it was a civil suit, not of common-law, but of admiralty and maritime, jurisdiction. The seizure was on the waters of the United States. The process was *in rem*, and did not, in any degree, touch the person, and no jury was necessary.

Afterwards, in the case of *The United States* v. *The Schooner Sally*, (*b*) the vessel was libelled in the District Court, as forfeited for being concerned in *the slave-trade; and this *374 was also held, on appeal, to be a case, not of common-law, but of admiralty, jurisdiction. So, in the case of *The United States* v. *The Schooner Betsey*, (*a*) it was held that all seizures under the act of Congress suspending commercial intercourse with a foreign country, and made on waters navigable from the sea, by vessels of ten tons burden, were civil causes of admiralty jurisdiction, being proceedings *in rem*, and not according to the course of the common law, and were to be tried without a jury. The court said, that the place of seizure being on navigable waters decided the jurisdiction, and that the act of Congress meant to make seizures on waters navigable from the sea civil causes of admiralty and maritime jurisdiction. In this last case, the counsel for the claimant contended that the seizure was made within the body of a county, for a breach of a municipal law of trade, and that though it belonged to the jurisdiction of the District Court,

(*a*) 3 Dallas, 297. (*b*) 2 Cranch, 406. (*a*) 4 Cranch, 443.

it was not a case of admiralty cognizance. All seizures in England, for violation of the laws of revenue, trade, or navigation, were tried by a jury in the Court of Exchequer, according to the course of the common law; and though a proceeding be *in rem*, it is not necessarily a proceeding or cause in the admiralty.

In the case of the *Samuel*, (*b*) where the vessel and cargo were seized and libelled, and condemned in the District Court of Rhode Island, for a breach of the non-importation laws of the United States, the same objection was made upon appeal to the Supreme Court, and it was again overruled, on the authority of the preceding cases. The same objection was taken in the case of the *Octavia;* (*c*) and it was contended that the word *including*, in the 9th section of the Judiciary Act, ought not to be construed cumulatively; and that a suit might be a cause of admiralty and maritime jurisdiction, and yet triable under the common
* 375 law, proceeding * by information, instead of the civil-law process by libel. The objection was again overruled. The last case that brought up the same point for review and discussion was *The Sarah;* (*a*) and the Supreme Court there recognized the marked and settled distinction between the common law and the admiralty jurisdictions of the district courts. In seizures made on land, the District Court proceeds as a court of common law, according to the course of the English Exchequer, on information *in rem*, and the trial of issues of the fact is to be by jury. (*b*) But in cases of seizures on waters navigable from the sea, by vessels of ten or more tons burden, the court proceeds as an instance court of admiralty, by libel *in rem*, and the trial is by the court.

It may now be considered as the settled law of this country, that all seizures under laws of impost, navigation, and trade, if made upon tide waters navigable from the sea, are civil cases of admiralty jurisdiction; and the successive judgments of the Supreme Court, upon this point, are founded upon the Judiciary Act of 1789. If the act of Congress declares them to be cases of admiralty jurisdiction, it is apprehended that this is an extension of admiralty powers beyond the English practice. Cases of forfeiture for breaches of revenue law are cognizable in England in the Exchequer upon information, though the seizure was made

(*b*) 1 Wheaton, 9. (*c*) 1 Wheaton, 20. (*a*) 8 Wheaton, 391.
(*b*) Thompson, J., 1 Paine, 504; United States *v.* Fourteen Packages, Gilpin, 235.

upon navigable waters, and they proceed there to try the fact on which the forfeiture arises, by jury. (*c*) Informations are filed in the Court of Exchequer for forfeiture, upon seizure of property, for breach of laws of revenue, impost, navigation, and trade. In the case of *The Attorney-General* v. *Jackson*, (*d*) the seizure was of a vessel lying in port at Cowes, for breach of the act of navigation, and the proceeding was by information and trial by jury, according to the course of the common law. Lord Hale said, (*e*) that informations of that *nature lay exclusively *376 in the Exchequer. Congress had a right, in their discretion, to make all such seizures and forfeitures cognizable in the district courts; but it may be a question, whether they had any right to declare them to be cases of admiralty jurisdiction, if they were not so by the law of the land when the Constitution was made. The Constitution secures to the citizen trial by jury, in all criminal prosecutions, and in all civil suits at common law where the value in controversy exceeds twenty dollars. These prosecutions for forfeitures of large and valuable portions of property, under revenue and navigation laws, are highly penal in their consequences; and the government and its officers are always parties, and deeply concerned in the conviction and forfeiture. And if, by act of Congress, or by judicial decisions, the prosecution can be turned over to the admiralty side of the District Court, as being neither a criminal prosecution nor a suit at common law, the trial of the cause is then transferred from a jury of the country to the breast of a single judge.[1] It is probable, however, that the Judiciary Act of 1789 did not intend to do more than to declare the jurisdiction of the district courts over these cases; and that all prosecutions for penalties and forfeitures, upon seizures under laws of impost, navigation, and trade, were not to be considered of admiralty jurisdiction, when the case admitted of a prosecution at common law; for the act saves to "suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it."[2] We have

(*c*) Attorney-General *v.* Le Merchant, 1 Anst. 52.

(*d*) Bunb. 236.

(*e*) Harg. L. T. 227.

[1] See Union Ins. Co. *v.* United States, 6 Wall. 759, and other cases cited, *ante*, 357, n. 1. See also 302, n. 1.

[2] *Ante*, 369, n. 1.

seen that it is competent to give it, because, under the vigorous system of the English law, such prosecutions *in rem* are in the Exchequer, according to the course of the common law; and it may be doubted whether the case of *La Vengeance*, on which all the subsequent decisions of the Supreme Court have rested, was sufficiently considered. There is, however, much colonial precedent for this extension of admiralty jurisdiction. The vice-admiralty courts, in this country, when we were colonies, and also in the West Indies, obtained jurisdiction in revenue * 377 causes to an extent * totally unknown to the jurisdiction of the English admiralty, and with powers quite as enlarged as those claimed at the present day. (*a*) But this extension, by statute, of the jurisdiction of the American vice-admiralty courts beyond their ancient limits, to revenue cases and penalties, was much discussed and complained of on the part of this country, at the commencement of the Revolution. (*b*)

Whatever admiralty and maritime jurisdiction the district courts possess would seem to be *exclusive*, for the Constitution declares that the judicial power of the United States shall extend to *all cases* of admiralty and maritime jurisdiction; and the act of Congress of 1789 says, that the district courts shall have *exclusive* original cognizance of all civil causes of admiralty and maritime jurisdiction. (*c*)[1] It is certain, however, that the state

(*a*) See the form of the commissions of these vice-admiralty courts under the colonial establishments, in a note to the case of De Lovio *v.* Boit, 2 Gallison, 470, and in Du Ponceau on Jurisdiction, 158.

(*b*) Journals of Congress, i. 22, 29, 39; Journals of the Assembly of the Colony of New York, ii. 795, 797, 800. In England, as Judge Conkling observes, all revenue seizures are cognizable exclusively in the Court of Exchequer; and such of them as are cognizable on the admiralty side of the district courts of the United States are made so only by force of a legislative act. The effect of the statute as to such seizures embraced by it is to withdraw them from the consideration of a jury, according to the course of the civil law. Conkling's Treatise, 2d ed. 391.

(*c*) Constitution, art. 3, sec. 2; Act of Congress of September 24, 1789, c. 20, sec. 9; *vide supra*, 304, 372. Mr. Justice Story (3 Comm. on Const. p. 533, note) says, that the opinion here expressed is "founded in mistake," and that the admiralty and maritime jurisdiction was intended by the Constitution to be exactly as extensive or exclusive, and no more so, in the national judiciary, than it "existed in the jurisprudence of the common law;" and that where the cognizance of admiralty and

[1] See as to the subjects treated in the text and note (*c*), *ante*, 369, n. 1. In Taylor *v.* Carryl, 20 How. 583, the remarks of Mr. Justice Story above referred to are cited with approbation.

courts take an extensive and unquestioned cognizance of maritime contracts, and on the ground that they are nct cases, strictly and technically speaking, of admiralty and maritime jurisdiction. If, however, the claim of the district courts be well founded to the cognizance of all maritime contracts, wheresoever the same may be made, or whatever may be the form of the contract, it would seem that the jurisdiction of the state courts over those contracts could not be sustained. But I apprehend it may fairly be doubted, whether the Constitution of the United States meant by admiralty and maritime jurisdiction anything more than that jurisdiction which was settled and in practice in this country under the English jurisprudence, when the Constitution was made; and whether it had any retrospective or historical reference to the usages and practice of the admiralty, as it once existed in the middle ages, before its territories * had * 378 been invaded and partly subdued by the bold and free

maritime cases "was previously concurrent in the courts of common law," it remained so. If I was mistaken as to the meaning of the Constitution, in supposing that the judicial power, extending "to all cases of admiralty and maritime jurisdiction," was exclusive, I was led into the error by following the construction assumed by the Supreme Court of the United States, in the judgment delivered in Martin *v.* Hunter's Lessee, 1 Wheaton, 304. In that case, the court observed, that the words "the judicial power *shall extend,*" &c., were imperative, and that Congress could not vest any portion of the judicial power of the United States, except in courts ordained and established by itself. It was their duty to vest the *whole judicial power* in their own courts. The learned judge who delivered the opinion of the court noted and dwelt on the distinction in the language of the Constitution, between declaring that the judicial power *shall extend to all cases* in law and equity arising under the Constitution, — to *all cases* affecting ambassadors, &c., — to ALL CASES of admiralty and maritime jurisdiction, — and then (dropping *ex industria* the word *all*) to controversies to which the United States shall be a party, — to controversies between, &c., &c. The difference of phraseology, he said, was not accidental, but designed, and the jurisdiction in the one case was *imperative*, and in the other might be qualified; and that, upon any construction, the judicial power of the United States was in some cases unavoidably exclusive, and *in all others might be made so*, at the election of Congress. Upon this ground I was led to the view I took in the text, that as the admiralty and maritime jurisdiction, within the purview of the Constitution, was *exclusive*, it ought not to extend further than the *settled* admiralty and maritime jurisdiction when the Constitution was formed. It appeared to me, therefore, upon a reconsideration of the subject, that the elaborate decision in De Lovio *v.* Boit grasped at too much jurisdiction. But we are taught by the note in the Commentaries referred to that the state courts have all the concurrent cognizance which they had originally, in 1787, over maritime contracts, and that this concurrent jurisdiction does not depend, as declared in 1 Wheaton, 337, on the pleasure of Congress, but is founded on the "reasonable interpretation of the Constitution."

spirit of the courts of common law, armed with the protecting genius and masculine vigor of trial by jury.

4. Jurisdiction as an Instance Court of Admiralty. — The extensive and superior claims of the American courts of admiralty, as courts of civil maritime jurisdiction, we have had occasion already to consider; but, according to the English jurisprudence, the instance court takes cognizance only of things done, and contracts not under seal made *super altum mare*, and without the body of any county. This, of course, excludes all creeks, bays, and rivers which are within the body of some county; and if the place be the sea-coast, then the ebbing and flowing of the tide determines the admiralty. The cause must arise *wholly* upon the sea, and not within the precincts of any county, to give the admiralty jurisdiction. If the action be founded on a matter done partly on land and partly on water as if a contract be made on land to be executed at sea, or be made at sea to be executed on land, the common law has the preference, and excludes the admiralty.(*a*)[1] The admiralty has cognizance of maritime hypothecations of vessels and goods in foreign ports, for repairs done, or necessary supplies furnished;(*b*) and in the

(*a*) Com. Dig. tit. Adm. E. 1. 7, 10, 12, F. 1. 2, 4, 5; 3 Blackst. Comm. 106, 107. In cases purely dependent upon the *locality* of the act done, the admiralty jurisdiction is limited to the sea and to tide water as far as the tide flows, and does not reach beyond high-water mark. But in *mixed cases*, as where salvage services are performed partly on tide waters and partly on shore, for the preservation of the property, the admiralty has jurisdiction. United States *v.* Coombs, 12 Peters, 72. In Peyroux *v.* Howard, 7 Peters, 324, the Supreme Court decided, that New Orleans was within the ebb and flow of the tide, and that admiralty jurisdiction prevailed there, and that repairs done there by a shipwright upon a steamboat were essentially a maritime service, and gave a lien, notwithstanding the commencement or termination of the voyage of the steamboat might be at some place up the Mississippi, beyond the reach of the tide. It was held, in Smith *v.* The Pekin, Gilpin, 203, that a contract for wages on a voyage between ports of adjoining states, and on the tide waters of a river or bay, is within the jurisdiction of the district courts, and may be enforced by a suit *in rem* in the admiralty. But if a vessel be engaged substantially in interior navigation and trade, not on tide waters, the admiralty has no jurisdiction, though she may have touched at one *terminus* of the voyage on tide waters. The Steamboat Orleans *v.* Phœbus, 11 Peters, 175. *The principle which seems to be established is that admiralty jurisdiction extends to all maritime causes and services, to be substantially performed on tide waters.* See pp. 364, 367, 369, 370, 371, 378, 379, of this volume. [But see now 369, n. 1.]

(*b*) Johnson *v.* Shippen, 1 Salk. 34; Lord Raym. 982, s. c. It seems to be, also, not only the better opinion, but the settled law, that the admiralty has jurisdiction

[1] *Ante*, 369, n. 1.

case of *Menetone* v. *Gibbons*, (*c*) it was admitted by the K. B. that the admiralty had entire jurisdiction in the case of an hypothecation bond, charging a ship with money taken up in a foreign port for necessaries, though the bond was under seal, and executed on land. The jurisdiction, in such a case, depended on the subject-matter, for the contract was merely *in rem*, and there was no personal covenant for the payment of the money, and the admiralty jurisdiction in such a case was indispensable, as the courts of common law * do not proceed *in rem*. (*a*) If * 379 the admiralty has cognizance of the principal thing, it has also of the incident, though that incident would not, of itself, and if it stood for a principal thing, be within the admiralty jurisdiction. Upon this principle it is that goods taken by pirates, and sold on land, may be recovered from the vendee, by suit in the admiralty. (*b*) Suits for seamen's wages are cognizable in the admiralty, though the contract be made upon land, provided it be not a contract under seal; and this is intended for the ease and benefit of seamen, for they are all allowed to join in the suit, and all the persons on board below the rank of the master are comprehended in the description of mariners. (*c*)

in rem in the case of bottomry bonds creating a lien on a vessel, whether the bond was executed by the owner in a foreign or in a *home* port. Whenever the local law gives a lien on the vessel as a security, or there is an express hypothecation, the admiralty has jurisdiction *in rem* to enforce it. Corish *v.* The Murphy, 2 Bro. Civ. & Adm. Law, 530, App.; The Sloop Mary, 1 Paine, 671; The Brig Draco, 2 Sumner, 157.

(*c*) 3 T. R. 267.

(*a*) In the case of The Atlas, 2 Hagg. Adm. 48–73, it was admitted that the court of admiralty had an undoubted jurisdiction over bottomry bonds founded upon sea risks, and defeasible by the destruction of the ship in the course of the voyage. It was an original jurisdiction exercised upon the ground of authorized usage and established authority. But the jurisdiction would not attach upon any bond not dependent upon the accidents of the voyage.

(*b*) Com. Dig. tit. Adm. F. 6; 3 Blacks. Com. 108. The court of admiralty has authority to entertain a civil suit, entitled *causa spolii civilis et maritima*, for the restitution of goods piratically taken on the high seas. The Hercules, 2 Dods. 369; [528 Pieces of Mahogany, 2 Low. 323].

(*c*) 1 Salk. 34; Str. 761, 937; 1 Lord Raym. 398; 3 Lev. 60; 4 Inst. 134, 142; Com. Dig. tit. Adm. E. 15; 2 Lord Raym. 1044, 1206. A contract for wages on board a steamboat plying between ports of adjoining states, on a *navigable tide water*, may be enforced by a suit *in rem* in the admiralty. Wilson *v.* The Steamboat Ohio, Gilpin, 505. But to render a service on board a vessel even on tide waters *maritime*, so far as to give admiralty jurisdiction over it as for wages, it must contribute to the preservation of the vessel, or of those whose labor and skill are employed to navigate her. Musicians do not come within that description. Trainer *v.* The Superior,

This case of seamen's wages the courts of common law admit to be of admiralty jurisdiction; and this is an exception in favor of seamen, to the general rule that the admiralty has no jurisdiction of any matter arising on land, though it be of a maritime nature, as a charter-party or policy of insurance. The District Court, as a court of admiralty, possesses a general jurisdiction in suits by seamen and salvors, and by material-men, *in rem* and *in personam*. The courts of admiralty have a general jurisdiction to enforce maritime liens, by process *in rem*, and there may be a maritime jurisdiction *in personam*, where there is no lien, and consequently no jurisdiction *in rem*.[1] Seamen have an implied lien on the vessel for services rendered upon the high seas or upon tide waters. They may proceed *in rem* and *in personam*; but the proceeding *in rem* is only maintainable by material-men when there is a specific lien, or for wages or for repairs made, or necessaries furnished to a foreign ship, or to a ship in the ports of the state to which she does not belong. (*d*) The admi-

Gilpin, 514. The service must be essentially maritime; labor on board a fuel or coal boat is not of that description. Thackery *v.* The Farmer, ib. 524. The service must concern transactions and proceedings relative to commerce and navigation, and to damages and injuries upon the sea. Nor has the admiralty any jurisdiction in matters of account between part owners. The Steamboat Orleans *v.* Phœbus, 11 Peters, 175. It is limited in matters of contract to those which are *maritime*. Ib. Thus, in the case of The Thomas Jefferson, 10 Wheaton, 428, it was held that the admiralty had no jurisdiction over contracts for the hire of seamen, unless the service was substantially performed upon the sea, or upon waters within the ebb and flow of the tide. Suits for seamen's wages on a voyage from a place in Kentucky, up the river Missouri and back again, were, therefore, not of admiralty and maritime jurisdiction. But state courts under state laws have jurisdiction *in rem* in cases of supplies and repairs to boats or vessels on river navigation in the interior, as well as under contracts for the carriage of persons or property upon navigable river waters. Statutes of Missouri, 1835, p. 102. The district courts, as instance courts of admiralty, have cognizance of all claims for salvage in cases of shipwreck, and of vessels derelict at sea. This is well settled by the American cases. See Conkling's Treatise, 2d ed. 156.

(*d*) The Hope, 3 C. Rob. 215; The Trelawney, 3 C. Rob. 216, note; The General Smith, 4 Wheaton, 438; The Jerusalem, 2 Gall. 345; The Robert Fulton, 1 Paine, 620; Drinkwater *v.* Brig Spartan, Ware, 149; Sheppard *v.* Taylor, 5 Peters, 675; Story, J., in the case of the Brig Nestor, 1 Sumner, 74; Conkling's Treatise, 2d ed. 155; The Schooner Marion, 1 Story, 68. See also *infra*, iii. 167–170. If materials for a vessel be furnished in a home port, and a note of hand given by the owner, a libel in the admiralty *in personam* will not lie. Ramsay *v.* Allegre, 12 Wheaton, 611. In this last case the extent of admiralty jurisdiction *in personam* was much discussed and questioned by Mr. Justice Johnson. But in Willard *v.* Dorr, 3 Mason, 93, and in Ham-

[1] *Ante*, 369, n. 1.

ralty jurisdiction is essential *in all such cases, for the *380 process of a court of common law cannot directly reach the thing *in specie*. If the law raises a lien for a maritime service, a court of admiralty has power to carry it into effect. (*a*)[1] The act of Congress of July 20, 1790, relative to seamen, sec. 6, has given a specific and summary relief for seamen in the recovery of wages, by authorizing the district judge, or, in his absence, a magistrate, to summon the master before him, and to attach the vessel as security for the wages. (*b*)

We have now finished a general survey of the admiralty jurisdiction of the district courts in civil and criminal cases, and both as an instance and a prize court. It would not be consistent with the plan of these elementary disquisitions to give a detailed sketch of the course of proceeding, and of the peculiar practice in the admiralty courts. The proceedings are according to the course of the civil law, and are remarkable for their comprehensive brevity, celerity, and simplicity. Nothing can be more

mond *v.* Essex F. & M. Ins. Co., 4 Mason, 196, Mr. Justice Story considered it to be settled jurisdiction of the admiralty, that the master could sue there *in personam* for his wages, and the seamen *in rem* as well as *in personam* for their wages. This appears to be a well-established distinction.

(*a*) Phillips *v.* Scattergood, Gilpin, 1. No prior replevin or attachment of the property under any state court process can control the paramount jurisdiction of the admiralty *in rem*, for freight or seamen's wages, or on a bottomry bond. Certain Logs of Mahogany, 2 Sumner, 589. A person hired for service as one of the crew on board of a canal-boat, under a coasting license, in the coal trade from the tide waters of the river Delaware, through the Raritan Canal, to the tide waters in the harbor of New York, performs service of a maritime character, and has a lien on the vessel for his wages, and may proceed *in rem* for the same. Weizer *v.* Coal Boat D. C. Salisbury, D. C. U. S. New York, November, 1844.

(*b*) See iii. 169–171, as to the lien of material-men. Ib., as to the remedy for seamen's wages. Material-men and workmen, having liens on vessels *under state laws*, may enforce them in the District Court as well as in a state court, at their election, as the jurisdiction is in that case concurrent. Davis *v.* A New Brig, Gilpin, 473. In the case of Heyer *v.* The Schooner Wave, in the District Court of the Southern District of New York, 2 Paine, 131, the plaintiffs, as branch or deputy pilots, libelled the vessel for salvage, in relieving her in distress within the harbor of New York, and salvage was allowed. On appeal to the Circuit Court of the United States for the Southern District of New York, the decree was reversed, on the ground that the act of Congress of August 7, 1789, c. 9, had adopted the pilotage laws of the states respectively, temporarily, and had not since interfered, and that the remedy for the pilots was in the state courts, and that the District Court had no jurisdiction in the case of pilotage arising within the waters of the states, until Congress should give it, as they had the right to do. See *infra*, iii. 176, note.

[1] *Ante*, 369, n. 1.

unlike, in its process, pleadings, proof, trial, and remedy, than the practice of the courts of admiralty and of the courts of common law. (*c*)

* 381 **5. Civil Jurisdiction of the District Courts.** — * The jurisdiction of the District Court, when proceeding as a court of common law, extends to all minor crimes and offences cognizable under the authority of the United States, and which are not strictly of admiralty cognizance; and to all seizures on land, and on waters not navigable from the sea; and to all suits for penalties and forfeitures there incurred; and to all suits by aliens, for torts done in violation of the law of nations, or of a treaty; and to suits against consuls and vice-consuls; and to all suits at common law, where the United States sue, and the matter in dispute amounts to one hundred dollars. (*a*) It has jurisdiction, likewise, of proceedings to repeal patents obtained surreptitiously, or upon false suggestions. This was given by the act of Congress of February 21, 1793, chap. ii., and it is a jurisdiction that leads

(*c*) The act of Congress of May 8, 1792, c. 36, sec. 2, declared that the form of writs, executions, and other processes, except their style, in suits of admiralty and maritime jurisdiction, should be according to the principles, rules, and usages which belong to courts of admiralty, as contradistinguished from courts of common law, subject to alterations and additions by the said courts, and to regulations to be prescribed by the Supreme Court. For a knowledge of the admiralty practice, I would refer the student to Clerke's Practice of the Court of Admiralty in England, which is a work of undoubted credit; and in 1809 a new edition was published in this country by Mr. Hall, with an appendix of precedents. I would also refer him to the 2d volume of Brown's Civil and Admiralty Law, and to the appendix to the 1st and 2d volumes of Mr. Wheaton's Reports, where he will find the practice of the instance and prize courts digested and summarily explained. See also the Treatise of Mr. Dunlap, on Admiralty Practice. He was formerly attorney of the United States for Massachusetts; and his work is pronounced, by the most competent judges, to be learned, accurate, and well-digested. See also the case of Lane *v.* Townsend, in the District Court of Maine, in 1835, Ware, 287, in which the learned judge defines the nature and effect of stipulations in the admiralty. That case contains a learned examination of the mode of commencing a suit, and of the prætorian stipulations required of the defendant in the Roman law, and it satisfactorily shows great inaccuracy in Brown's view of the subjects of the stipulations, cautions, or securities required in the progress of the suit by the practice of the Roman forum. In the case also of Hutson *v.* Jordan, Ware, 385, 395, the admiralty practice, as derived from the Roman law and the civil law courts, is discussed with the customary learning and ability of the distinguished judge. So also the practice on the joinder of different actions of different natures in one libel, ib. 427. See, in 3 N. Y. Legal Observer, 357, and in the Law Reporter for March, 1846, the rules of practice in the courts of the United States, in causes of admiralty and maritime jurisdiction on the instance side of the court, established in pursuance of the act of Congress of 23d August, 1842, c. 188.

(*a*) Judiciary Act of September, 1789, sec. 9.

frequently to the most intricate, nice, and perplexed investigations, respecting the originality of inventions and improvements in complicated machinery. (*b*) It was made a question in the District Court of New York, in the case *Ex parte Wood*, whether the process to be awarded to repeal the patent was not in the nature of a *scire facias* at common law, upon which issue of fact might be taken and tried by a jury. The district judge decided, that the proceeding was summary, upon a rule to show cause, and that no process of *scire facias* was afterwards admissible. But upon appeal to the Supreme Court of the United States, (*c*) the decree of the District Court was reversed, and the District Court was directed by *mandamus* to enter upon record the proceedings in the cause antecedent to the granting of the rule to show cause why process should not issue to repeal the patent. The District Court was further directed to award process, in the nature of a *scire facias*, to the patentee, to show cause why the patent should not be repealed; and upon the return * of the process, the court was to proceed to try *382 the cause upon the pleadings of the parties, and the issue of law or fact joined thereon, as the case might be; and that if the issue be an issue of fact, the trial thereof was to be by jury, according to the course of the common law.

This was a just and liberal decision of the Supreme Court; and it was observed, in the opinion which was pronounced, that it was not lightly to be presumed that Congress, in this class of patent cases, placed peculiarly within their patronage and protection, involving some of the dearest and most valuable rights which society acknowledges, and the Constitution itself meant to favor, would institute a new and summary process, which should finally adjudge upon those rights without a trial by jury, without a right of appeal, and without any of those guards with which, in equity suits, it has fenced round the general administration of justice. The Supreme Court then went into an analytical examination of the 10th section of the act of 1793, on which the claim of summary jurisdiction rested, and vindicated the construction which they assumed in opposition to that taken by the District Court.

The jurisdiction of the judges of the district courts, in cases of bankruptcy, has presented for consideration some important

(*b*) See vol. ii. 368.

(*c*) 9 Wheaton, 603.

questions on the point of jurisdiction. We have no bankrupt system in existence under the government of the United States; but there may be some lingering traces of business yet arising and undetermined, under the Bankrupt Act of the year 1800, and many questions may be expected to arise under the Bankrupt Act of 1841, which has been recently repealed. (*a*) In the case of *Comfort Sands*, (*b*) in the District Court of New York, it was observed that in England the sole power of directing the execution, and controlling the administration of the bank-
* 383 rupt system in all its departments * and in every stage of the proceeding, resided in the lord chancellor.

This jurisdiction of the English chancellor is not in the court of chancery, but in the individual who holds the great seal; and it is exercised summarily upon petition, and his judgment upon the petition is without appeal, unless the chancellor, in his discretion, allows a bill to be filed, in order to found an appeal thereon. The judge then proceeded to examine the several provisions of the Bankrupt Act of the United States of 1800, in order to show, that, upon the principles of construction adopted in England, the district judge had the same jurisdiction in cases of bankruptcy as is exercised by the lord chancellor. The same course of reasoning which sustains the jurisdiction of the one would confer that of the other. He insisted that the jurisdiction was given, not to the District Court, but to the individual who happened to hold the office of district judge, and that, consequently, all his decisions in bankruptcy were without appeal, for appeals lie only from the decrees of the District Court. But that extraordinary doctrine has since been overruled; and it has been held (*a*) that the circuit courts of the United States had jurisdiction of matters arising under the bankrupt law, and the district courts had not exclusive jurisdiction over the entire execution of such laws. They could not remove the assignees, nor compel them to account. An appeal lay in proceedings under the Bankrupt Act from the district to the circuit courts, and the state courts had a concurrent jurisdiction in matters of account between the bankrupt and his creditors, and which has been freely and extensively exercised. (*b*)

(*a*) See *infra*, ii. 391. (*b*) United States Law Journal, i. 15.

(*a*) Lucas *v.* Morris, 1 Paine, 396.

(*b*) See the case of Sands *v.* Codwise, 4 Johns. 536. In the case *Ex parte* Christy,

6. Territorial Courts of the United States. — With respect to the vast territories belonging to the United States, Congress have assumed to exercise over * them supreme powers of * 384 sovereignty. Exclusive and unlimited power of legislation is given to Congress by the Constitution, and sanctioned by judicial decisions. (*a*) Congress was, by the Constitution, (*b*) clothed with authority "to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as might, by cession of particular states and the acceptance of Congress, become the seat of government of the United States." The District of Columbia was created for that purpose, under cessions from the states of Maryland and Virginia. The territorial jurisdiction of that district, known as the District of Columbia, and which embraces the city of Washington, and throws its municipal protection over all the officers and agents of the government of the United States, is extremely important. (*c*) (*x*)

3 How. 292, it was held that the *Supreme Court* had no revising power over the decrees of the District Court sitting in *bankruptcy*, under the act of 1841 ; but it had over proceedings as a court of admiralty and maritime jurisdiction. The District Court, when sitting in bankruptcy, had plenary power over liens and mortgages on the bankrupt's property, and summarily to decide on their validity and extent, and may operate upon the parties in the state courts by injunction, and in that way control the proceedings in the state courts. s. c. But in the case of Peck *v.* Jenness, Sup. Court of New Hampshire, July, 1845 [16 N. H. 516], it was adjudged that the Bankrupt Act of 1841 neither limited nor enlarged the jurisdiction of the state courts, and that creditors of a bankrupt may pursue their remedies in the state courts, notwithstanding their claims are debts capable of being asserted under the bankruptcy, and that mortgages and liens saved by the Bankrupt Act may be enforced in the state courts, and that the district courts cannot interfere with or control the exercise of it. See *supra*, 247, and *infra*, 411. On the other hand, in Lewis *v.* Fisk, 6 Rob. (La.), 159, it was held that a decree of bankruptcy, under the act of 1841, devested all jurisdiction in the state courts, and they had no authority to decide questions involving the adjustment of privileges and liens among the creditors of the bankrupt, or the distribution of the funds of the estate. All the estate of the bankrupt is, by the decree of bankruptcy, *ipso facto* vested in the assignee.

(*a*) Const. art. 4, sec. 3 ; American Ins. Co. *v.* Canter, 1 Peters, 511. See also *supra*, 258.

(*b*) Art. 1, sec. 8, 17.

(*c*) The powers of the judiciary of the District of Columbia were ably discussed and declared by Ch. J. Cranch, in the Circuit Court of that district, on the 6th of June, 1837, in the case of the United States, *ex relat.* Stokes, Stocktons, and Moore *v.*

(*x*) Congress cannot delegate general legislative power to the local government of the District of Columbia. Roach *v.* Van Riswick, 4 MacArthur, 171.

By the Act of April 7, 1874, ch. 80, § 2 (18 St. at L. 27), the appellate jurisdiction of the Supreme Court over the judgments and decrees of the Territorial

The general sovereignty existing in the government of the United States over its territories is founded on the Constitution, which

Amos Kendall, Postmaster-General of the United States, [5 Cranch, C. C. 163.] It was decided that the court had authority to issue a *mandamus* to compel the defendant to credit the relators with the amount of an award made by the Solicitor of the Treasury in their favor, under an act of Congress of July 2, 1836. The defendant had refused to appear under a citation in that cause, and claimed exemption from all personal responsibility, as one of the heads of the departments, to the jurisdiction of the court. The Chief Justice held that the Circuit Court of the district had all the jurisdiction that any circuit court of the United States could have, under the acts of Congress of 13th February, 1801, sec. 11, and of the 27th February, 1801, [c. 15,] sec. 5, and it had more, — it was inferior only to the Supreme Court. It had power to call before it any person found in the district, from the highest to the lowest. No officer of government in the district was too high to be reached by the process of the court. The defendant in the case could not shelter himself under the authority or command of the President. There is no law establishing a relation between the Postmaster-General and the President, or any authority in the latter to prescribe his duties, or control him in the exercise of his official functions. The Postmaster, in the exercise of his official duties, is as independent of the President as the President is of him. If the President has any power to control him, it is only through the fear of removal; and no act done under such a control would be justified. This decision was affirmed on appeal to the Supreme Court of the United States, in January term, 1838. Kendall *v.* The United States, 12 Peters, 524.

courts in jury cases is to be exercised by writ of error, and in other cases by appeal according to the rules and regulations prescribed by the Supreme Court. As to criminal cases in th Territories, see 18 St. at L. 254; *In re* Snow, 120 U. S. 274; Folsom *v.* United States, 16 S. C. 222; 26 St. at L. 829, § 13. Under the St. of Mar. 3, 1885 (23 St. at L. 443), § 2, providing for appeals and writs of error from the territorial Supreme Courts in certain cases, it is not necessary that the decision should be against the authority asserted. Clayton *v.* Utah, 132 U. S. 632. See Linford *v.* Ellison, 155 U. S. 503; Maricopa & P. R. Co. *v.* Arizona, 156 U. S. 347. In appeals or writs of error from the judgments or decrees of the Supreme Court of the District of Columbia, or the territorial courts, the matter in dispute, exclusive of costs, must now exceed $5,000, excepting cases of patents, copyrights, or under treaties or Federal statutes. Act of Mar. 3, 1885, ch. 355 (23 St. at L. 443). As to the District of Columbia the amount of $1,000, named in the Rev. Stats. § 705, was increased to $2,500 in 1879 (20 St. at L. 320.) By the Act of Feb. 9, 1893, ch. 74, § 8 (27 St. at L. 434), establishing a court of appeals for the District of Columbia, appeals lie from that court to the U. S. Supreme Court. The Act of Mar. 3, 1891, ch. 539, § 9 (26 St. at L. 858), establishing a court of private land claims, provides for an appeal from that court to the Supreme Court. By the Act of June 10, 1890, ch. 407, § 15 (26 St. at L. 131, 138), the circuit courts may allow an appeal to the U. S. Supreme Court in cases of controversy as to the appraisal of imported merchandise.

The power conferred by the Constitution to make war and treaties implies the power to acquire territory by conquest or treaty and to govern such territory until it is admitted as a State into the Union. Nelson *v.* United States, 30 Fed. Rep. 112; *supra*, 25 n. (*x.*) The power of the United States over such territory extends

declared (*d*) that Congress "should have power to dispose of and make all needful rules and regulations respecting the Terri-

(*d*) Art. 4, sec. 3.

to all rightful subjects and methods of legislation. Ibid; Late Church of Latter-Day Saints *v.* United States, 131 U. S. 1. This includes the powers of both national and municipal government, and the United States may there grant, for appropriate purposes, titles and rights in tide lands below high water mark. Shively *v.* Bowlby, 152 U. S. 1. Upon the admission of the new State, the land beneath the navigable waters within its limits, vests in such State, and not in the United States. Van Brocklin *v.* Tennessee, 117 U. S. 151. Lands conveyed to a Territory, "its successors and assigns forever," pass to the State when admitted. Brown *v.* Grant, 116 U. S. 207, 211. So of all property owned by the Territory, unless otherwise declared by Congress. Ibid. The act of Mar. 3, 1887 (24 St. at L. 476; as amended, 25 id. 45) made it unlawful for aliens and private corporations to acquire lands in the Territories. Modifications of the enabling act in the constitution adopted by a Territory are presumably accepted when the President and Congress formally admit it into the Union. Romine *v.* State, 7 Wash. St. 215. The power of the Territories to pass local or special laws was restricted by the Act of July 30, 1886 (24 St. at L. 170.) See Higbee *v.* Higbee, 4 Utah, 19; Elk Point *v.* Vaughn, 1 Dak. 113; Territory *v.* O'Connor, 5 id. 397 Same *v.* Guyott, 9 Mont. 46; Downes *v.* Parshall, 3 Wyom. 425. As to the right of suffrage in the Territories, see Nelson *v.* United States, 30 Fed. Rep. 112; 16 A. G. Op. 115; 30 Cent. L. J. 309, note. Upon admitting a Territory as a State, Congress may naturalize all its foreign born inhabitants as citizens of the United States. Boyd *v.* Nebraska, 143 U. S. 135.

"The personal and civil rights of the inhabitants of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, State and national; their political rights are franchises which they hold as privileges in the legislative discretion of Congress." Murphy *v.* Ramsey, 114 U. S. 15, 44. Article 7 of the U. S. Constitution, preserving the right of trial by jury, has been held to apply only to powers exercised by the Federal government, and not to those of the States and Territories. Walker *v.* New Mexico & S. P. R. Co. (New Mex.), 34 Pac. Rep. 43. This provision has, however, been held to apply to territorial courts. Bradford *v.* Territory, 1 Olk. 366.

Cases appealed to the U. S. Supreme Court from a Territory admitted as a State pending the appeal may be remanded to the State court, if no Federal question is involved; if two States are formed from one Territory, it will be remanded to the State which contains the trial county. Rader *v.* Maddox, 150 U. S. 128; Elliott *v.* Chicago, &c. Ry. Co., id. 245. Under § 15 of the Act of Mar. 3, 1891 (*supra*, 330, n. *x*) appeals now lie from a Territorial Supreme Court to the circuit of appeals. Aztec M. Co. *v.* Ripley, 151 U. S. 79; 53 Fed. Rep. 7; Badaracco *v.* Cerf, id. 169. The right to remove a pending cause from the courts of a Territory is not lost upon its admission as a State if a petition for removal is filed in the State Supreme Court before action by it in the cause. Carr *v.* Fife, 156 U. S. 494; Koeningsberger *v.* Richmond S. M. Co., 158 U. S. 41; see Burke *v.* Bunker Hill, &c. Co., 46 Fed. Rep. 644; Sargent *v.* Kindred, 49 id. 485.

The United States, by transferring or

tories, or other property belonging to the United States." (*e*) In the territories northwest of the river Ohio, and as separate

(*e*) It was held, in the case of The Canal Company *v.* Railroad Company, 4 Gill & Johns. 1, by the Court of Appeals in Maryland, that Congress acted in the government of the District of Columbia and other districts, not as a local legislature, but as the legislature of the Union; and in the case of The State *v.* New Orleans N. Company, 11 Martin, 38, 309, it was held that the legislature of the Orleans *territory* could grant a charter binding on the future State of Louisiana. So, in the case of Williams *v.* The Bank of Michigan, 7 Wend. 539, the New York Court of Errors adjudged that the power to incorporate a bank was within the scope of the general powers of territorial legislation, conferred upon the Michigan territory by the act of Congress of January 11, 1805. The government of the United States, which can lawfully acquire territory by conquest or treaty, must, as an inevitable consequence, possess the power to govern it. The territories must be under the dominion and jurisdiction of the Union, or be without any government; for the territories do not, when acquired, become entitled to self-government, and they are not subject to the jurisdiction of any state. They fall under the power given to Congress by the Constitution. This was the doctrine and decision of the Supreme Court in the case of the American Ins. Company *v.* Canter, 1 Peters, 511; and see also 3 Story's Comm. 193–198, 536. In a case submitted to the Supreme Judicial Court of Massachusetts in 1841 (1 Met. 580), it was held that in places ceded to the United States for navy yards, arsenals, &c., and where there is no other reservation of jurisdiction to the state than that of a right to serve civil and criminal process on such lands, the persons residing there were not entitled to the benefit of the common schools of the town, nor liable to any tax assessments, nor acquired any town settlement by a residence therein, nor any elective franchise, as inhabitants of the town.[1]

[1] [In respect to the district containing the site of the national government, the grant of power to Congress is "to exercise exclusive legislation in all cases." In respect to the territories, the grant is "to make all needful rules and regulations concerning the territory and *other property* belonging to the United States." The nature of, and the limitations upon, the sovereignty of the Union over the territories and the people thereof have become the subjects of angry and dangerous political discussion. In the celebrated case of Dred Scott, 19 How. 393, a majority of the judges of the Supreme Court were of opinion that the last-mentioned clause of the Constitution applies only to territory within the original states at the time the Constitution was adopted, and that it did not apply to future territory acquired by treaty or conquest from foreign nations. They were also of opinion that the power of Congress over such future territorial acquisitions was not unlimited, that the

surrendering part of its jurisdiction over an offence, does not lose it all. *In re* Wilson, 140 U. S. 575. A Territorial criminal statute is suspended and not repealed by an Act of Congress upon the same subject, and becomes the law upon the admission of the Territory as a State. *In re* Nelson, 69 Fed. Rep. 712.

The exception of "the territories" from an Act of Congress applies only where an organized system of civil government has been established, and not to such a district as Oklahoma. *In re* Lane, 135 U. S. 443; see United States *v.* Pridgeon, 153 U. S. 48.

territories were successively formed, Congress adopted and applied the principles of the ordinance of the confederation Congress of the date of the 13th of July, 1787. That ordinance was framed upon sound and enlightened maxims of civil jurisprudence. The organized territories belonging to the United States, and governed under the superintendence of Congress, at present consists of the territory of Columbia. The territories of Michigan and Arkansas were admitted into the Union as states, and upon an equality with the other states, by acts of Congress of June 15, 1836, and January 26, 1837; and the territories of Iowa and Florida were admitted into the Union as states, and upon an equality with the other states, by acts of Congress of March 3, 1845, c. 48, and of December 28, 1846, c. 1; and the territory of Wisconsin was admitted into the Union, on like equality, by acts of Congress of August 6, 1846, c. 89, and March 3, 1847, c. 53; and the republic of Texas, by a joint resolution of Congress of March 1, 1845, and of December 29, 1845.[2]

*It would seem, from these various congressional regu- * 385
lations of the territories belonging to the United States, that Congress have supreme power in the government of them, depending on the exercise of their sound discretion. That discretion has hitherto been exercised in wisdom and good faith, and with an anxious regard for the security of the rights and privileges of the inhabitants, as defined and declared in the ordinance of July, 1787, and in the Constitution of the United States. "All admit," said Chief Justice Marshall, (*a*) "the constitutionality of a territorial government." But neither the District of Columbia, nor a territory, is *a state*, within the meaning of the Constitution, or entitled to claim the privileges secured to the members of the Union. This has been so adjudged by

(*a*) 4 Wheaton, 422.

citizens of the states migrating to a territory were not to be regarded as colonists subject to absolute power in Congress, but as citizens of the United States, with all the rights of citizenship guaranteed by the Constitution, and that no legislation was constitutional which attempted to deprive a citizen of his property on his becoming a resident of a territory. The question arose under an act of Congress prohibiting slavery in the territory of Upper Louisiana, acquired from France.]

[2] States since admitted are California, by act of Sept. 9, 1850; Minnesota, by act of May 11, 1858; Oregon, by act of Feb. 14, 1859; Kansas, by act of Jan. 29, 1861; West Virginia, by act of Dec. 31, 1862; Nevada, by act of March 21, 1864; Nebraska, by act of Feb. 9, 1867, &c.

the Supreme Court. (*b*) Nor will a writ of error or appeal lie from a territorial court to the Supreme Court, unless there be a special statute provision for the purpose. (*c*) If, therefore, the government of the United States should carry into execution the project of colonizing the great valley of the Columbia or Oregon River, to the west of the Rocky Mountains, it would * 386 afford a * subject of grave consideration, what would be the future civil and political destiny of that country. It would be a long time before it would be populous enough to be created into one or more independent states; and in the mean time, upon the doctrine taught by the acts of Congress, and even by the judicial decisions of the Supreme Court, the colonists would be in a state of the most complete subordination, and as dependent upon the will of Congress as the people of this country would have been upon the king and parliament of Great Britain, if they could have sustained their claim to bind us in all cases whatsoever. Such a state of absolute sovereignty on the one hand, and of absolute dependence on the other, is not congenial with the free and independent spirit of our native institutions; and the establishment of distant territorial governments, ruled according to will and pleasure, would have a very natural tendency, as all proconsular governments have had, to abuse and oppression. (*a*)

(*b*) Hepburn *v.* Ellzey, 2 Cranch, 445; Corporation of New Orleans *v.* Winter, 1 Wheaton, 91; [*ante*, 326, n. 1.] [As to the jurisdiction of territorial courts in admiralty cases, see The City of Panama, 101 U. S. 453. — B.]

(*c*) Clarke *v.* Bazadone, 1 Cranch, 212; United States *v.* More, 3 id. 159.

(*a*) Cicero, in his Oration for the Manilian Law, c. 14, describes, in glowing colors, the oppressions and abuses committed by Roman magistrates, exercising civil and military power in the distant provinces.

LECTURE XVIII.

OF THE CONCURRENT JURISDICTION OF THE STATE GOVERNMENTS.

THE question, how far the state governments have concurrent powers, either legislative or judicial, over cases within the jurisdiction of the government of the United States, has been much discussed. It will be my endeavor, in the course of the present lecture, to ascertain the just doctrine and settled distinctions applicable to this great and important constitutional subject.

1. **Of Concurrent Powers of Legislation.** — It was observed in the Federalist, (*a*) that the state governments would clearly retain all those rights of sovereignty which they had before the adoption of the Constitution of the United States, and which were not by that Constitution exclusively delegated to the Union. The alienation of state power or sovereignty would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the states from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the states would be absolutely and totally contradictory and repugnant. (*x*)

(*a*) No. 32.

(*x*) The same act or series of acts may be punished under both Federal and State laws. Cross *v.* North Carolina, 132 U. S. 131. When the offence charged is a crime under both Federal and State laws, the questions at issue may be first raised in the State court, which is under the same obligation as the Federal courts to give effect to the supreme law of the land, and to protect rights thereby secured, as the latter courts, and the jurisdiction of the U. S. Supreme Court may be invoked to protect any Federal right asserted by the accused and denied by the State judgment. New York *v.* Eno, 155 U. S. 89.

A sale under the decree of a Federal court may be set aside by a State court, when made in violation of an injunction previously issued by the State court, and necessary to give complete relief in dealing with the entire subject-matter, if the State court has jurisdiction of all the par-

In the judicial construction given from time to time to the Constitution, there is no very essential variation from the
* 388 * contemporary exposition which was here laid down by the high authority of the Federalist. Judge Chase, in the case of *Calder* v. *Bull*, (*a*) declared that the state legislatures retained all the powers of legislation which were not expressly taken away by the Constitution of the United States; and he held that no constructive powers could be exercised by the federal government. Subsequent judges have not expressed themselves quite so strongly in favor of state rights, and in restriction of the powers of the national government. In *Sturges* v. *Crowninshield*, (*b*) the Chief Justice of the United States observed, that the powers of the states remained, after the adoption of the Constitution, what they were before, except so far as they had been abridged by that instrument. The mere grant of a power by Congress did not imply a prohibition on the states to exercise the same power. Thus, Congress are authorized to establish uniform laws on the subject of bankruptcy; but the states may pass bankrupt laws, provided there be no acts of Congress in force establishing a uniform law on that subject. (*c*) The states may legislate in the absence of congressional regula-

(*a*) 3 Dallas, 386. (*b*) 4 Wheaton, 193.

(*c*) In Golden *v.* Prince, 3 Wash. 313, Judge Washington had previously held, in the Circuit Court of the United States for Pennsylvania, that Congress had the exclusive power to pass bankrupt laws; but this opinion was subsequently corrected, and qualified according to the doctrine in the text.

ties. Stevens *v.* Central Nat. Bank, 144 N. Y. 50.

The appointment of a receiver for an insolvent bank by a State court does not bar a creditor's suit in the Federal court to set aside a fraudulent conveyance to the bank, and the latter court retains its jurisdiction even when the receiver sells the property so conveyed pending the Federal suit. Bacon *v.* Harris, 62 Fed. Rep. 99. Conversely, property rightfully in the possession of a Federal receiver is not subject to seizure and levy under State process to enforce the collection of a tax assessed upon its owner under State laws. *In re* Tyler, 149 U. S. 164. A State court has jurisdiction of an indictment for a wilful and felonious assault by a pilot in causing a collision and death on the other vessel, as the U. S. Rev. Stats. § 5344 is not applicable. *In re* Welch, 57 Fed. Rep. 576. The Federal courts are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends; their jurisdiction over controversies between citizens of different States cannot be impaired by State laws which prescribe the modes of redress in their courts, or which regulate the distribution of judicial power. Chicot County *v.* Sherwood, 148 U. S. 529. See also, The Willamette Valley, 62 Fed. Rep. 293.

tions. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states. But the concurrent power of legislation in the states did not extend to every case in which the exercise of it by the states had not been expressly prohibited. The correct principle was, that whenever the terms in which the power was granted to Congress, or the nature of the * power * 389 required that it should be exercised exclusively by Congress, the subject was as completely taken from the state legislatures, as if they had been expressly forbidden to act on it. In *Houston* v. *Moore*, (*a*) the same principles were laid down by Judge Washington, in delivering the opinion of the Court. He observed, that the power of the state governments to legislate on the subject of the state militia, having existed prior to the formation of the Constitution, and not being prohibited by that instrument, it remained with the states, subordinate, nevertheless, to the paramount power of the general government, operating upon the same subject. If Congress, for instance, did not exercise the power of providing for organizing, arming, and disciplining the militia, it was competent for the states to do it; but as Congress had exercised its constitutional powers upon the subject of the militia as fully as was thought proper, the power of legislation over that subject by the states was excluded, except so far as it had been permitted by Congress. The doctrine of the court was, that when Congress exercised their powers upon any given subject, the states could not enter upon the same ground, and provide for the same objects. The will of Congress may be discovered as well by what they have not declared, as by what they have expressed. Two distinct wills cannot at the same time be exercised, in relation to the same subject, effectually, and at the same time be compatible with each other. If they correspond in every respect, then the latter is idle and inoperative. If they differ, they must, in the nature of things, oppose each other so far as they do differ. It was, therefore, not a true and constitutional doctrine, that in cases where the state governments have a concurrent power of legislation with the national government, they may legislate upon any subject on

(*a*) 5 Wheaton, 1.

which Congress have acted, provided the two laws are not in their operation contradictory and repugnant to each other.

*390 *Judge Story, in the opinion which he gave in this case, spoke to the same effect, and defined with precision the boundary line between the concurrent and residuary powers of the states, and the exclusive powers of the Union. A mere grant of power in affirmative terms to Congress did not *per se* transfer an exclusive sovereignty on such subjects. The powers granted to Congress were never exclusive of similar powers existing in the states, unless where the Constitution has expressly in terms given an exclusive power to Congress, or the exercise of a like power was prohibited to the states, or there was a direct repugnancy or incompatibility in the exercise of it by the states. This is the same description of the nature of the powers as that given by the Federalist. An example of the first class is to be found in the exclusive legislation delegated to Congress over places purchased for forts, arsenals, &c.; and of the second class, in the prohibition of a state to coin money, or emit bills of credit; and of the third class, in the power to establish a uniform rule of naturalization, and in the delegation of admiralty and maritime jurisdiction. In all other cases, the states retain concurrent authority with Congress, except where the laws of the states and of the Union are in direct and manifest collision on the same subject, and then those of the Union, being the supreme law of the land, are of paramount authority, and the state laws, so far, and so far only as such incompatibility exists, must necessarily yield.

In the application of these general principles to the case before the court, it was observed, that the power given to Congress to provide for organizing, arming, and disciplining the militia was not exclusive. It was merely an affirmative power, and, being not incompatible with the existence of a like power in the states, it might well leave a concurrent power in the latter. But when once Congress has acted on the subject, and carried this power into effect, its laws for the organization, arming, and disciplining the militia were supreme, and all interfering regulations of the states suspended. A state may organize, arm, and disci-

*391 pline *its own militia, in the absence of, or subordinate to, the regulations of Congress. This power originally existed in the states, and the grant of it to Congress was not

necessarily exclusive, unless a concurrent power in the states would be repugnant to the grant, and there was no such repugnancy in the nature of the power. But the question was, whether a state legislature had any concurrent power remaining after Congress had provided, in its discretion, for the case. The conclusion was, that when once the legislature of the Union has exercised its powers on a given subject, the state power over that same subject, which had before been concurrent, was, by that exercise, prohibited; and this was the opinion of the court.

These expositions of the paramount powers of the general government are to be received as correct and conclusive, for they proceed from the highest authority, and are exceedingly clear and logical in their deductions. The same doctrines had been previously declared in the Court of Errors of New York, in the steamboat case of *Livingston* v. *Van Ingen.* (*a*) "Our safe rule of construction and action," as it was there observed, (*b*) "was this, that if any given power was originally vested in this state, if it had not been exclusively ceded to Congress, or if the exercise of it had not been prohibited to the states, we might then go on in the exercise of the power until it came practically in collision with the exercise of some congressional power. When that happened to be the case, the state authority would so far be controlled, but it would still be good in those respects in which it did not contravene the provision of the paramount law." A similar exposition of the concurrent jurisdiction of the states was given by the Supreme Court of Pennsylvania, in *Moore* v. *Houston;* (*c*) and by the Chief Justice of Massachusetts, in *Blanchard* v. *Russell.* (*d*) [1]

(*a*) 9 Johns. 507.
(*b*) 9 Johns. 576.
(*c*) 3 Serg. & Rawle, 179.
(*d*) 13 Mass. 16.

[1] Gilman *v.* Philadelphia, 3 Wall. 713. [*Fourteenth and Fifteenth Amendments.* — By the fourteenth amendment to the Constitution, it is provided that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (*x*)

By the fifteenth amendment, "The right of citizens of the United States to

(*x*) In the Fourteenth Amendment the word "citizens" is used in the political sense, and the word "persons" includes private corporaticns. Baldwin *v.* Franks, 120 U. S. 678; Charlotte &c. R. Co. *v.* Gibbes, 142 U. S. 386; see State *v.* Delaware, &c. Co., 7 Houst. (Del.) 269. A tribal Indian, who has not been natural-

When the Constitution of the United States was under the consideration of the state conventions, there was much * 392 * concern expressed on the subject of the general power

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."

These amendments have been a number of times before the courts, and in the construction of them the whole subject of the relative powers of the United States and of the states respectively has been largely discussed. There are two systems of government combined in one. The same person may be a citizen of both, entitled to the protection of each, and amenable to the laws of each. The United States has only the power which have been delegated to it, but within the range of these powers is supreme. The same act may be an offence against both state and United States law (*e. g.* passing forged coin). Each may then punish for the infringement of its own laws. There are certain immunities and privileges belonging to citizens of the United States, as such, or which are guaranteed by the United States Constitution, and these are under the protection of the federal government. Such privileges and immunities as do not fall within this class are exclusively under state protection.

In Slaughter-House Cases, 16 Wall. 36, it was held that there was nothing in the amendments (13th or 14th) to prevent a state from granting to a corporation the exclusive right to erect cattle-yards and slaughtering-houses, and from prohibiting the landing or slaughtering of cattle at any other than specified places which were under the control of said corporation, and for the use of which it was entitled to charge a reasonable compensation.

In Minor *v.* Happersett, 21 Wall. 162, it was held that no right to vote is given or guaranteed by the thirteenth or fourteenth amendments. Hence, that an ex-

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ized, taxed, or recognized as a citizen, either by the United States or a State, is not a citizen within the first section of the Fourteenth Amendment. Elk *v.* Wilkins, 112 U. S. 94. The Fourteenth Amendment restricts the action of the States, and does not relate to legislation by Congress. *In re* Sing Lee, 54 Fed. Rep. 334; Walston *v.* Nevin, 128 U. S. 578; Freeland *v.* Williams, 131 U. S. 405. It applies to all the departments of State government. Ah Kow *v.* Nunan, 5 Sawyer, 552. It applies, as to due process of law, to a taking by right of eminent domain, after the amendment, under a State statute previously enacted. Kaukauna Water-power Co. *v.* Green Bay & M. Canal Co., 142 U. S. 254; Marchant *v.* Pennsylvania R. Co., 153 U. S. 380, 388. It does not apply in a particular State to corporations foreign to that State. Norfolk & W. R. Co. *v.* Pennsylvania, 136 U. S. 114; Pembina Mining Co. *v.* Pennsylvania, 125 U. S. 181; Singer Manuf. Co. *v.* Wright, 33 Fed. Rep. 121. The defence of the Statute of Limitations against a debt already barred is not "property" within the Fourteenth Amendment, of which the debtor is deprived by a repeal of the statute. Campbell *v.* Holt, 115 U. S. 620.

The following are in conflict with the Fourteenth Amendment: Exclusion laws as applied to Chinese children born in the United States: Gee Fook Sing *v.* United States, 49 Fed. Rep. 146; discriminating State legislation against one class of persons of a particular race or nation: *In re* Parrott, 6 Sawyer, 349; an Act imposing the full term of the original sentence of a convict after his attempt to escape, without any allowance for the time already served: State *v.* Lewin, 53 Kansas, 679; discrimi-

of taxation over all objects of taxation, vested in the national government; and it was supposed that it would be in the power of Congress, in its discretion, to destroy in effect the

clusion of females from the suffrage, by a state, was not unconstitutional. See also United States *v.* Reese, *infra*.

The right of jury trial is not protected by the fourteenth amendment. Walker *v.* Sauvinet, 92 U. S. 90.

It is a violation of the fourteenth amendment for a state, through any of its departments or agencies, to discriminate in the selection of jurors between different persons on account of race or color. Strauder *v.* West Virginia, 100 U. S. 303; *Ex parte* Virginia, ib. 339; Commonwealth *v.* Johnson, 78 Ky. 509. But a colored person has not any absolute right to have even a single colored juror on the jury that tries him, provided only there be no discrimination in the choice. Virginia *v.* Rives, 100 U. S. 313.

The fifteenth amendment gives simply the right to exemption from discrimination on account of race, color, or previous condition of servitude, in the exercise of the elective franchise; and Congress has no power to legislate for any purpose beyond this. United States *v.* Reese, 92 U. S. 214. As to "due process of law," see Kennard *v.* Louisiana, 92 U. S. 480; McMillen *v.* Anderson, 95 U. S. 37; Kelley *v.* Pittsburgh, 104 U. S. 78.

The history of these amendments, and their purpose as peculiarly applicable to the colored race, is discussed in the foregoing cases. They do, however, it would seem, apply to other races as well; and it has been held that the effect of them is to forbid all class legislation, — such legislation being a denial of the "equal protection of the laws." Ah Kow *v.* Nunan, 5 Saw. 552; s. c. 18 Am. L. Reg. N. S. 676, and note; Parrott's Chinese Case, 6 Saw. 349; *In re* Ah Chong, ib. 451; Slaughter-House Cases, 16 Wall. 36, 72. Comp. State *v.* Ah Chong, 16 Nev. 50.

For further discussion of the respective rights and powers of the United States and of the states, see United States *v.* Cruikshank, 92 U. S. 542; Tennessee *v.* Davis, 100 U. S. 257. — B.]

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nating taxes: Jennings *v.* Coal Ridge I. & C. Co., 147 U. S. 147; Columbus S. Ins. Co. *v.* Wright, 151 U. S. 470; Northern Pacific R. Co. *v.* Walker, 47 Fed. Rep. 681; Shirk *v.* La Fayette, 52 id. 857; special assessments without notice to the owner or opportunity for him to be heard. Murdock *v.* Cincinnati, 39 Fed. Rep. 891.

The following are not: A State law upheld by the State courts as not providing a cruel and unusual punishment: McElvaine *v.* Brush, 142 U. S. 155; State punishments, penalties, and fair provisions for trials applying equally to all persons of the same class: Louisville & N. R. Co. *v.* Woodson, 134 U. S. 614; Marchant *v.* Penn. R. Co., 153 U. S. 380; *In re* Boggs, 45 Fed. Rep. 475; San Mateo County *v.* Southern Pac. R. Co., 8 Sawyer, 238; a State law making all grain elevators public warehouses: Brass *v.* North Dakota, 153 U. S. 391; a State law fixing elevator rates, for cities exceeding a certain population: Budd *v.* New York, 143 U. S. 517; or forbidding laundry business in parts of a city between certain hours at night, but not applying to other kinds of business: Soon Hing *v.* Crowley, 113 U. S. 703; or the carrying of dangerous weapons: Miller *v.* Texas, 153 U. S. 535; a State law making it a misdemeanor to issue a policy of fire insurance without express authority therefor by charter, and making the policy void: Com'th *v.* Vrooman, 164 Penn. St. 306; a State law requiring a certificate or license appropriate to a par-

concurrent power of taxation remaining in the states, and to deprive them of the means of supplying their own wants. All the resources of taxation might, by degrees, become the subjects

ticular profession: Dent *v.* West Virginia, Ry. Co., 125 U. S. 465, 513; Cantini *v.* 129 U. S. 114; admitting or refusing to admit women to practise law in a State: *Ex parte* Lockwood, 154 U. S. 116; separate railroad cars for white and negro passengers, if the accommodations are equally good: Anderson *v.* Louisville & N. R. Co., 62 Fed. Rep. 46; or empowering railroad commissioners to abolish grade crossings: New York & N. E. R. Co. *v.* Bristol, 151 U. S. 556; absence of the accused in a capital case from court when judgment is affirmed by the appellate court: Schwab *v.* Berggren, 143 U. S. 442; Fielden *v.* Illinois, id. 452; State statutes prohibiting intermarriage between whites and blacks. Dodson *v.* State (Ark.), 31 S. W. Rep. 977.

See also Walston *v.* Nevin, 128 U. S. 578; Kauffman *v.* Wootters, 138 U. S. 285; Fielden *v.* Illinois, 143 U. S. 452; Minneapolis & St. L. Ry. Co. *v.* Emmons, 149 U. S. 364; New York & N. E. R. Co. *v.* Bristol, 151 U. S. 556; Pittsburgh &c., R. Co. *v.* Backus, 154 U. S. 421; Indianapolis & V. R. Co. *v.* Backus, id. 438; Gilchrist *v.* Helena Hot Spring & S. R. Co., 58 Fed. Rep. 708; *Ex parte* Murray, 35 id. 496; Union Central Life Ins. Co. *v.* Chowning, 86 Texas, 654; Braceville Coal Co. *v.* People, 147 Ill. 66; Att.-Gen. *v.* Jochim, 99 Mich. 358; Wulzen *v.* Supervisors, 101 Cal. 15; State *v.* Goodwill (33 W. Va. 179), 25 Am. St. Rep. 863, and note; cases cited *supra*, 248 n. (*y*).

The provision as to due process of law in the Fourteenth Amendment applies to the acts of State officers. Pacific Gas Imp. Co. *v.* Ellert, 64 Fed. Rep. 421. The police power is a right reserved by the States, and was not surrendered to the general government when authority was conferred upon Congress to regulate commerce. Bowman *v.* Chicago & N. W. Tillman, 54 Fed. Rep. 969. Summary power vested in health officers to quarantine those afflicted with dangerous and infectious disease, or to remove dead animals, is due process of law. *In re* Smith, 84 Hun, 465; National F. Co. *v.* Lambert, 48 Fed. Rep. 458. So is the right of eminent domain when duly exercised. Barr *v.* New Brunswick, 67 Fed. Rep. 402. A State statute authorizing the exactions of tolls, fixed without notice or hearing, for using an improved waterway is not a taking of property without due process of law. Sands *v.* Manistee River Imp. Co., 123 U. S. 288. Nor is an act fixing a maximum charge for grain elevators. Budd *v.* New York, 143 U. S. 517. The principle that no person shall be deprived of life, liberty, or property without due process of law, which was in substance embodied also in the constitutions of nearly all the States when the Fourteenth Amendment was adopted, is not incompatible with the equally vital principle that all property is held under the implied obligation that the owner's use of it shall not be injurious to the community. See Mugler *v.* Kansas, 123 U. S. 623, 665. A constitutional requirement of due process of law will preclude the State Supreme Court from answering a question propounded by the legislature and governor as to the priority of appropriations for private claims, all of which are in excess of the constitutional limitation. *In re* Priority of Legislative Appropriations (Col.), 34 Pac. Rep. 277. Under the exclusion acts, due process of law places the burden upon the government to show that a Chinaman is unlawfully in this country. United States *v.* Long Hop, 55 Fed. Rep. 58; Barr *v.* New Brunswick, 67 Fed. Rep. 402; Sanford *v.* Poe, 69 id. 546.

of federal monopoly. The states must support themselves, by direct taxes, duties, and excises, and Congress may lay the same burden, at the same time, on the same subject. Suppose the national tax should be as great as the article, whether it be land, or distilled spirits, or pleasure-carriages, for instance, will conveniently and prosperously bear, and the state should be obliged to lay a further tax for its own necessities; the doctrine, as I understand it, is, that the claim of the United States would be preferred, and must be first satisfied, because the laws of the United States, made in pursuance of the Constitution, are the supreme law of the land. The author of the Federalist (*a*) admits that a state might lay a tax on a particular article, equal to what it would well bear, but the United States would still have a right to lay ·ther tax on the same article; and that all collisions, in a struggle between the two governments for revenue, must and would be avoided by a sense of mutual forbearance. He nowhere, however, meets and removes the difficulty in the case of a want of this mutual forbearance, where there is a concurrent tax laid on the same subject, which will not bear both taxes. He says only that the United States would have no right to abolish the state tax. This is not contended; but would not the United States have a right to declare that their taxes were liens from the time they were imposed; and would they not, as of course, be entitled to be first paid; and must not the state collector, in all cases, stand by and wait until the national

*tax is collected, before he proceeds to collect his state tax *393 out of the exhausted subject? Upon the doctrine of the federal courts, and upon the doctrine of the Federalist himself, this must be the case; and though the state legislatures have a concurrent jurisdiction in the case of taxation, except as to imposts, yet, in effect, though not in terms, this concurrent power becomes a subordinate and dependent power. In every other case of legislation, the concurrent power in the states would seem to be a power entirely dependent, and subject to be taken away absolutely, whenever Congress shall choose to exercise their powers of legislation over the same subject. I do not mean to be understood to question the validity, or to excite alarm at the existence, of this doctrine. The national government ought to be supreme within its constitutional limits, for it is intrusted with

(*a*) No. 32. See also Nos. 31, 33, 34.

the paramount interests and general welfare of the whole nation. Our great and effective security consists in the fact, that the constituents of the general and of the state governments are one and the same people; and the powers of the national government must always be exercised with a due regard to the interest and prosperity of every member of the Union; for on the concurrence and good will of the parts, the stability of the whole depends. My object is to discover what this concurrent power of legislation amounts to, and what is its value, and on what constitutional foundation it is supported.

It was observed by Mr. Hamilton, in the convention of New York, in 1788, (*a*) that if the United States and the state should each lay a tax on a specific article, and the individual should be unable to pay both, the party who first levied would hold the property. But this position must be received with some *394 qualification. The United States have * declared, by law, that they were entitled, in respect to their debts, to priority of payment; and when it was said that this claim would interfere with the rights of the state sovereignties, and would defeat the measures they had a right to adopt, to secure themselves against delinquencies, the answer given in *United States* v. *Fisher* (*a*) is, that "the mischief suggested, so far as it can really happen, was the necessary consequence of the supremacy of the laws of the United States, on all subjects to which the legislative power of Congress extends." It would seem, therefore, that the concurrent power of the legislation in the states is not an independent, but a subordinate and dependent power, liable, in many cases, to be extinguished, and in all cases to be postponed, to the paramount or supreme law of the Union, whenever the federal and the state regulations interfere with each other. (*b*)

(*a*) Debates in the New York Convention, printed by Francis Childs, 113.

(*a*) 2 Cranch, 358, 397.

(*b*) Mr. Hamilton, as Secretary of the Treasury, in his Report in January, 1790, on "a provision for the support of the public credit of the United States," recommended the assumption of the state debts, on the ground, among others, that if the states were left with the duty and burden of providing for the payment of the state debts contracted during the Revolutionary War (and which were then estimated at twenty-five millions of dollars), there might be a competition for resources, producing interfering regulations, collision, and confusion. Particular branches of industry might be oppressed by an accumulation of taxation upon them, in the exercise, at the same time, of the powers of the Union and of the states upon the same objects, and by different modes. The Secretary, though fully and deeply impressed with the embarrass-

In *Wayman* v. *Southard*, (*c*) the question arose, how far the judicial process of the federal courts could be controlled by the laws of the several states. It was decided, that Congress had exclusive authority to regulate proceedings and executions in the federal courts, and that the states had no authority to control such process; and, therefore, executions by *fieri facias*, in the federal courts, were not subject to the checks created by the Kentucky statute, forbidding sales on execution of land for less than three fourths of its appraised value. It was, in that case, further observed, that the forms of execution, and other process, in the federal courts, in suits at common law, except modes of proceeding, were to be the same as used in September, 1789, in the supreme courts of the states, subject only to alterations and additions by Congress, and by the federal courts, but not to alterations since made in the state laws and practice. It was further observed, that the laws of the several states were, by the Judiciary Act of 1789, sec. 34, to be regarded as *rules *395 of decision in trials at common law, in cases where they

ment of the case, does not seem to question the authority of each government to lay taxes in its discretion, but assumes the policy and necessity of moderation and forbearance, when there should happen to be a preoccupancy in the taxation of an article. It has become a settled point, and I think it was a very clear one from the beginning, that in the construction of the power of Congress to lay and collect taxes, duties, imposts, and excises, it is not to be taken as an independent grant of power, without any defined limit or object, but that it is a power to be considered in connection with the words immediately thereafter by which it is made subject to the qualification or limitation of being exercised *for the purpose* of "paying the debts, and providing for the common defence and general welfare of the United States." The purpose for which the taxes are to be laid is not of itself a distinct, substantial power, but a qualification of the power of taxation, by restricting it to those great and specified purposes, though the application of it to those purposes does undoubtedly admit, and necessarily requires, the exercise of a large and undefined discretion. The progress of this question, and the very weighty opinions upon it, are fully shown and forcibly illustrated in Story, Comm. ii. 367–398; and see particularly Mr. Monroe's Message on the bill respecting the Cumberland road, May 4, 1822, ib. 445–456. That Congress possess the power to appropriate money raised by taxation or otherwise, *for other purposes*, in their discretion, than those pointed out in the enumerated powers, is a question that has given rise to very able and acute discussions; and the affirmative side of the question has been sustained and successfully vindicated by the practice of the government, and the weighty authority, among others, of Mr. Hamilton and Mr. Monroe, in celebrated documents under their official sanction. See Hamilton's Report on Manufactures, and President Monroe's Message above referred to. Story, Comm. ii. 440–458. This distinguished commentator gives to the affirmative side of the question the sanction also of his decided opinion.

(*c*) 10 Wheaton, 1; United States Bank *v.* Halstead, ib. 51, S. P.

apply, unless the Constitution, treaties, or statutes of the United States had otherwise provided. This, however, did not apply to the practice of the federal courts. As to that, the laws of the states were no rule of decision, and the direction was intended only as a legislative recognition of the principles of universal jurisprudence, as to the operation of the *lex loci*, in the trial and decision of causes. The law respecting final process was materially altered by the act of Congress of 1828, (*a*) and that act adopted into the national courts in each state respectively (Louisiana excepted), the existing laws and usages of the several courts, regulating the effect and operation of judgments and executions, and the proceedings for their enforcement; but where judgments were a lien in the state upon the property of the defendants, and the defendants were entitled to an imparlance thereon of one term or more, the defendants in the United States courts, in such state, are entitled to an imparlance of one term. If, in any state, there were no courts of equity with the ordinary equity jurisdiction, the courts of the United States, in such states, might prescribe the mode of executing their decrees in equity; and the courts of the United States were also invested with power to alter, in their discretion, the final process in their courts, and to conform the same to legislative changes made for the state courts. (*x*)

(*a*) Act of Congress of May 19, 1828, c. 68, sec. 2, 3.

(*x*) The U. S. Rev. Stats. §§ 914, 915, require the practice, pleadings and forms and modes of proceeding in civil causes in the Federal courts to conform to State practice. The statute does not apply to the form of verdicts. Abbott *v.* Curtis & Co. Manuf. Co., 25 Fed. Rep. 402. And the Federal courts are not bound by a State statute providing for the submission of special questions to a jury. McElwee *v.* Met. Lumber Co., 69 Fed. Rep. 302. So the Federal courts are not controlled by State statutes in the allowance or amount of costs. Bradford *v.* Bradford, 2 Flippin, 280; Huntress *v.* Epsom, 15 Fed. Rep. 732; O'Neil *v.* Kansas City, &c. R. Co., 31 id. 663; Ford *v.* Louisville &c. R. Co., 45 id. 210; see Willard *v.* Serpell, 62 id. 625. Equitable defences, though pleadable under State practice, cannot be pleaded in the Federal court for that district. Snyder *v.* Pharo, 25 Fed. Rep. 398; Herklotz *v.* Chase, 32 id. 433. So the practice in the State courts which allows upon an answer or counter-claim the relief usually obtainable only by a cross-bill, is not followed in the Federal courts. Chapin *v.* Walker, 6 Fed. Rep. 794; Brande *v.* Gilchrist, 18 id. 465; White *v.* Bower, 48 id. 186. The fact that a State statute permits a married woman to sue in equity in her own name does not enable her so to do in a Federal court. Wills *v.* Pauly, 51 Fed. Rep. 257; see Morning Journal Ass'n *v.* Smith, 56 id. 141. The same is true of the examination of the adverse

2. Of Concurrent Judicial Power. — In the 82d number of the Federalist, it is laid down as a rule, that the state courts retained

party, as if under cross-examination, allowed by a State statute. Penn. R. Co. *v.* Allegheny R. Co., 25 Fed. Rep. 115; Dravo *v.* Favel, id. 116. A provision in a State statute which gives the same right of action for negligence causing death as the deceased would have if living, that the action is to be brought in the State court only, has been held invalid as a limitation upon the Federal courts of admiralty. Bigelow *v.* Nickerson, 70 Fed. Rep. 113 (Showalter, C. J., dissenting). But interpleader of adverse claimants in equity, as allowed by a State statute, may be enforced in the Federal courts. Wells *v.* Miner, 25 Fed. Rep. 533. So of a partition suit based on equitable titles. Aspen Mining & S. Co. *v.* Rucker, 28 Fed. Rep. 220. The fact that a suit may be brought in a State upon its penal statutes after the offender's death does not affect the Federal courts which follow the common-law rule that *qui tam* actions on penal statutes do not survive. Schreiber *v.* Sharpless, 110 U. S. 76. The question whether garnished funds are to be deposited in the court registry is determined by the Federal and not by State practice. Gaines *v.* New Orleans, 27 Fed. Rep. 411.

New remedies created by State statutes enlarging equitable rights may be enforced in the equity courts of the United States. Holland *v.* Challen, 110 U. S. 15; Goldsmith *v.* Gilliland, 22 Fed. Rep. 865; Wells, Fargo & Co. *v.* Miner, 25 id. 533; A. & W. Sprague Manuf. Co. *v.* Hoyt, 29 id. 421; Rosenbaum *v.* Council Bluff Ins. Co., 37 id. 7; Fechheimer *v.* Baum, id. 167; Borland *v.* Haven, id. 394; Sage *v.* Winona &c. R. Co., 58 id. 297; Prentice *v.* Duluth S. & F. Co., id. 437. A remedy provided by a State statute for a right thereby newly created, must be adopted, either at law or in equity, in the Federal courts. First Nat. Bank *v.* Peavey, 69 Fed. Rep. 455. But rights enforceable in the State courts will not be there followed when confusion or conflict of interests may result. Hence the same receivers appointed in the former courts will not necessarily be re-appointed in the latter. Young *v.* Aronson, 27 Fed. Rep. 241. And the right to set off a judgment or decree of one of these Courts in the other is restricted. Lauderdale Co. *v.* Foster, 23 Fed. Rep. 516. A provision in a State Code which permits a defendant to demand from the plaintiff more certain and definite statements in his complaint does not apply to the Federal Circuit Court sitting in equity. Phelps *v.* Elliott, 26 Fed. Rep. 881. But supplementary proceedings allowed by State law for discovery of the debtor's property at law or in equity, may be enforced in the Federal courts. Senter *v.* Mitchell, 16 Fed. Rep. 206. Chancery practice is uniform in all the Federal courts, and is the same whether the local State has courts of equity or not. In the Federal courts legal and equitable claims cannot be joined in one suit, and the existence of an adequate remedy at law is fatal to the jurisdiction at any stage of the case. Northern Pacific R. Co. *v.* Paine, 119 U. S. 561; Quincy *v.* Steel, 120 U. S. 241; Ridings *v.* Johnson, 128 U. S. 212; Mississippi Mills *v.* Cohn, 150 U. S. 202; Leighton *v.* Young, 52 Fed. Rep. 439; Tyler *v.* Savage, 143 U. S. 79, 97; Franklin Tel. Co *v.* Harrison, 145 U. S. 459, 474; Lindsay *v.* First Nat. Bank, 156 U. S. 485. This uniformity of equity practice prevails also in cases removed from the State to the Federal courts, and in such cases a recast of the pleadings is often necessary upon the removal. Benedict *v.* Williams, 10 Fed. Rep. 208; Phelps *v.* Elliott, 26 id. 881; Hunton *v.* Equitable Life Ass. Society, 45 id. 661. But Equity

all pre-existing authorities or the jurisdiction they had before the adoption of the Constitution, except where it was taken away, either by an exclusive authority granted in express terms to the Union, or in a case where a particular authority * 396 was granted to the * Union, and the exercise of a like authority was prohibited to the states, or in the case where an authority was granted to the Union, with which a similar authority in the states would be utterly incompatible. A concurrent jurisdiction in the state courts was admitted, in all except those enumerated cases; but this doctrine was only applicable to those descriptions of causes of which the state courts had previous cognizance, and it was not equally evident in relation to cases which grew out of the Constitution. Congress, in the course of legislation, might commit the decision of causes arising upon their laws to the federal courts exclusively; but unless the state courts were expressly excluded by the acts of Congress, they would, of course, take concurrent cognizance of the causes to which those acts might give birth, subject to the exceptions which have been stated. In all cases of concurrent jurisdiction, an appeal would lie from the state courts to the Supreme Court of the United States; and without such right of appeal, the concurrent jurisdiction of the state courts, in matters of national concern, would be inadmissible; because, in that case, it would be inconsistent with the authority and efficiency of the general government.

Such were the early and speculative views of the ablest commentators on the Constitution, in relation to the judicial powers of the state courts. We will now examine a series of decisions in the federal courts, defining and settling the boundaries of the judicial authorities of the states.

In the case of *Martin* v. *Hunter*, (*a*) Judge Story, in delivering the opinion of the court, seemed to think that it was the duty of Congress to vest the whole judicial power of the United States in courts ordained and established by itself. But the general observation was subsequently qualified and confined to that judicial

rule 94, requiring in a stockholder's suit his corporation's rights, has no technical certain allegations for the enforcement of force in removed cases. Evans *v.* Union Pac. Ry. Co., 58 Fed. Rep. 497.

(*a*) 1 Wheaton, 304. See *supra*, 377.

power which was exclusively vested in the United States. The whole judicial power of the * United States should be, * 397 at all times, vested either in an original or appellate form, in some courts created under its authority. It was considered that there was vast weight in the argument, that the Constitution is imperative upon Congress to vest all the judicial power of the United States, in the shape of original jurisdiction, in the supreme and inferior courts created under its own authority. At all events, it was manifest that the judicial power of the United States is, unavoidably, in some cases, exclusive of all state authority, and, in all cases, may be made so, at the election of Congress.[1] (*x*) No part of the criminal jurisdiction of the United States can, consistently with the Constitution, be delegated to state tribunals. The admiralty and maritime jurisdiction is of the same exclusive cognizance; and it can only be in those cases where, previous to the Constitution, state tribunals possessed jurisdiction independent of national authority, that they can now constitutionally exercise a concurrent jurisdiction. Congress, throughout the Judiciary Act, and particularly in the 9th, 11th, and 13th sections, have legislated upon the supposition that in all the cases to which the judicial powers of the United States extended, they might rightfully vest exclusive jurisdiction in their own courts.

[1] The Moses Taylor, 4 Wall. 411, 429; *post*, 402, n. 1. [In Claflin *v.* Houseman, 93 U. S. 130, it was held that an assignee in bankruptcy, under the law of March 2, 1867, might sue in a state court. It was held that the laws of the United States were to be regarded as laws of the states also; and hence state courts were competent to adjudge rights under them, except where exclusive jurisdiction was given by Congress to the United States court, in all cases where their jurisdiction, as fixed by state laws, made them competent. The right to take cognizance of such cases was said not to be a new jurisdiction conferred by Congress, but a right, under their state jurisdiction, to take cognizance of all cases of a given character, whether arising under state or United States laws. — B.]

(*x*) Although a suit against a bankrupt might be suspended by order of the bankrupt court until he obtained or was refused a discharge, yet the jurisdiction of the State courts over controversies between parties, one of whom was proceeded against under the national bankrupt law, was not taken away by the bankruptcy proceedings; and the rule that a receiver cannot be sued without the permission of the court which appointed him, does not deprive a State court of jurisdiction to determine an application for a *mandamus*, of which the Federal receiver of a corporation has notice, directing a State recorder of mortgages to cancel a writing in favor of the corporation. Calhoun *v.* Lanaux, 127 U. S. 634.

State courts may, in the exercise of their ordinary, original, and rightful jurisdiction, incidentally take cognizance of cases arising under the Constitution, the laws, and treaties of the United States; yet to all these cases the judicial power of the United States extends, by means of its appellate jurisdiction. (*a*)

In *Houston* v. *Moore*, (*b*) the same question came again under the consideration of the Supreme Court; and Judge Washington, in delivering the opinion of the court, observed, that he saw

nothing unreasonable or inconvenient in the doctrine of * 398 the Federalist, on the subject of the concurrent * jurisdiction of the state courts, so long as the power of Congress to withdraw the whole or any part of those cases from the jurisdiction of the state courts be, as he thought it must be, admitted. The practice of the general government has been conformable to this doctrine; and, in the Judiciary Act of 1789, the exclusive and concurrent jurisdiction conferred on the courts by that act were clearly distinguished and marked. The act shows that, in the opinion of Congress, a grant of jurisdiction generally was not

(*a*) In Wadleigh *v.* Veazie, 3 Sumner, 165, in the Circuit Court of the United States, in a writ of entry for land, the defendant pleaded in abatement an action in the state court between the same parties for the same land. It was held not to be a good plea, because the parties were reversed; but it was stated by the court, that, in cases of concurrent jurisdiction in the state and federal courts, the latter court had no discretion to control the suit, in order to prevent a collision between the courts. It was suggested that one or other of the courts, on a reconstruction of the Constitution, ought to have exclusive jurisdiction; and in Wallace *v.* M'Connell, 13 Peters, 136, it was held that an attachment commenced and conducted to a conclusion, before the institution of a suit against the debtor in a federal court, is a defence to the suit. So an attachment pending in a state court, prior to the commencement of a suit in the court of the United States, may be pleaded in abatement. The attaching creditor acquires a lien on the debt, good against the world. In Mabry *v.* Herndon, Ala. Sup. Court (Law Reporter for October, 1846, ix. 254,) it was adjudged, in an able and clear argument by Collier, Ch. J., that the state courts had cognizance, concurrently with the federal courts, of cases of fraud in a bankrupt's discharge, under the act of Congress of 1841, as no act of Congress had expressly excluded such a cognizance. The power of impeaching a bankrupt's discharge for fraud rested upon the principles of the common law, as well as on the provisions of the act of 1841. So, in the case of Ward *v.* Mann, in the Supreme Judicial Court of Massachusetts (the Law Reporter for March, 1847), it was adjudged, after an able consideration of the case, that if a case be within the ordinary jurisdiction of a state court, the court may take cognizance of it, though the cause of action arises under rights acquired by a statute of the United States, provided there be no restriction under the Constitution or the statute of the United States, confining the jurisdiction to the federal courts.

(*b*) 5 Wheaton, 1.

of itself sufficient to vest an exclusive jurisdiction. The Judiciary Act grants exclusive jurisdiction to the circuit courts of all crimes and offences cognizable under the authority of the United States, except where the laws of the United States should otherwise provide; and this accounts for the proviso in the act of 24th of February, 1807, c. 75, and in the act of 10th of April, 1816, c. 44, concerning the forgery of the notes of the Bank of the United States, declaring that nothing in that act contained should be construed to deprive the courts of the individual states of jurisdiction under the laws of the several states, over offences made punishable by that act. There is a similar proviso in the act of 21st of April, 1806, c. 49, concerning the counterfeiters of the current coin of the United States. Without these provisos, the state courts could not have exercised concurrent jurisdiction over those offences, consistently with the Judiciary Act of 1789. But these saving clauses restored the concurrent jurisdiction of the state courts, so far as, under the state's authority, it could be exercised by them. (*a*)[1] There are many other acts of Congress which permit jurisdiction over the offences therein described, to be exercised by state magistrates and courts. This was necessary; because the concurrent jurisdiction of the state courts over all offences was taken away, and that jurisdiction was vested exclusively in the national courts by the Judiciary Act, and it required another act to restore it. The state courts could exercise no jurisdiction whatever over crimes and offences against *the United States, unless where, in particular *399 cases, the laws had otherwise provided; and whenever such provision was made, the claim of exclusive jurisdiction in the particular cases was withdrawn, and the concurrent jurisdiction of the state courts, *eo instanti*, restored, not by way of grant from

(*a*) In the case of The State *v.* Tutt, 2 Bailey (S. C.), 44, the state courts are considered as having jurisdiction, independent of the acts of Congress, to punish the uttering and passing counterfeit bank bills and coin of the United States, and on the principle that such a power is essential to the protection of the citizens. In the case of The Commonwealth *v.* Fuller, 8 Metcalf, 313, it was adjudged that the state courts had jurisdiction of the offence of possessing, with intent to pass, *scienter*, counterfeit gold or silver coin, current by law or usage within the state. The proviso in the acts of Congress of 1789, 1806, 1825, recognizes the concurrent jurisdiction of the states over such crimes.

[1] *Post*, 402, n. 1.

the national government, but by the removal of a disability before imposed upon the state tribunals.

In the case last referred to, the Supreme Court disclaimed the idea that Congress could authoritatively bestow judicial powers on state courts and magistrates. "It was held to be perfectly clear, that Congress cannot confer jurisdiction upon any courts but such as exist under the Constitution and laws of the United States, although the state courts may exercise jurisdiction in cases authorized by the laws of the state, and not prohibited by the exclusive jurisdiction of the federal courts."

The Supreme Court, having thus declared the true foundation and extent of the concurrent jurisdiction of the state courts in criminal cases, proceeded to meet and solve a difficulty occurring on this subject of concurrent jurisdiction, whether the sentence of one jurisdiction would oust the jurisdiction of the other. The decision on this point was, that the sentence of either court, whether of conviction or acquittal, might be pleaded in bar of the prosecution before the other; as much so as the judgment of a state court, in a civil case of concurrent jurisdiction, might be pleaded in bar of an action for the same cause instituted in a circuit court of the United States.

There was another difficulty, not so easily surmounted, and that was, whether, if a conviction of a crime against the United States be had in a state court admitted to have concurrent jurisdiction, the governor of the state would have the power to pardon, and in that way control the law and policy of the United States. Judge Washington, in speaking for the court, did not answer this question, but contented himself with merely observing, that he was by no means satisfied that the governor *400 could pardon, but that if *he could, it would furnish a reason for vesting the jurisdiction of criminal matters exclusively in the federal courts.

The conclusion then is that in judicial matters the concurrent jurisdiction of the state tribunals depends altogether upon the pleasure of Congress, and may be revoked and extinguished whenever they think proper, in every case in which the subject matter can constitutionally be made cognizable in the federal courts; and that, without an express provision to the contrary, the state courts will retain a concurrent jurisdiction in all cases

where they had jurisdiction originally over the subject-matter. (*a*) We will next see whether this state jurisdiction does not equally depend upon the volition of the state courts.

There are various acts of Congress in which duties have been imposed on state magistrates and courts, and by which they have been invested with jurisdiction in civil suits, and over complaints and prosecutions in penal and criminal cases, for fines, penalties, and forfeitures, arising under laws of the United States. We have seen a very clear intimation given by the judges of the Supreme Court, that the state courts were not bound, in consequence of any act of Congress, to assume and exercise jurisdiction in such cases. It was merely permitted to them to do so, as far as was compatible with their state obligations; and in some instances the state courts have acted in those cases, and in other instances they have declined jurisdiction, though expressly vested with it by the act of Congress.

In the case of *Ferguson*, (*b*) an application was made to the Supreme Court of New York, for the allowance of a *habeas corpus* to bring up the party alleged to be detained in custody by an officer of the army of the United States, on the ground of being an enlisted soldier; and the allegation was, that he was an infant, and so not duly enlisted. It was much discussed, whether the state courts had concurrent * jurisdiction, by *habeas* * 401 *corpus*, over the question of unlawful imprisonment, when that imprisonment was by an officer of the United States, by color, or under pretext of the authority of the United States. The Supreme Court did not decide the question, and the motion was denied on other grounds; but subsequently, *In the matter of Stacy*, (*a*) the same court exercised a jurisdiction in a similar case, by allowing and enforcing obedience to the writ of *habeas corpus*. The question was therefore settled in favor of a concurrent jurisdiction in that case, and there has

(*a*) In the case of Delafield *v.* The State of Illinois, it was decided in the Court of Errors of New York, in December, 1841, upon appeal from a decree in chancery, that the state courts have a concurrent jurisdiction with the Supreme Court of the United States in suits between a state and citizens of another state, and the decree in chancery was affirmed. 2 Hill (N. Y.), 159; s. c. 26 Wendell, 192. The federal courts have exclusive jurisdiction when a state is defendant at the suit of another state, and when crimes are committed against the United States, and when Congress have declared the jurisdiction of the federal courts exclusive. Ib.

(*b*) 9 Johns. 239.

(*a*) 10 Johns. 328.

been a similar decision and practice by the courts of other states. (*b*)[1] (*x*)

(*b*) Case of Lockington, before Tilghman, Chief Justice of Pennsylvania, November, 1813, 5 Hall's L. J. 92; same case, 5 Hall's L. J. 301–330. A similar case in Maryland, 5 Hall's L. J. 486; and in South Carolina, 5 Hall's L. J. 497. Commonwealth *v.* Harrison, 11 Mass. 63; Case of Joseph Almeida, in Maryland, and the case of Pool and others, in Virginia, cited in Sergeant's Constitutional Law, 279, 280. By the New York Revised Statutes, ii. 563, sec. 22, a *habeas corpus* may be awarded, unless the party be detained by process from a court or judge of the United States, having *exclusive* jurisdiction in the case.

[1] But see Ableman *v.* Booth, 21 How. 506. In that case the defendant Booth had been charged with having aided and abetted in the escape of a fugitive slave from the custody of the United States marshal, which was a penal offence under the Fugitive Slave Law of Sept. 18, 1850. His bail having given him up, a warrant for Booth's commitment was made by a United States commissioner. On the next day, however, Booth was released by a state judge on *habeas corpus*, and the judge's decision was affirmed by the Supreme Court of Wisconsin, on the ground that the Fugitive Slave Law was unconstitutional. The marshal took a writ of error returnable to the Supreme Court of the United States. After Booth's release, he was indicted in the District Court, tried, and sentenced to a month's imprisonment, and again released on *habeas corpus* by the state court, who also directed their clerk to make no return to the writ of error brought thereupon. The Supreme Court reversed the judgment of the state court in both cases, on the broad ground that no state judge or court, after they are judicially informed that a party is imprisoned under the authority of the United States, has any right to interfere with him (p. 524); s. c. 3 Wis. 1. See also Matter of Spangler, 11 Mich. 298; State *v.* Zulick, 5 Dutcher, 409; *Ex parte* Holman, 28 Iowa, 88; Matter of Hopson, 40 Barb. 34; O'Connor, 48 Barb. 258; Jordan, 2 Am. L. Rep. N. S. 749; Farrand, 1 Abb. U. S. 140; 2 Am. L. T. U. S. Cts. R. 4; Neill, 8 Blatchf. 156.

It was considered by some judges that the principle of Ableman *v.* Booth did not extend beyond imprisonment under judicial process of a federal court. This was the suggestion in an interesting note to the last edition of this work, ii. 32. Note the language of the court in Freeman *v.* Howe, 24 How. 450, 459, 460; and see Matter of Barrett, 42 Barb. 479; Matter of Martin, 45 Barb. 142; People *v.* Gaul, 44 Barb. 98, 105; McCarey, Pet., 2 Am. L. Rev. 347; *Ex parte* Anderson, 16 Iowa, 595; Comm. *v.* Fox, 7 Penn. St. 336. In Gormley's Case, 12 Op. Att.-Gen. 258, the principle was thought not to apply to an imprisonment by an executive officer. In Tarble's Case, 25 Wis. 390, the Supreme Court of Wisconsin, still denying

(*x*) See *supra*, 301, note (*x*). Subject to the exclusive and paramount authority of the general government to control questions arising from the action of its own tribunals in matters of *habeas corpus*, the State courts may investigate illegal restraints, even when such illegality arises from a violation of the Constitution and laws of the United States. Robb *v.* Connolly, 111 U. S. 624. A Federal circuit court may discharge a person held, in violation of the Federal constitution, under State process for trial on an indictment charging him with an offence against the laws of the State. *Ex parte* Royall, 117 U. S. 241, 254; *Ex parte* Fonda, id. 516.

The Supreme Court of New York, in the case of *The United States* v. *Dodge*, (*c*) held that they had jurisdiction, and did sustain a suit on a bond for duties given to a collector of the United States customs. The suit was authorized by the Judiciary Act of 1789, giving concurrent jurisdiction to the state courts in suits at common law, where the United States were plaintiffs. (*d*) Afterwards, in the case of *The United States* v. *Lathrop*, (*e*) the same court discussed, very much at large, the question whether a state court had jurisdiction of an action in favor of the United States, to recover a penalty or forfeiture for breach of a law of the United States, and when a suit for the penalty was by the *act declared to be cognizable in a state court. It *402 was decided that the court had no such jurisdiction, and that it could not even be conferred by an act of Congress. (*x*) The difference between this case and the one preceding was, that the preceding case was a suit on a bond given to a collector of the customs for duties, and this was an action of debt for a pen-

(*c*) 14 Johns. 95.

(*d*) The act of Congress of September 24, 1789, c. 20, sec. 33, declared, that for any crime or offence against the United States, any justice of the peace, or other magistrate *of any of the states*, might cause the offender to be arrested and imprisoned or bailed under the usual mode of process.

(*e*) 17 Johns. 4.

the soundness of the reasoning in Ableman *v.* Booth, and asserting a right, even when a party was imprisoned by order of a court, to inquire collaterally into the single fact of its jurisdiction, thought that there was room for refusing to apply that reasoning where the detention was by a mere military officer, without the judgment of any court. They accordingly affirmed the discharge of a party who was held in the custody of a United States recruiting officer as an enlisted soldier, ordered by a state commissioner on the alleged ground that he enlisted when less than eighteen years old, and without the consent of his father. This decision was reversed by the Supreme Court of the United States, and it was once more laid down that a state judicial officer has no jurisdiction to issue or continue proceedings under a writ of *habeas corpus*, for the discharge of a person held under the authority, or claim and color of authority, of the United States, by an officer of that government. 13 Wall. 397; *post*, 410, n. 1.

(*x*) See Stearns *v.* United States, 2 Paine, 310; Brigham *v.* Claflin, 31 Wis. 607; 11 Am. Rep. 623, 628. In Betz *v.* Columbia Nat. Bank, 87 Penn. St. 87, 91, it was held that the decision of the State court, as to its jurisdiction to enforce a penalty under Federal laws, should, when the Federal jurisdiction is not clearly exclusive, be favorable to its own jurisdiction, leaving the doubt to be solved by the Federal Courts.

alty for breach of the excise law. They were both cases of debts due to the United States, but the one was a civil debt, and the other a penalty for breach of a revenue law; and this slight difference in the nature of the demand was considered to create a most momentous difference in its results upon the great question of jurisdiction. It was the opinion of the court that Congress could not invest the state courts with a jurisdiction which they did not enjoy concurrently before the adoption of the Constitution; and a pecuniary penalty for a violation of an act of Congress was a punishment for an offence created under the Constitution, and the state courts had no jurisdiction of the criminal offences or penal laws of the United States. The Judiciary Act of 1789 was the true exposition of the Constitution with respect to the concurrent jurisdiction of the state courts, and the exclusive jurisdiction of those of the United States; and by that act the exclusive cognizance of all crimes and offences cognizable under the authority of the United States, and of all suits for penalties and forfeitures, was given to the federal courts. The Judiciary Act in no instance excluded the previously existing jurisdiction of the state courts, except in a few specified cases of a national nature; but their jurisdiction was excluded in all criminal cases; and with respect to offences arising under the acts of Congress. In such cases the federal jurisdiction was necessarily exclusive;[1] but it was not so as to pre-existing matters within the jurisdiction of the state courts. (*a*)

The doctrine seems to be admitted, that Congress cannot compel a state court to entertain jurisdiction in any case. (*b*)

*403 * It only permits state courts which are competent for the purpose, and have an inherent jurisdiction adequate to the case, to entertain suits in the given cases; and they do not become

(*a*) Ely *v.* Peck, 7 Conn. 239; Davison *v.* Champlin, ib. 244, s. p.
(*b*) Dewey, J., in Ward *v.* Jenkins, [10 Metcalf, 583.]

[1] State *v.* Tuller, 34 Conn. 280, 296; Teall *v.* Felton, 1 Comst. 537, 546.

But a party may be punished in a state court under a state law for passing counterfeit coin of the United States. Fox *v.* Ohio, 5 How 410 See Moore *v.* Illinois, 14 How. 13.

So it has been held that the embezzlement, by an officer of a national bank, of a special deposit in such bank, not being punishable by any statute of the United States, may be punished in a state court, under a state law. State *v.* Tuller, 34 Conn. 280; Commonwealth *v.* Tenney, 97 Mass. 50. See Comm. *v.* Hall, ib. 570.

inferior courts in the sense of the Constitution, because they are not ordained by Congress. The state courts are left to infer their own duty from their own state authority and organization; but if they do voluntarily entertain jurisdiction of causes cognizable under the authority of the United States, they assume it upon the condition that the appellate jurisdiction of the federal courts shall apply. Their jurisdiction of federal causes is, however, confined to civil actions, or to enforce penal statutes; and they cannot hold criminal jurisdiction over offences exclusively existing as offences against the United States. Every criminal prosecution must charge the offence to have been committed against the sovereign whose courts sit in judgment upon the offender, and whose executive may pardon him. (*a*)

We find a similar doctrine in one of the courts in the State of Ohio, in the case of *The United States* v. *Campbell*. (*b*) That was an information filed by the collector of the revenue, to recover a penalty for breach of the excise law; and the court held it to be a criminal prosecution, and that one sovereign state could not make use of the municipal courts of another government to en-

(*a*) It has been a question of grave discussion how far treason might be committed against one of the United States separately considered. If the same crime amounted to treason against the United States, the exclusive cognizance of the crime belonged to the courts of the United States. This was the doctrine of the Supreme Court of New York, in the case of The People *v.* Lynch, 11 Johns. 549. But it was agreed in that case that treason might be committed against a state, as by opposing the laws, or forcibly attempting to usurp the government, and be not at the same time merged in the crime against the United States. But *levying war* against one state is a levying of war against all in their federal capacity, and is a crime belonging exclusively to the federal government. The limitation of treason against a state in its distinct capacity would seem to be confined to cases in which the open and armed opposition to the laws is not accompanied with the intention of *subverting the government.* However, the statute laws in many of the states by their language cover the whole enlarged ground of treason, and the line of demarcation is not distinctly defined. See an able essay on this subject in the American Law Magazine, No. 8, for January, 1845. The act of the legislature of New York, 1 N. Y. R. S. 170, 326, 3d ed., assumes that treason, committed within the state, may be cognizable and punishable by its laws. This was also the doctrine of the Supreme Court of Rhode Island in Dorr's Trial, and is the doctrine of such distinguished elementary writers as Mr. Rawle and Mr. Sergeant. See Wharton's American Criminal Law, Phil. 1846, pp. 586–592. [In 1860 John Brown invaded the State of Virginia with a small armed force, for the purpose of liberating the slaves held under the laws of that state, and subverting the state government. He was convicted of treason, in one of the local tribunals, and executed. — C.]

(*b*) 6 Hall's Law Journal, 113.

force its penal laws; and it was not in the power of Congress to vest such a jurisdiction in the state courts. Upon the same principle, the Court of Errors in Virginia, in the case of *The State* v. *Feely*, decided that it had no jurisdiction to punish by indictment stealing packets from the mail, as that was an offence created by act of Congress. (*c*) And in *Jackson* v. *Row*, the General Court of Virginia made the same decision precisely as that made in New York, in the case of *Lathrop;* and it held that

the act of Congress authorizing such suits for penalties in *404 *the state courts, was not binding. It was decided in

another case in Virginia, (*a*) that Congress could not give jurisdiction to, or require services of, a state court, or magistrate, as such, nor prosecute in the state courts for a public offence. In Kentucky it was held, as late as 1833, (*b*) that no state court could take cognizance of a penal case arising under an act of Congress. Such a jurisdiction would require an act of the state, and the consent of Congress.

After these decisions in Virginia, Ohio, Kentucky, and New York, the act of Congress of 3d March, 1815, c. 100, may be considered as essentially nugatory. That act vested in the state courts, concurrently with the federal courts, cognizance of all "complaints, suits, and prosecutions for taxes, duties, fines, penalties, and forfeitures, arising and payable under any act of Congress, passed or to be passed, for the collection of any direct tax or internal duties;" and it gave to the state courts and the presiding judge thereof the same power as was vested in the district judges, to mitigate or remit any fine, penalty, or forfeiture. (*c*) And here the inquiry naturally suggests itself, can the state courts, consistently with those decisions, sustain a criminal prosecution for forging the paper of the Bank of the United States, or for counterfeiting the coin of the United States? These

(*c*) Sergeant's Const. Law, 272; Virginia Cases, 321, s. c.

(*a*) *Ex parte* Pool, Sergeant's Const. Law, 272, 274; [2d ed. 282, 287.]

(*b*) Haney *v.* Sharp, 1 Dana (Ky.), 442.

(*c*) The act of Congress, of February 28, 1839, c. 36, sec. 3, notwithstanding the state decisions, authorized all *pecuniary penalties and forfeitures* under the laws of the United States to be sued for before any court of competent jurisdiction in the state or district where the cause of action arises, or the offender may be found. It was said, in the case of Prigg *v.* Comm. of P., 16 Peters, 539, that the state magistrates *might*, if they chose, exercise powers conferred upon them by act of Congress, unless prohibited by state legislation.

are cases arising under acts of Congress declaring the offence. The state courts have exercised criminal jurisdiction over these offences, as offences against the state; but it is difficult to maintain the jurisdiction upon the doctrine of the Supreme Court of New York, in the case of *Lathrop;* and if it be entertained, there are difficulties remaining to be definitively cleared. These difficulties relate to the effect of a prosecution in one jurisdiction upon the jurisdiction of the concurrent court, and to the effect of the executive power of pardon of the crime under one government, upon the claim of concurrent jurisdiction. (*d*)[1]

(*d*) In the case of The State *v.* Randall, 2 Aikens, 89, the Supreme Court of Vermont decided, in 1827, that the state courts had concurrent criminal jurisdiction over the offences of counterfeiting and passing counterfeit bills of the Bank of the United States. And in the case of The State *v.* Wells, 2 Hill (S. C.), 687, it was held that the state courts had concurrent cognizance of the indictable offence of opening a letter contrary to the act of Congress, and that Congress might constitutionally confer such a jurisdiction. On the other hand, it was decided in Missouri, in Mattison *v.* The State, 3 Mo. 421, that their courts had no cognizance of the case of counterfeiting the current coin, and that a statute of the state, providing for the cognizance and punishment of such crimes, was void. The doctrine was, that the states had no concurrent legislation on the subject, and that the power resided exclusively in Congress. So, the Constitution of the United States (art. 4, sec. 2) having declared that persons held to service or labor in one state, under the laws thereof, and escaping into another, should be delivered up, on claim of the party to whom such service or labor might be due; the laws of New York, in furtherance of this duty, have provided for the arrest of such fugitives, on *habeas corpus*, founded on due proof, and for a certificate in favor of the right of the claimant, and delivery of the fugitive to him to be removed. But the fugitive is entitled to his writ of *homine replegiando*, notwithstanding the *habeas corpus* and certificate. N. Y. Revised Statutes, ii. 560, sec. 6–20. See ii. 32, on this point, and see, in American Jurist for April, 1837, xvii. 96–113, the substance of the report of the committee on the judiciary in the legislature of Massachusetts, respecting the validity of the act of Congress of February 12, 1793, providing for the seizure and surrender of fugitive slaves. It urges the right and duty of providing, by the writ of *habeas corpus* or of *replevin*, for the trial by jury of the question whether the person seized be a freeman or a slave. The act of Congress authorizes the owner of the fugitive slave, by himself or his agent, to seize at once the fugitive slave, and carry him before a judge of the United States, or any magistrate of the county, city, or town in the state where the slave is seized, and, upon satisfying the magistrate by proof that the person seized is such fugitive slave, he is to give a certificate, which amounts to a warrant to remove the slave. This law is generally found to be insufficient to give the claimant the requisite constitutional protection in his property, or the fugitive due protection of his liberty; and its execution meets with embarrassment in the northern states, and several of them have endeavored, by local statutes,

[1] *Ante*, 402, n. 1.

Since the passage of the thirteenth amendment to the Constitution, further notes on the subject of fugitives from labor, note (*d*), seem unnecessary. As to fugitives from justice, *post*, ii. 32, n.

to supply the deficiency. The Constitution of the United States, and the act of Congress, evidently contemplated summary ministerial proceedings, and not the ordinary course of judicial investigation. Story's Comm. on the Const., iii. 677 ; Wright *v.* Deacon, 5 Serg. & Rawle, 62. In the last case it was held that the writ of *homine replegiando* did not lie to try the right of the fugitive to freedom, though on the return of the fugitive to the state from which he fled his right to freedom might be tried. See further, *infra*, ii. 32, notes (*c*), (*d*). It seems to be an unsettled question whether statute provisions relative to the surrender of fugitives from labor, in obedience to the Constitution of the United States, be of exclusive jurisdiction in the United States, or may be aided by auxiliary statute provisions in the states. But the case of Prigg *v.* The Commonwealth of Pennsylvania, 16 Peters, 539, may be considered as settling the question in favor of the exclusive jurisdiction of the United States. See *infra*, ii. 32, 248. It was there declared that the national government, in the absence of all positive provisions to the contrary, was bound, through its proper department, legislative, executive, or judiciary, as the case might require, to carry into effect all the rights and duties imposed upon it by the Constitution. Any legislation by Congress, in a case within its jurisdiction, supersedes all state legislation, and impliedly prohibits it. See Houston *v.* Moore, 5 Wheaton, 21, 22; Sturges *v.* Crowninshield, 4 Wheaton, 122, 193, s. p.

[540]

LECTURE XIX.

OF CONSTITUTIONAL RESTRICTIONS ON THE POWERS OF THE SEVERAL STATES.

WE proceed to consider the extent and effect of certain constitutional restrictions on the authority of the separate states. As the Constitution of the United States was ordained and established by the people of the United States, for their own government as a nation, and not for the government of the individual states, the powers conferred, and the limitations on power contained in that instrument, are applicable to the government of the United States, and the limitations do not apply to the state governments unless expressed in terms.[1] Thus, for instance, the provision in the Constitution that private property shall not be taken for public use without just compensation, was intended solely as a limitation on the exercise of power by the government of the United States, and does not apply to the state governments. (*a*) The people of the respective states are left to create such restrictions on the exercise of the power of their particular governments as they may think proper; and restrictions by the Constitution of the United States, on the exercise of power by the individual states, in cases not consistent with the objects and policy of the powers vested in the Union, are expressly enumerated.

"No state," says the Constitution, (*b*) "shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but

(*a*) Barron *v.* The Mayor and City Council of Baltimore, 7 Peters, 243. See also In the matter of Smith, 10 Wendell, 449.

(*b*) Art. 1, sec. 10.

[1] Twitchell *v.* The Commonwealth, 7 Wall. 321; Pervear *v.* The Commonwealth, 5 Wall. 475; Withers *v.* Buckley, 20 How. 84; Smith *v.* Maryland, 18 How. 71; Fox *v.* Ohio, 5 How. 411. See The Justices *v.* Murray, 9 Wall. 274, 278; *ante*, 326, n. 1.

gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; or grant any title of nobility. No state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, nor lay any duty on 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."

Most of these prohibitions would seem to speak for themselves, and not to stand in need of exposition. I shall confine myself to those cases in which the interpretation and extent of some of these restrictions have been made the subject of judicial investigation.

1. Of Bills of Credit. — *Bills of Credit*, within the purview of the Constitution of the United States, prohibiting the
* 408 emission of them, are declared * to mean promissory notes or bills issued by a state government, exclusively on the credit of the state, and intended to circulate through the community for its ordinary purposes as money redeemable at a future day, and for the payment of which the faith of the state is pledged. (*a*) (*x*) The prohibition does not therefore apply to the

(*a*) Craig *v.* The State of Missouri, 4 Peters, 410. In the case of Briscoe *v.* The Bank of Kentucky, 11 Peters, 257, the question what were *bills of credit*, of which the emission was prohibited to the states, was extensively discussed. They were defined to be *paper issued by the authority of a state on the faith of the state, and designed to circulate as money;* and under this definition it was adjudged that a bank of the State of Kentucky, established in the name and on behalf of the state, under the direction of a president and twelve directors chosen by the legislature, and the bank exclusively the property of the state, and with a capital of two millions, and with authority to issue notes payable to bearer on demand, and receive deposits and make loans; and the notes of which bank, by a subsequent act, were to be received on executions by plaintiff, and if refused, further proceedings to be delayed on the judgment for two years, *was not within the prohibition in the Constitution of the United States against the emission of bills of credit.* Mr. Justice Story dissented from this decision, and said that the late Chief Justice Marshall was of opinion with him, when the same case was before the court, and argued at a preceding term; and he further said that he would not distinguish the case in principle from that of Craig *v.* The State of Missouri. It appears to me, with great submission to the Supreme Court, that this decision

(*x*) Coupons upon bonds issued by a State, which are receivable for taxes and negotiable, but which are not intended to circulate as money, are not "bills of credit." Virginia Coupon Cases (Poindexter *v.* Greenhow), 114 U. S. 270.

notes of a state bank, drawn on the credit of a particular fund set apart for the purpose. (*b*) Through all our colonial history, paper money was much in use; and from the era of our independence down to the date of the Constitution, bills of credit, issued under the authority of the confederation Congress, or of the individual states, and intended for circulation from hand to hand, were universally denominated *paper money;* and it was to bar the governmental issues of such a delusive and pernicious substitute for cash, that the constitutional prohibition was introduced. The issuing of such bills by the State of Missouri, under the denomination of *certificates*, was adjudged to be unconstitutional, though they were not made generally a legal tender, but they were, nevertheless, made receivable in payment of taxes, and by all civil and military officers in discharge of salaries and fees of office. Instruments, however, issued by or on behalf of a state, binding it to pay money at a future day, for services actually received, or for money borrowed for present use, were declared not to be bills of credit, within the meaning of the Constitution. (*c*)[1]

essentially overrules the case of Craig, and greatly impairs the force and value of the constitutional prohibition. In the case of Linn *v.* State Bank of Illinois, 1 Scam. 87, decided by the Supreme Court of that state in 1833, it appeared that the State Bank of Illinois was owned by the state, and authorized to issue notes or bills in small sums from twenty dollars to one dollar, drawing interest, and receivable in payment of debts due to the state; and that the legislature were pledged to redeem the bills, and creditors were stayed from collecting their debts for three years, unless they would receive the bills in payment. The court held that the analogy was so striking between that institution and the Missouri loan office, as to render the decision in Craig *v.* The State of Missouri in point, and binding on the states; and, consequently, it was adjudged that the act establishing the State Bank of Illinois was unconstitutional, and its notes void. And in the case of McFarland *v.* The State Bank, 4 Ark. 44, the Supreme Court of Arkansas held itself bound and concluded by the decision in Briscoe *v.* The Bank of Kentucky, though it was admitted to be inconsistent with the doctrine and decision in the prior case of Craig *v.* The State of Missouri. The court evidently regretted that the case of Craig had been overruled, as it contained the sound and true constitutional doctrine. The Bank of Arkansas stood on the same ground, and had the same essential qualities, and its notes were bills of credit within the decision of Craig, and not bills of credit within the decision of Briscoe, and the latter decision they held themselves bound to obey.

(*b*) Billis *ads.* The State, 2 M'Cord, 12.

(*c*) Craig *v.* The State of Missouri, *ubi supra.* Mr. Justice Story, in his Commentaries on the Constitution, iii. p. 19, seems to be of opinion, that, independent of long-

[1] See further, as to what are not bills of credit, McCoy *v.* Washington County, 3 Wall. Jr. 381; Bailey *v.* Milner, 1 Abbott, U. S. 261; 35 Ga. 330; Darrington *v.*

2. Ex post Facto Laws. — In *Calder* v. *Bull*, (*d*) the question on the meaning of an *ex post facto* law, within the prohibition of the Constitution, was extensively discussed.

The legislature of Connecticut had, by a resolution or law, set aside a decree of the court of probates, rejecting a will, and directed a new hearing before the court of probates, and the point was, whether that resolution was an *ex post facto* law prohibited by the Constitution of the United States.

It was held that the words *ex post facto* laws were technical expressions, and meant every law that made an act done before

the passing of the law, and which was innocent when * 409 * done, criminal; or which aggravated a crime, and made

it greater than it was when committed; or which changed the punishment, and inflicted a greater punishment than the law annexed to the crime when committed; or which altered the legal rules of evidence, and received less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender. The Supreme Court concluded that the

continued practice from the time of the adoption of the Constitution, the states would not, upon a sound construction of the Constitution, if the question was *res integra*, be authorized to incorporate banks, with a power to circulate bank paper as currency, inasmuch as they are expressly prohibited from coining money. He cites the opinions of Mr. Webster, of the Senate of the United States, and of Mr. Dexter, formerly Secretary of War, on the same side. But the equal, if not the greater authority of Mr. Hamilton, the earliest Secretary of the Treasury, may be cited in support of a different opinion, and the contemporary sense and uniform practice of the nation are decisive on the question. Bank paper, like checks and negotiable notes, circulates entirely upon private credit, and is not a coercive circulation. It is at every person's option to receive or reject it. The Constitution evidently had in view bills of credit issued by law, in the name and on the credit of the state, and intended for circulation from hand to hand as money, and of which our history furnished so many pernicious examples. The words of the Constitution are, that *no state shall emit bills of credit*. The prohibition does not extend to bills emitted by individuals, singly or collectively, whether associated under a private agreement for banking purposes, as was the case with the Bank of New York prior to its earliest charter, in the winter of 1791, or acting under a charter of incorporation, so long as the state lends not its credit, or obligation, or coercion, to sustain the circulation. In the case of Briscoe *v.* The Bank of the Commonwealth of Kentucky, this question was put at rest, by the opinion of the court that there was no limitation in the Constitution on the power of the states to incorporate banks, and their notes were not intended to be inhibited, nor were considered as *bills of credit*. 11 Peters, 257, 345, 349.

(*d*) 3 Dallas, 386.

Bank of Ala., 13 How. 12 (same principle as Briscoe *v.* Bank of Ky.); as to what are, City N. Bank *v.* Mahan, 2 La. Ann. 751.

law or resolution of Connecticut was not within the letter or intention of the prohibition, and was, therefore, lawful. (*a*) Afterwards, in *Fletcher* v. *Peck*, (*b*) it was observed that an *ex post facto* law was one which rendered an act punishable in a manner in which it was not punishable when it was committed. This definition is distinguished for its comprehensive brevity and precision, and it extends to laws passed after the act, and affecting a person by way of punishment of that act, either in his person or estate. *Ex post facto* laws relate to penal and criminal proceedings, which impose punishments or forfeitures, and not to civil proceedings, which affect private rights retrospectively.[1] Retro-

(*a*) Strong *v.* The State, 1 Blackf. (Ind.) 193, s. p.
(*b*) 6 Cranch, 138.

[1] *Ex post Facto Laws.* — This is one of the great constitutional questions which has been reopened and much discussed in cases arising out of the rebellion.

An act of Congress provided that no one should be admitted as an attorney or counsellor to the bar of any United States court, or should be allowed to appear by virtue of any previous admission, unless he should have first taken an oath that he had not done certain acts of treason against the United States, had not held office under, or yielded voluntary support to, any authority hostile to them, and would support and bear true allegiance to the Constitution. It was held that this act, which was, of course, directed at those who had taken part in the rebellion, was both a bill of attainder and an *ex post facto* law, and therefore unconstitutional. *Ex parte* Garland, 4 Wall. 333. See *Ex parte* Law, 35 Ga. 285. So, in Cummings *v.* Missouri, 4 Wall. 277, a provision in a state constitution that no clergyman should be permitted to teach, preach, or solemnize marriage, unless he should first take an oath that he had not done certain specified acts, some of which at the time of doing them were not criminal, was held void for like reasons. See, however, the very able dissenting opinion of Mr. Justice Miller, in which the Chief Justice and Swayne and Davis, JJ., concurred, p. 382. But these were both cases of persons who had previously been admitted to their respective callings; and Mr. Pomeroy (Const. Law, § 532) thinks that as to future applicants the requirement of the test oath was constitutional, and cites *Ex parte* Magruder, Supreme Ct. D. C., to that effect, § 534. Further cases on the subject are *Ex parte* Law, 35 Ga. 285; The Murphy & Glover Test Oath Cases, 41 Mo. 339.

But in several cases it has been held that those who had taken part in the rebellion might be constitutionally deprived of the right to vote. Anderson *v.* Baker, 23 Md. 531; Ridley *v.* Sherbrook, 3 Coldw. 569; Blair *v.* Ridgely, 41 Mo. 63. And it is very clear that an act exempting all persons from prosecution for acts done by virtue of military authority of the United States or of the state during the late war, and made pleadable in bar of all actions then instituted or thereafter to be against any person for such acts, was constitutional. Drehman *v.* Stifle, 8 Wall. 595.

A law imposing a less penalty than a former law which it repeals is not *ex post facto* as to offences committed before its passage. Commonwealth *v.* Wyman, 12 Cush. 237; State *v.* Arlin, 39 N. H. 179, 180. As to the general question, what is

spective laws and state laws, devesting vested rights, unless *ex post facto*, or impairing the obligation of contracts, do not fall within the prohibition contained in the Constitution of the United States, however repugnant they may be to the principles of sound legislation. (c) (x)

(c) Calder *v.* Bull, 3 Dallas, 386 ; Satterlee *v.* Matthewson, 2 Peters, 413 ; Watson *v.* Mercer, 8 id. 88.

an *ex post facto* law, see Hartung *v.* People, 22 N. Y. 95 ; State *v.* Sullivan, 14 Rich. (S. C.) 281 ; State *v.* Paul, 5 R. I. 185 ; Lord *v.* Chadbourne, 42 Me. 429 ; Coffin *v.* Rich, 45 Me. 507 ; Rich *v.* Flanders, 39 N. H. 304 ; Gut *v.* The State, 9 Wall. 35. [A statute removing the bar of the statute of limitations where it has already run is *ex post facto*. Moore *v.* State, 43 N. J. L. 203, overruling s. c. 42 N. J. L. 208 ; Dinckerlocker *v.* Marsh, 75 Ind. 548. Held *contra*, as to an extension of the time allowed by the statute where it has not yet run. Com. *v.* Duffy, 96 Pa. St. 506 ; People *v.* Lord, 12 Hun, 282. A law requiring less evidence to convict than when the act was committed is *ex post facto*. United States *v.* Hughes, 8 Ben. 29. In Kring *v.* Missouri, 107 U. S. 221, a person was convicted of murder in the second degree ; and the conviction was set aside on his appeal, which operated as an acquittal of the crime of murder in the first degree. Held, that a statute changing the effect of such reversal was *ex post facto*. Though the change may be one of procedure, it affects a substantial right of defendant, and this is the test. — B.]

(x) See The Energia, 66 Fed. Rep. 604 ; Sears *v.* Mahoney, id. 860 ; United States *v.* 64 Barrels of Spirits, 3 Cliff. 308 ; Kille *v.* Reading Iron Works, 134 Penn. St. 225 ; Mitchell *v.* Campbell, 19 Oregon, 198 ; McLane *v.* Bonn, 70 Iowa, 752 ; Demoville *v.* Davidson County, 87 Tenn. 214 ; Stetson *v.* Hall, 86 Maine, 110 ; Foster *v.* Police Commissioners, 102 Cal. 483 ; Re Wright, 3 Wyom. 478 ; People *v.* Spicer, 99 N. Y. 225 ; People *v.* Hayes (140 N. Y. 484), 37 Am. St. Rep. 572, and note ; Pepole *v.* Maxwell, 83 Hun, 157 ; People *v.* Hawkins, 31 N. Y. S. 115.

It is competent for Congress to impose taxes retrospectively. Stockdale *v.* Ins. Cos., 20 Wall. 323. A statute which, after annual settlements, authorized county auditors in Ohio to extend back, for four years, inquiries as to property returnable for taxation, was held constitutional. Sturges *v.* Carter, 114 U. S. 511. But penalties added for such previous years are within a constitutional prohibition against retroactive laws. Gager *v.* Prout, 48 Ohio St. 89 ; Metz *v.* Hagerty (Ohio), 38 N. E. Rep. 11 ; Ryan *v.* State, 5 Neb. 276. So penalties which have accrued for non-payment of a tax, but which have been swept away by a repeal of the tax law, cannot be revived by new legislation. State *v.* Jersey City, 37 N. J. L. 39. An additional penalty may lawfully be prescribed for an act previously unlawful. Mackey *v.* Holmes, 52 Fed. Rep. 722.

An act which imposes an increased punishment or penalty is *ex post facto* as to offences committed before its enactment. *In re* Medley, 134 U. S. 160 ; *In re* Savage, id. 176 ; see Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747 ; Holden *v.* Minnesota, 137 U. S. 483 ; People *v.* McNulty, 93 Cal. 427 ; *Ex parte* Hunt, 28 Tex. App. 361. An habitual criminal Act, made applicable to previous and subsequent offences, does not violate constitutional prohibitions against both *ex post*

3. The States cannot control the Exercise of Federal Power. — The state legislatures cannot annul the judgments, nor determine the extent of the jurisdiction, of the courts of the Union. This was attempted by the legislature of Pennsylvania, and declared to be inoperative and void by the Supreme Court of the United States, in the case of *The United States* v. *Peters*. (*d*) Such a power, as we have heretofore seen, necessarily resides in the supreme judicial tribunal * of the nation. It has also been * 410 adjudged that no state court has authority or jurisdiction to enjoin a judgment of the Circuit Court of the United States, or to stay proceedings under it. This was attempted by a state court in Kentucky, and declared to be of no validity by the Supreme Court of the United States, in *M'Kim* v. *Voorhies*. (*a*) [1]

(*d*) 5 Cranch, 115.

(*a*) 7 Cranch, 279.

[1] Riggs *v.* Johnson County, 6 Wall. 166, stated *ante*, 322, n. 1; The Mayor *v.* Lord, 9 Wall. 409; Supervisors *v.* Durant, ib. 415; Amy *v.* The Supervisors of Des Moines, 11 Wall. 136; *ante*, 401, n. 1.

The last statement in the text of this page (* 410) has been twice referred to and denied to be law by the Supreme Court. Freeman *v.* Howe, 24 How. 450, 458; Buck *v.* Colbath, 3 Wall. 334, 341.

The rule now laid down is, "that whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court, and under its control for the time being; and that no other

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facto and retroactive laws. Blackburn *v.* State, 50 Ohio St. 428; Com'th *v.* Graves, 155 Mass. 163; Sturtevant *v.* Com'th, 158 Mass. 598. A State statute providing that every colored child previously born shall be the legitimate child of his colored father, if acknowledged by him, though retrospective in conferring a privilege, is not invalid as an *ex post facto* law or as impairing the obligation of contracts. Callahan *v.* Callahan, 36 S. C. 454. Vested rights under contracts cannot be impaired by new enactments. Koshkonong *v.* Burton, 104 U. S. 668; Stetson *v.* Hall, 86 Maine, 110. A constitutional amendment making changes in the trial court after the crime was committed is not an *ex post facto* law: Duncan *v.* Missouri, 152 U. S. 377; nor is one passed after a crime was committed, and before trial, enlarging the capacity of witnesses: Hopt *v.* Utah, 110 U. S. 574; nor is a law changing the trial court: State *v.* Welch, 65 Vt. 50; State *v.* Cooler, 30 S. C. 105; or the place of trial: Cook *v.* United States, 138 U. S. 157; or the parties necessary to suits upon contracts: Tompkins *v.* Forrestal, 54 Minn. 119; or one partially doing away with grand juries: State *v.* Hoyt, 4 Wash. St. 818; Lybarger *v.* State, 2 id. 552; see People *v.* Tisdale, 57 Cal. 104; or one affecting only the remedy. Drake *v.* Jordan, 73 Iowa, 707. Curative statutes are not objectionable on this ground when the defect is not in matter of substance. Smith *v.* Hard, 59 Vt. 13; Bartlett *v.* Wilson, id. 23; Johnson *v.* Wells County Com'rs, 107 Ind. 15; Coles *v.* Washington County, 35 Minn. 124; Thweatt *v.* Hopkinsville Bank, 81 Ky. 1.

No state tribunal can interfere with seizures of property made by revenue officers, under the laws of the United States; nor interrupt, by process of replevin, injunction, or otherwise, the exercise of the authority of the federal officers; and any intervention of state authority for that purpose is unlawful. This was so declared by the Supreme Court in *Slocum* v. *Mayberry*. (*b*) Nor can a state court issue a *mandamus* to an officer of the United States. This decision was made in the case of *M' Cluny* v. *Silliman*, (*c*) and it arose in consequence of the Supreme Court in Ohio sustaining a jurisdiction over the register of the land office of the United States, in respect to his ministerial acts as register, and claiming a right to award a *mandamus* to that officer to compel him to issue a final certificate of purchase. The principle declared by the Supreme Court was, that the official conduct of an officer of the government of the United States can only be controlled by the power that created him.

If the officer of the United States who seizes, or the court which awards the process to seize, has jurisdiction of the subject-matter, then the inquiry into the validity of the seizure belongs exclusively to the federal courts. But if there be no jurisdiction in the instance in which it is asserted, as if a marshal of the United

(*b*) 2 Wheaton, 1. Any restraint by state authority on state officers in the execution of the process of their courts is altogether inoperative upon the officers of the United States in the execution of the mandates which issue to them. Baldwin, J., in McNutt *v.* Bland, 2 How. 17.

(*c*) 6 Wheaton, 598.

court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises." Miller, J., in Buck *v.* Colbath, *supra*. See Riggs *v.* Johnson County, 6 Wall. 166, 196; Taylor *v.* Carryl, 20 How. 583, 595. On this principle it was held that replevin did not lie in a state court against a marshal of the United States for property attached by him on mesne process from a United States court against a third person. Freeman *v.* Howe, *supra* (reversing s. c. 14 Gray, 566); Munson *v.* Harroun, 34 Ill. 422. See also Taylor *v.* Carryl, *supra*. But on the other hand it has been decided, qualifying some expressions in Freeman *v.* Howe, that trespass does lie in a state court against a marshal for taking goods under a writ of attachment from a United States court, which did not belong to the defendant in the attachment suit. Buck *v.* Colbath, *supra*; Ward *v.* Henry, 19 Wis. 76; Booth *v.* Ableman, 18 Wis. 495.

Trover will lie in the state courts against a postmaster for improperly detaining a newspaper, although such detention is under color of the laws of the United States, and the regulations of the post-office department. Teall *v.* Felton, 12 How. 284; affirming s. c. 1 Comst. 537.

States, under an execution in favor of the United States against A, should seize the person or property of B, (*d*) then the state courts have jurisdiction to protect the person and the property so illegally invaded; and it is to be observed that the jurisdiction of the state courts in Rhode Island was admitted by * the Supreme Court of the United States, in *Slocum* v. * 411 *Mayberry*, upon that very ground.

In the case of *The United States* v. *Barney*, (*a*) the district judge of Maryland carried to a great extent the exemption from state control of officers or persons in the service of the United States, and employed in the transportation of the mail. He held that an innkeeper had no lien on the horses which he had fed, and which were employed in the transportation of the mail. The act of Congress of March, 1790, prohibited all wilful obstruction of the passage of the mail; and a claim for debt would not justify the stopping of the mail, or the means necessary to transport it, either upon principles of common law, or upon the statute. The judge stated, in this case, that even a stolen horse found in the mail stage could not be seized; nor could the driver, being in debt, or having committed an offence, be arrested, in such a way as to obstruct the passage of the mail. But in a subsequent case in the Circuit Court of Pennsylvania, (*b*) it was held that the act of Congress was not to be so construed as to endanger the public peace and safety. The carrier of the mail, driving through a populous city with dangerous rapidity, and contrary to a municipal ordinance, may be stopped, and the mail temporarily detained by an officer of the city. So, if the officer had a warrant against a felon in the stage, or if the driver should commit murder in the street, and then place himself on the mail stage box, he would not be protected from arrest, though a temporary stoppage of the mail might be the consequence.[1] The public safety in one case is of more moment than the public inconvenience which it might produce in the other. (*c*)

(*d*) Bruen *v.* Ogden, 6 Halst. 370; Dunn *v.* Vail, 7 Martin (La.), 416.

(*a*) 3 Hall's Law Journal, 128.

(*b*) United States *v.* Hart, 1 Peters, C. C. 390.

(*c*) A toll-gate keeper, on a national road passing through a state, cannot stop the coach carrying the United States mail, for a refusal to pay toll. The remedy, if any, is by action against the contractor. Hopkins *v.* Stockton, 2 Watts & Serg. 163.

[1] United States *v.* Kirby, 7 Wall. 482.

But while all interference on the part of the state authorities with the exercise of the lawful powers of the national government has been in most cases denied, there is one case in * 412 which any control by the federal over the state * courts, other than by means of the established appellate jurisdiction, has equally been prevented. In *Diggs and Keith* v. *Wolcott*, (*a*) it was decided generally, that a court of the United States could not enjoin proceedings in a state court; and a decree of the Circuit Court of the United States for the District of Connecticut was reversed, because it had enjoined the parties from proceeding at law in a state court. So in *Ex parte Cabrera*, (*b*) it was declared that the circuit courts of the United States could not interfere with the jurisdiction of the courts of a state. These decisions are not to be contested; and yet the district judge of the Northern District of New York, in the spring of 1823, in the case of *Lansing and Thayer* v. *The North River Steamboat Company*, enjoined the defendants from seeking in the state courts, under the acts of the state legislature, the remedies which those acts gave them. This would appear to have been an assumption of the power of control over the jurisdiction of the state courts, in hostility to the doctrine of the Supreme Court of the United States. (*c*) In the case of *Kennedy* v. *Earl of Cassillis*, (*d*) an injunction had been unwarily granted, in the English Court of Chancery, to restrain a party from proceeding in a suit in the Court of Sessions in Scotland, where the parties were domiciled. It was admitted that the Court of Sessions was a court of compe-

(*a*) 4 Cranch, 179. S. P. in Kittredge *v.* Emerson, [15 N. H. 227,] and in Dudley's Case, C. C. U. S. for Pennsylvania, 1 Pennsylvania Law Journal, 302; Carrell *v.* F. & M. Bank, Har. (Mich.) Ch. 197. Neither the United States nor the state courts can interfere or control the operations of each other. The courts of the United States can only interfere by their appellate jurisdiction, and the state courts have no power to interfere by injunction. 3 Story's Comm. on the Const. 624, 625.

(*b*) 1 Wash. 232; United States *v.* French, 1 Gall. 1, S. P.

(*c*) The assumed jurisdiction was not afterwards sustained; and a bill in equity in a state court for an injunction, though against an alien or citizen of another state, was held not to be such a suit as was removable to a circuit court of the United States. 1 Paige, 183.

(*d*) 2 Swanst. 313. But in the subsequent case of Bushby *v.* Munday, 5 Mad. 297, the Vice-Chancellor granted an injunction, under special circumstances, to restrain proceedings in the Court of Sessions in Scotland. The New York Court of Chancery has disclaimed any such jurisdiction, in respect to a foreign suit previously commenced, though it was in possession of jurisdiction over the person of the party. Mead *v.* Merritt, 2 Paige, 402.

tent jurisdiction, and an independent foreign tribunal, though subject to an appeal, like the Court of Chancery, to the House of Lords. If the Court of Chancery could in that way restrain proceedings in the Court of Sessions, the Sessions might equally enjoin proceedings in chancery, and thus stop all proceedings in either court. Lord Eldon said he never meant to go further with the injunction than the property in England; and he, on motion, dissolved it *in toto*. (*e*)

***4. The States cannot impair the Obligation of Con-** *413 **tracts.**[1] (*x*) — We come next to a prohibition of great moment,

(*e*) It has been assumed and asserted by official authority, that the judicial power of the United States had no power to *enjoin* the executive branch of the government from the execution of a constitutional duty or of a constitutional law, any more than they could arrest the legislature itself in passing the law. Opinions of the Attorneys-General, i. 507, 508; [*ante* 296, n. 1; 323, n. 1.]

[1] *Post*, 419, n. 1.

(*x*) The following impair the obligation of contracts: Legislation affecting the previous exemption of a railroad from taxation until its net earnings equal a certain per cent: Com'th *v.* Philadelphia & E. R. Co., 164 Penn. St. 252; Barnes *v.* Kornegay, 62 Fed. Rep. 671; Williamson *v.* New Jersey, 130 U. S. 189; see Louisville Water Co. *v.* Clark, 143 U. S. 1; New Orleans City & L. R. Co. *v.* New Orleans, id. 192; St. Paul, M. & M. Ry. Co. *v.* Todd County, 142 U. S. 282.; Justices' Opinion, 58 N. H. 623; a law decreasing the legal rate of interest, as to prior contracts: Getto *v.* Friend, 46 Kansas, 24, 31; Butler *v.* Rockwell, 17 Col. 290; Robertson *v.* Van Cleave, 129 Ind. 217; or taking away the right to foreclose previous mortgages: O'Brien *v.* Krenz, 36 Minn. 136; see Edwards *v.* Johnson, 105 Ind. 594; a law abolishing a private corporation, like the State board of agriculture, and transferring its property to another institution: Downing *v.* State Board, 129 Ind. 443; see Essex Public Road Board *v.* Skinkle, 140 U. S. 334; Tammany Water Works *v.* New Orleans Water Works, 120 U. S. 64; Stein *v.* Bienville W. S. Co., 141 U. S. 67; Citizens' Water Co. *v.* Bridgeport Hydraulic Co., 55 Conn. 1; a law changing the scheme of a public charitable bequest without the consent of all parties in interest: Cary Library *v.* Bliss, 151 Mass. 364; an act transferring the right to fix water or gas rates from the water or gas company to the city or town: New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650; New Orleans Water Works Co. *v.* Rivers, id. 674; Santa Anna Water Co. *v.* San Buenaventura, 56 Fed. Rep. 339; see Walla Walla Water Co. *v.* Walla Walla, 60 id. 957; a law impairing the State's own contracts: Georgia Pen. Co. *v.* Nelms, 71 Ga. 301; or materially altering unconditional corporation charters: Bryan *v.* Board of Education, 151 U. S. 639; Eagle Ins. Co. *v.* State, 153 U. S. 446; Machias Boom Proprietors *v.* Sullivan, 85 Maine, 343; *In re* Brooklyn, 143 N. Y. 596; Chicago, B. & Q. R. Co. *v.* Jones, 149 Ill. 361; Barnes *v.* Kornegay, 62 Fed. Rep. 671; Smith *v.* Atchison, &c., R. Co., 64 id. 272; Virginia Dev. Co. *v.* Crozer I. Co., 90 Va. 126; Shields *v.* Clifton H. L. Co., 94 Tenn. 123.

A State constitution is a law within

and affecting extensively and deeply the legislative authority of the states. There is no prohibitory clause in the Constitution

the meaning of this clause of the Federal constitution, and a State can no more impair the obligation of a contract by her organic law than by her statutes. New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 672; Sheehan *v.* Treasurer, 33 N. Y. S. 428. When a foreign railroad corporation is empowered by a State statute to construct and operate its road through the State on payment of a certain annual sum and other conditions, which it fulfils, the contract is impaired by a later Act which requires it to deduct from interest on its bonds, payable in the State of its creation, and pay to the State, a tax imposed on the bonds owned by residents of the State. New York, L. E. & W. R. Co. *v.* Pennsylvania, 153 U. S. 628.

See also Shreveport *v.* Cole, 129 U. S. 36; McGahey *v.* Virginia, 135 U. S. 662; People *v.* Squire, 145 U. S. 175; Brown *v.* Smart, id. 454; Hamilton Gas Co. *v.* Hamilton, 146 U. S. 258; People *v.* Cook, 148 U. S. 397; Bier *v.* McGehee, id. 137; Bryan *v.* Board of Education, 151 U. S. 639; New York, L. E. & W. R. Co. *v.* Pennsylvania, 153 U. S. 628; Baltimore Trust Co. *v.* Baltimore, 64 Fed. Rep. 153; Tuttle *v.* Block, 104 Cal. 443; Dowell *v.* Talbot Paving Co., 138 Ind. 675.

The obligation of contracts is not impaired by the repeal of a lottery franchise: Stone *v.* Mississippi, 101 U. S. 814; Commonwealth *v.* Douglass (Ky.), 24 S. W. Rep. 233; by a State statute admittedly valid, but construed erroneously: Central Land Co. *v.* Laidley, 159 U. S. 103; by a change in a State constitution, restricting the payment of claims against the State: Baltzer *v.* State, 109 N. C. 187; 104 N. C. 265; by an insolvent law discharging prior debts: Pomeroy *v.* Gregory, 66 Cal. 574; Porter *v.* Imus, 79 Cal. 183; Chicago Life Ins. Co. *v.* Needles, 113 U. S. 574; Sloane *v.* Chiniquy, 22 Fed. Rep. 213; Keating *v.* Vaughn, 61 Texas, 518; by a law reducing the rate of interest on judgments upon contracts which do not provide for interest: Morley *v.* Lake Shore & M. S. Ry. Co., 146 U. S. 162; by laws requiring insurance companies already chartered to make annual statements of its condition: Eagle Ins. Co. *v.* Ohio, 153 U. S. 446; by a change in the laws relating to marriage: State *v.* Tutty, 41 Fed. Rep. 753; by a law authorizing the abolition of grade crossings at large expense: New York & N. E. R. Co. *v.* Bristol, 151 U. S. 556; or requiring a railroad to be fenced: Minneapolis & St. L. Ry. Co. *v.* Emmons, 149 U. S. 364; an act changing the salaries of public officers: Commonwealth *v.* Bailey, 81 Ky. 395; Harvey *v.* Rush County Commissioners, 32 Kansas, 159; by laws affecting municipal corporations: New Orleans *v.* New Orleans Water-works, 142 U. S. 79; see Citizens' St. R. Co. *v.* City Ry. Co., 56 Fed. Rep. 746; Baltimore T. & G. Co. *v.* Baltimore, 64 id. 153; or exercising the right of eminent domain: Atlanta Uni. *v.* Atlanta, 93 Ga. 468; Baltimore & F. T. Road *v.* Baltimore, &c. Co. (Md.), 31 Atl. Rep. 854; or enlarging mechanics' liens: Albright *v.* Smith, 2 S. D. 577, 587; by a change in decisions of the courts upon the faith of which contracts have been made: Springer *v.* Citizens Natural Gas Co. 145 Penn. St. 430; Allen *v.* Allen, 95 Cal. 184; see Wood *v.* Brady, 150 U. S. 18; by the abolition of dower: Hamilton *v.* Wirsch, 2 Wash. 223; by a change of remedies, or in the rules of evidence: Davies H. L. Co. *v.* Gottschalk, 81 Cal. 641; State *v.* New Orleans City & L. R. Co., 42 La. Ann. 550; Ward *v.* Hubbard, 62 Texas, 559; People *v.* Common Council, 140 N. Y. 300; Henry *v.* Henry, 31 S. C. 1; Texas Mex. Ry. Co. *v.* Locke, 74 Texas, 370; Biddle *v.* Hooven, 120 Penn. St. 221; Reid *v.* Hart, 45 Ark. 41; Stockwell *v.* Robinson, 9 Houst. (Del.), 313.

The contract, to raise a Federal ques-

which has given rise to more various and able discussions, or more protracted litigation, than that which denies to any state the right to pass any law impairing the obligation of contracts. I shall endeavor to give a full and accurate view of the judicial decisions defining and enforcing this prohibition.

The case of *Fletcher* v. *Peck* (*a*) first brought this prohibitory clause into direct discussion. The legislature of Georgia, by an act of 7th of January, 1795, authorized the sale of a large tract of wild land, and a grant was made, by letters-patent, in pursuance of the act, to a number of individuals, under the name of the Georgia Company. Fletcher held a deed from Peck for a part of this land, under a title derived from the patent; and in the deed Peck had covenanted that the State of Georgia was lawfully seised when the act was passed, and had good right to sell, and that the letters-patent were lawfully issued, and the title has not since been legally impaired. The action was for breach of covenant; and the breach assigned was, that the letters-patent were void, for that the legislature of Georgia, by act of 13th February, 1796, declared the preceding act to be null and void, as being founded in fraud and corruption. One of the questions presented to the Supreme Court upon the case was, whether the legislature of Georgia could constitutionally repeal the act of 1795, and rescind the sale made under it.

*The court declared, that when a law was, in its nature *414 a contract, and absolute rights have vested under that con-

(*a*) 6 Cranch, 87.

tion, must be a valid one, capable of being impaired. New Orleans *v.* New Orleans Water-works, 142 U. S. 79. A judgment for a tort is not a contract under this constitutional restriction. Freeland *v.* Williams, 131 U. S. 405; McAfee *v.* Covington, 71 Ga. 272. Statutes which limit the creditor's right to enforce his claim against the debtor's property are part of all subsequent contracts and do not impair their obligation. Denny *v.* Bennett, 128 U. S. 489. A subsequent legislature may revoke a contract or grant made by a previous one when not within the limits of the powers possessed by the State. Coxe *v.* State, 144 N. Y. 396. Modes of procedure in the courts of a state are so far within its control that a particular remedy, existing at the time of the making of a contract, may be abrogated altogether without impairing the obligation of the contract, if another and equally adequate remedy for the enforcement of that obligation remains or is substituted for the one taken away. Conn. Life Ins. Co. *v.* Cushman, 108 U. S. 51, 64; McGahey *v.* Virginia, 135 U. S. 662, 693; New Orleans, &c., R. Co. *v.* New Orleans, 157 U. S. 219, 224; Walker *v.* Glenn (Kansas), 40 Pac. Rep. 316.

tract, a repeal of the law could not devest those rights, nor annihilate or impair the title so acquired. A grant was a contract within the meaning of the Constitution. The words of the Constitution were construed. to comprehend equally executory and executed contracts, for each of them contains obligations binding on the parties. A grant is a contract executed, and a party is always estopped by his own grant. A party cannot pronounce his own deed invalid, whatever cause may be assigned for its invalidity, and though that party be the legislature of a state. A grant amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A grant from a state is as much protected by the operation of the provision of the Constitution, as a grant from one individual to another; and the state is as much inhibited from impairing its own contracts, or a contract to which it is a party, as it is from impairing the obligation of contracts between two individuals. It was accordingly declared that the estate held under the act of 1795, having passed into the hands of a *bona fide* purchaser for a valuable consideration, the State of Georgia was constitutionally disabled from passing any law whereby the estate of the plaintiff could be legally impaired and rendered void.

The next case that brought this provision in review before the Supreme Court was that of *The State of New Jersey* v. *Wilson.* (*a*) It was there held, that if the legislature should declare by law that certain lands, to be thereafter purchased for the use of the Indians, should not be subject to any tax, such a legislative act amounted to a contract, which could not be rescinded by a subsequent legislature. In that case, the colonial legislature of New

(*a*) 7 Cranch. 164. In Brewster *v.* Hough, 10 N. H. 138, it was held that the legislature of a state could not effectually devest itself of the power of taxation, for it was essentially a power of sovereignty or eminent domain, and the court considered the case of New Jersey *v.* Wilson might be sustained on the ground that it was in the nature of a treaty with the Indians. Ch. J. Marshall, in the case of Providence Bank *v.* Billings, 4 Peters, 561, considered that it was not to be inferred, without positive stipulation, that a state had agreed to relinquish its power of taxation. But in Gordon *v.* Appeal Tax Court, 3 How. 133, it was adjudged that the legislature of a state might make a binding contract not to be impaired, to refrain from imposing any tax upon a bank or its stockholders. This would seem to remove the doubt suggested in the case in New Hampshire, and to show that a state may, in relation to any particular subject, and for reasons of public policy or consideration, contract that the sovereign power shall not be exercised. This point is ably discussed in the American Law Magazine for January, 1846, art. 4.

Jersey, in 1758, authorized the purchase of lands for the Delaware *Indians, and made that stipulation. Lands *415 were accordingly purchased, and conveyed to trustees for the use of the Indians, and the Indians released their claim to other lands, as a consideration for this purchase. The Indians occupied these lands until 1803, when they were sold to individuals under the authority of an act of the legislature, and, in 1804, the legislature repealed the act of 1758, exempting those lands from taxation. The act of 1758 was held to be a contract, and the act of 1804 was held to be a breach of that contract, and void under the Constitution of the United States.[1]

The Supreme Court went again, and more largely, into the consideration of this delicate and interesting constitutional doctrine, in the case of *Terret* v. *Taylor*. (*a*) It was there held that a legislative grant, competently made, vested an indefeasible and irrevocable title. There is no authority or principle which could support the doctrine that a legislative grant was revocable in its own nature, and held only *durante bene placito*. Nor can the legislature repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal vest the property in others, without the consent or default of the corporators. Such a proceeding would be repugnant to the letter and spirit of the Constitution, and to the principles of natural justice.

But it was in the great case of *Dartmouth College* v. *Woodward*, (*b*) (*x*) that the inhibition upon the states to impair by law the obligation of contracts received the most elaborate discussion, and the most efficient and instructive application. It was there held that the charter granted by the British crown to the trustees of Dartmouth College in 1769 was a contract within the meaning of the Constitution, and protected by it; and that the college was a private charitable institution not liable to the control of the legislature; *and that the act of the *416 legislature of New Hampshire, altering the charter in a material respect, without the consent of the corporation, was an

(*a*) 9 Cranch, 43. (*b*) 4 Wheaton, 518.

[1] *Post*, 419, n. 1.

(*x*) See the reviews of this case in 27 Am. L. Rev. 71, 525; 28 id. 356, 440; 6 Harv. L. Rev. 161, 213.

act impairing the obligation of the charter, and consequently unconstitutional and void.[1]

The chief justice, in delivering the opinion of the court, observed, that the provision in the Constitution never had been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. Dartmouth College was a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, and its funds were bestowed by individuals on the faith of the charter, and those funds consisted entirely of private donations. The corporation was not invested with any portion of political power, nor did it partake, in any degree, in the administration of civil government. It was the institution of a private corporation for general charity. The charter was a contract to which the donors, the trustees of the corporation, and the crown, were the original parties, and it was made on a valuable consideration, for the security and disposition of property. The legal interest, in every literary and charitable institution, is in trustees, and to be asserted by them, and they claim or defend in behalf of the religion, charity, and education, for which the corporation was created, and the private donations made. Contracts of this kind, creating these charitable institutions, are most reasonably within the purview and protection of the Constitution. This contract remained unchanged by the Revolution; and the duties, as well as the powers, of the government devolved on the people of New Hampshire; but the act of that state which was complained of transferred the whole power of governing the college from trustees appointed according to the will of the founder expressed in the charter, to the executive of New Hampshire. The will of the state was substituted for the will of the donors, in every essential operation of the college. The charter was reor-
* 417 ganized in such a manner as * to convert a literary institution, moulded according to the will of its founders, and placed under the control of private literary men, into a machine entirely subservient to the will of government. This was, consequently, subversive of that contract, on the faith of which the donors invested their property; and the act of the legislature

[1] *Post*, 419, n. 1.

of New Hampshire was therefore held to be repugnant to the Constitution of the United States.

The same course of reasoning, and leading to the same conclusion, was adopted and expressed by some of the other judges.

In the opinion given by Judge Story, he added some new and interesting views of the nature of the contracts which the Constitution intended to protect. He denied the power of the legislature to dissolve even the contract of marriage, without a breach on either side, and against the wishes of the parties. A dissolution of the marriage obligation, without any default or assent of the parties, may as well fall within the prohibition of the Constitution, as any other contract for a valuable consideration. A man has as good a right to his wife as to the property acquired under a marriage contract; and to devest him of that right without his default, and against his will, would be as flagrant a violation of the principles of justice as the confiscation of his estate. (*a*) The prohibitory clause he also considered to extend to other contracts besides those where the parties took for their own private benefit. A grant to a private trustee, for the benefit of a particular *cestui que trust*, or for any special, private, or public charity, cannot be the less a contract, because the trustee takes nothing for his own benefit. Nor does a private donation, vested in a trustee for objects of a general nature, thereby become a public trust, which the government may, at its pleasure, take from the trustee. Government cannot revoke a grant even of its own funds, when given to a private person, or to a corporation, for special uses. It has no other remaining authority, but what is judicial, to enforce the proper administration of the trust. Nor * is a grant less a contract, though no *418 beneficial interest accrues to the possessor. Many a franchise, whether corporate or not, may, in point of fact, be of no exchangeable value to the owners, and yet they are grants within the meaning and protection of the Constitution. All incorporeal

(*a*) In Maguire *v.* Maguire, 7 Dana, 184, Ch. J. Robertson considered the contract of marriage to be *sui generis*, and unlike ordinary or commercial contracts. It was *publici juris*, and created by the public law, subject to the public will, and not to that of the parties, who could not dissolve it by mutual consent. It was much more than a contract. It established fundamental domestic relations, and he did not think it was embraced by the constitutional interdiction of legislative acts impairing the obligation of contracts. This appears to be the soundest construction of the constitutional provision alluded to. [Green *v.* The State, 58 Ala. 190.]

hereditaments, as immunities, dignities, offices, and franchises, are rights deemed valuable in law, and whenever they are the subject of a contract or grant, they are just as much within the reach of the Constitution as any other grant. All corporate franchises are legal estates. They are powers coupled with an interest, and corporators have vested rights in their character as corporators. Upon this doctrine it was insisted that the trustees of Dartmouth College had rights and privileges under the charter, of which they could not be devested by the legislature without their consent.

The act of the legislature did impair their rights, and vitally affect the interest of the college under the charter. If a grant of franchise be made to A, in trust for a special purpose, the grant cannot be revoked, and a new grant made to A, B, and C, for the same purpose, without violating the obligation of the first grant. If property be vested by grant in A and B, for the use of a general charity, or private eleemosynary foundation, the obligation of the grant is impaired when the estate is taken from their exclusive management, and vested in them in common with ten other persons.

I have thus stated the substance of the argument of the Supreme Court in this celebrated case, and it contains one of the most full and elaborate expositions of the constitutional sanctity of contracts to be met with in any of the reports. The decision in that case did more than any other single act, proceeding from the authority of the United States, to throw an impregnable barrier around all rights and franchises derived from the grant of government; and to give solidity and inviolability to the literary, charitable, religious, and commercial institutions of our country.

*419 *The same prohibitory clause in the Constitution came again under discussion in the case of *Green* v. *Biddle.* (*a*) It was observed by the court, that the objection to a law, on the ground of its impairing the obligation of contracts, could never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance

(*a*) 8 Wheaton, 1; 4 Miller (La.), 94, s. p. See also Bronson *v.* Kinzie, 1 How. 311, and *infra*, iv. 434, s. p.

of those which are expressed, however minute or apparently immaterial in their effect upon the contract, or upon any part or parcel of it, impairs its obligation. To deny any remedy under a contract, or by burdening the remedy with new conditions and restrictions, to make it useless or hardly worth pursuing, is equally a violation of the Constitution. (*b*) Upon this principle it is that if a creditor agrees with his debtor to postpone the day

(*b*) It seemed to be admitted, in the case of Bronson *v.* Kinzie, that there might be legitimate alterations of the remedy, if they did not seriously impair the remedy. Something to the same extent was said by Ch. J. Marshall, in Sturges *v.* Crowninshield; but the admission is rather dangerous, from its liability to misconstruction and abuse; and still more so is the language of the court in the case of Evans *v.* Montgomery, 4 Watts & Serg. 218. In the case of Woodfin *v.* Hooper, 4 Humph. (Tenn.) 13, it was held that the right of the creditor to imprison a debtor, existing at the time of the formation of the contract, was no part of the contract, and that remedy might afterwards be repealed, and the defendant even discharged from prison, under an execution upon the contract. But to take away by legislative act the existing remedies for enforcing the obligation of the contract, so as to leave the creditor without redress, would be a mockery of justice, and repugnant to the Constitution of the United States. The courts do not undertake to go so far, nor do they undertake to draw the line between remedies that may and remedies that may not be taken away. The danger is, that the permission may be used so as to abolish all efficient remedies — *Utor permisso — et demo unum, demo etiam unum, dum cadat.* It is unfortunate that the loose language, in some cases, of the Supreme Court of the United States has encouraged the state legislatures to deal in discretion with lawful remedies existing when contracts were made. The better doctrine is, that all effectual remedies affecting the interests and rights of the owner, existing when the contract was made, become an essential ingredient in it, and are parcel of the creditor's right, and ought not to be disturbed. The constitution of New Jersey of 1844 (art. 4, sec. 7), declares that the legislature shall not deprive a party of any remedy for enforcing a contract which existed when the contract was made. This is a wise provision, giving additional and material securities to the sanctity and efficacy of contracts. All suspension by statute of remedies, or any part thereof, existing when the contract was made, is more or less impairing its obligation. The true doctrine of the Constitution on this subject is to be found in Bronson *v.* Kinzie, McCracken *v.* Haywood, and Lancaster Saving Institution *v.* Reizart, *infra*, iv. 434, n. (*c*). In the case of Chadwick *v.* Moore, 8 Watts & Serg. 49, it was held that a statute of Pennsylvania, in 1842, suspending for a year a sale on execution for less than two thirds of the appraised value, was not unconstitutional. Mr. Ch. J. Gibson, who delivered the opinion of the court, seemed to hold that a temporary restraint on the remedy, when not to an unreasonable degree, was within the sound discretion of the legislature, and he preferred such a qualified doctrine to one that went for the absolute integrity of the constitutional principle in the entire existing remedy. *Vide infra*, 455, 456. And see James *v.* Stull, 9 Barb. 482; Baugher *v.* Nelson, 9 Gill, 299; Stocking *v.* Hunt, 3 Denio, 274; Smith *v.* Morse, 2 Cal. 524. The sounder state doctrine, as it seems to me, is that declared by Ch. J. Bronson, in the case of Quackenbush *v.* Danks, 1 Denio, 128; for, as he observes, laws which in form go only to the remedy, may have the practical effect of nullifying the contract.

of payment, or in any other way to change the terms of the contract, without the consent of the surety, the latter is discharged, although the change was for his advantage.

The material point decided in that case was, that a compact between two states was a contract within the constitutional prohibition. The terms "contract" and "compact" were synonymous; and a contract is an agreement of two or more parties to do or not to do certain acts. The court declared that the doctrine had been already announced and settled, that the Constitution embraced all contracts executed and executory, and whether between individuals, or between a state and individuals; and that a state had no more power to impair an obligation into which she herself had entered, than she had to impair the contracts of individuals.[1]

[1] (*a*) *What impairs the Obligation of a Contract?* — In the prolonged litigation as to the validity of certain western county bonds, the Supreme Court have gone very far in their efforts to uphold the sanctity of contracts. It is said that if bonds are executed or contracts made after and in reliance upon a construction of the laws and constitution of the state by the highest state court, in accordance with which such bonds or contracts would be valid, "their validity and obligation cannot be impaired" by a subsequent contrary decision. Gelpcke *v.* Dubuque, 1 Wall. 175; Havemeyer *v.* Iowa County, 3 Wall. 294; Thomson *v.* Lee County, ib. 327; Lee County *v.* Rogers, 7 Wall. 181; Chicago *v.* Sheldon, 9 Wall. 50. This principle, if sound, seems to stand, not on the Constitution, as the above language might indicate, but on the general grounds of justice on which it was put by Taney, C. J., in Ohio Life Ins. Co. *v.* Debolt, 16 How. 416, 431. But as Mr. Justice Miller points out, 1 Wall. 211, the legal doctrine is that the law was always the same as expounded by the later decision, not that the state court makes a new law (see Stockton *v.* Dundee Manuf. Co., 7 C. E. Green (22 N. J. Eq.) 56); and if, as admitted, the United States court would follow the later state decision as to contracts made after it, it is hard to see how they can logically avoid doing so as to those made before. However, in the above cases there were prior decisions of the state courts which were made the ground for disregarding their subsequent determinations. In a later case this element was wanting. For when a city issued bonds and afterwards the state courts construed a statute in force at the time of issue so as practically to take away the remedy of the creditors, the Supreme Court overruled the construction, although there were no state decisions in accordance with their view. Butz *v.* Muscatine, 8 Wall. 575; *ante*, 342, n. 1.

A more obvious decision is that a declaratory law cannot modify the settled construction of a statute, as to contracts already made under it. *Post*, 456, n. (*c*); Reiser *v.* William Tell Savings Ass., 39 Penn. St. 137; ib. 154; Dundas *v.* Bowler, 3 McL. 397; [Koshkonong *v.* Burton, 104 U. S. 668; McNichol *v.* U. S. Rep. Agency, 74 Mo. 457.] See Lambertson *v.* Hogan, 2 Barr, 22. And it is equally clear that a change of constitution cannot release a state from contracts made under a constitution which permits them

Another case, which led to a very extensive inquiry into the operation and effect of the constitutional prohibition upon the

to be made. Dodge *v.* Woolsey, 18 How. 331; Railroad Co. *v.* McClure, 10 Wall. 511; White *v.* Hart, 13 Wall. 646, 652. Another case on a state constitution is Cummings *v.* Missouri, 4 Wall. 277, stated *ante*, 409, n. 1.

(*b*) *What Contracts.* — There is only room for a brief statement of other points which have arisen under this head. There are numerous later decisions upholding the principle of the Dartmouth College case, that a state cannot impair the obligation of its own contracts. Thus it has been repeatedly decided that a state may disable itself by contract from exercising its taxing power in particular cases; and perhaps the question is to be regarded as finally settled, although some of even the later decisions were not unanimous. Home of the Friendless *v.* Rouse, 8 Wall. 430; ib. 441; Wilmington R. R. *v.* Reid, 13 Wall. 264; Wright *v.* Sill, 2 Black, 544; Jefferson Bank *v.* Skelly, 1 Black, 436; State Bank of Ohio *v.* Knoop, 16 How. 369; Ohio L. Ins. Co. *v.* Debolt, ib. 416; Dodge *v.* Woolsey, 18 How. 331; McGee *v.* Mathis, 4 Wall. 143; Von Hoffman *v.* City of Quincy, ib. 535, 554. [University *v.* People, 99 U. S. 309.] And see Christ Church *v.* Philadelphia, 24 How. 300, stated below. So, a provision in the charter of a bank, the stock of which is owned by the state, that the bills of the bank shall be received in payment of debts due the state, is a contract, and cannot be repealed as to bills already issued. [Keith *v.* Clark, 97 U. S. 454]; Woodruff *v.* Trapnall, 10 How. 190. See Paup. *v.* Drew, ib. 218; Trigg *v.* Drew, ib. 224; Furman *v.* Nichol, 8 Wall. 44. So, a statute making the stock of the shareholders in a railroad liable for the debts of the corporation cannot be repealed as to existing creditors. Hawthorne *v.* Calef, 2 Wall. 10. See Curran *v.* Arkansas, 15 How. 304; below. So, the lien of one who has lent money for a canal, on the faith of an act pledging the same with its tolls, &c., cannot be devested or postponed by a subsequent act. Wabash & Erie Canal Co. *v.* Beers, 2 Black, 448. So, the power of local taxation, given to a city by a statute authorizing it to issue bonds and to use this power to pay them, cannot be abridged as to those who have bought bonds issued under the act. Von Hoffman *v.* Quincy, 4 Wall. 535; see 10 Wall. 653; but see Gilman *v.* Sheboygan, 2 Black, 510; [Louisiana *v.* Pillsbury, 105 U. S. 278; Durkee *v.* Board of Liquidation, 103 U. S. 646; Saloy *v.* New Orleans, 33 La. Ann. 79; State *v.* Brown, 29 La. Ann. 863. See New Orleans *v.* Morris, 105 U. S. 600. A statute passed as an execution of the police power of a state may be repealed at any time. Stone *v.* Mississippi, 101 U. S. 814; Crescent City, &c. Co. *v.* New Orleans, 33 La. Ann. 934. For the origin and history of the clause found in most state statutes reserving the power to alter, amend, or repeal charters, see Greenwood *v.* Freight Co., 105 U. S. 13. Such reservation does not give the right to impose taxes which were provided against in the charter. Asylum *v.* New Orleans, 105 U. S. 362. See also Railroad Co. *v.* Georgia, 98 U. S. 359; Weidenger *v.* Spruance, 101 Ill. 278. The extent of this reserved power was considered in the Sinking Fund Cases, 99 U. S. 700. The question arose under the acts incorporating the Union Pacific Railroad Company, in which the power was reserved to Congress at any time to "alter, amend, or repeal this act." It was admitted that such reserved power did not include a power to take away property which had been acquired under the act. Nor could amendments be made which were contrary to the original scope and

states not to pass laws impairing the obligation of contracts, was that of *Sturges* v. *Crowninshield.* (*c*) The defendant was sued

(*c*) 4 Wheaton, 122.

object of the incorporation. Railroad Co. to belong to said hospital, shall be and *v.* Maine, 96 U. S. 499; Shields *v.* Ohio, 95 U. S. 319. — B.]

On the other hand, an appointment to a public office for a definite term at a fixed salary is not a contract within the protection of the constitution, Butler *v.* Pennsylvania, 10 How. 402; Conner *v.* Mayor of New York, 1 Seld. 285; People *v.* Devlin, 33 N. Y. 269; Swann *v.* Buck, 40 Miss. 268, 302; Coffin *v.* State, 7 Porter (Ind.), 157; Barker *v.* Pittsburgh, 4 Barr, 49; nor is a limited exemption from taxation for service in the volunteer militia, People *v.* Roper, 35 N. Y. 629; nor, it seems, are legislative grants of power to public municipal corporations. The People *v.* Pinckney, 32 N. Y. 377. [But a contract made by a state with an individual, whereby the state is to pay a certain sum for definite services, is within the protection of the Constitution. Hall *v.* Wisconsin, 103 U. S. 5; *infra*, (*c*). — B.] So, the grant of a ferry right to such a corporation may be repealed at any time. East Hartford *v.* Hartford Bridge Co., 10 How. 511. See further, Darlington *v.* Mayor of New York, 31 N. Y. 164. But see Atkins *v.* Randolph, 31 Vt. 226. (Otherwise, of a like grant to a private person. McRoberts *v.* Washburne, 10 Minn. 23.) Again, the mere incorporation of a turnpike company without any express agreement not to charter another in its neighborhood, does not preclude a state from doing so. Turnpike Co. *v.* State, 3 Wall. 210; Hartford Bridge Co. *v.* Union Ferry Co., 29 Conn. 210; *post*, iii. 459, n. (*a*). (Otherwise; where there is an express contract. The Binghamton Bridge, 3 Wall. 51.) A simple enactment without consideration that "the real property now belonging to Christ Church Hospital, so long as the same shall continue remain free from taxes," is not a contract protected by the Constitution, Christ Church *v.* Philadelphia, 24 How. 300; nor is a state bounty law, Salt Company *v.* East Saginaw, 13 Wall. 373; nor is a state license (*c. g.* to sell liquors), although a fee was paid for it, Calder *v.* Kurby, 5 Gray, 597; State *v.* Holmes, 38 N. H. 225; Metropolitan Board of Excise *v.* Barrie, 34 N. Y. 657. A statute allowing a state to be sued may be modified by a subsequent act imposing further conditions, even as to suits already begun. Beers *v.* Alabama, 20 How. 527; Bank of Washington *v.* Arkansas, ib. 530. Of course, when, as is now usual, a power to repeal or alter the charter of a company is reserved by general law or the special act of incorporation, a subsequent repeal or alteration will be constitutional. *In re* Oliver Lee & Co.'s Bank, 21 N. Y. 9; *In re* Reciprocity Bank, 22 N. Y. 9; State *v.* Mayor of Jersey City, 2 Vroom (31 N. J.), 575; State *v.* Miller, ib. 521; Comm. *v.* Eastern R. R., 103 Mass. 254. See, as to state insolvent laws, 422, n. 1. As to marriage, see ii. 107, n. 1.

(*c*) *Distinction between the Contract and the Remedy.* — See ii. 463, n. 1; Hawthorne *v.* Calef, 2 Wall. 10; Von Hoffman *v.* Quincy, 4 Wall. 535, stated above. In the last named case it is said that if these doctrines were *res integræ*, the soundness of the reasoning which maintains a distinction between the contract and the remedy might perhaps well be doubted. But they are regarded as settled. (4 Wall. 554.) See the remarks of Cockburn, C. J., as to the statute of limitations. Harris *v.* Quine, L. R. 4 Q. B. 653, 657. But see Aust. Jurisp. Lect. 45, 3d ed. 788; Pomeroy's Const. Law, § 609 *et seq.*

The objections to the distinction, if

in one of the federal courts upon two promissory notes given in March, 1811, and he pleaded his discharge under an insol-

sound, are diminished by the decisions in which Bronson *v.* Kinzie, *supra*, n. (*b*), is followed. Butz *v.* Muscatine, 8 Wall. 575, 583, stated above. To take away all remedy is of course unconstitutional, White *v.* Hart, 13 Wall. 646; and it has been held that a statute of Alabama, authorizing a redemption of mortgaged property in two years after a sale under a decree, was void as to sales made under mortgages executed before the act was passed. Howard *v.* Bugbee, 24 How. 461. So a state law depriving the creditors of a bank of all legal process against its real property, affects the remedy in such a way as to impair the obligation of the contract. Curran *v.* Arkansas, 15 How. 304, 319. See Hawthorne *v.* Calef, 2 Wall. 10, stated above; Danks *v.* Quackenbush, 1 Comst. 129. But see Morse *v.* Goold, 1 Kern. 28; Mede *v.* Hand, 5 Am. L. Reg. N. S. 82; Rockwell *v.* Hubbell, 2 Dougl. (Mich.) 197; Cusic *v.* Douglas, 3 Kansas, 123; Root *v.* McGrew, ib. 215. So the stay laws passed in many southern states in consequence of the late war have been generally held unconstitutional. Wood *v.* Wood, 14 Rich. (S. C.) 148; State *v.* Carew, 13 id. 498; Coffman *v.* Bank of Kentucky, 40 Miss. 29; Burt *v.* Williams, 24 Ark. 91; Bennett *v.* Worthington, ib. 487; White *v.* McKee, 19 La. Ann. 111; Barnes *v.* Barnes, 8 Jones (N. C.), 366; Taylor *v.* Stearns, 18 Gratt. 244; Penrose *v.* Erie Canal Co., 56 Penn. St. 46, 49. But see *Ex parte* Pollard, 40 Ala. 77; Watson *v.* Stone, ib. 451. [Any law which lessens or impairs the efficacy of the remedy to enforce the obligation of a contract as it existed when the contract was entered into, is void. Louisiana *v.* New Orleans, 102 U. S. 203; Memphis *v.* United States, 97 U. S. 293; Edwards *v.* Kearzey, 96 U. S. 595; McClain *v.* Easley, 4 Baxt. 520; Hillebert *v.* Porter, 28 Minn. 496. So a law which adds a new condition precedent to the enforcement of the contract. Olmstead *v.* Kellogg, 47 Iowa, 460. But a law which merely changes the form of the remedy, or destroys one of two or more equally effective remedies, is valid. Tennessee *v.* Sneed, 96 U. S. 69; Munday *v.* Rahway, 43 N. J. L. 338; Long's App., 87 Pa. St. 114; Watts *v.* Everett, 47 Iowa, 269; Newark Savings Inst. *v.* Forman, 33 N. J. Eq. 436 (see note of reporter). A law limiting the time within which suits may be brought on existing causes of action is valid, if a reasonable time after the passage of the act be allowed to begin such suits. Koshkonong *v.* Burton, 104 U. S. 668; Terry *v.* Anderson, 95 U. S. 628; Sohn *v.* Waterson, 17 Wall. 596. So a statute of limitations may be repealed. Pearsall *v.* Kenan, 79 N. C. 472.' It has also been held that where a right has been given without any means to enforce it (*e. g.* a right to sue a state without any right of execution), the right itself may be taken away. Railroad Co. *v.* Tennessee, 101 U. S. 337. See generally on this subject, Oliver *v.* McClure, 28 Ark. 555; United States *v.* Lincoln Co., 5 Dill. 184; National Bank *v.* Sebastian Co., ib. 414. The restriction against impairing contracts does not apply to public laws, — *e. g.*, locating a county seat. Newton *v.* Commissioners, 100 U. S. 548. It does not apply to public officers. Wyandotte *v.* Drennan, 46 Mich. 478; Donohue *v.* County of Will, 100 Ill. 94; Opinion of the Justices, 117 Mass. 603. — B.]

On the other hand, an act limiting the time for suits on judgments obtained in the courts of other states before its passage to two years is valid. Bank of Alabama *v.* Dalton, 9 How. 522. See Bacon *v.* Howard, 20 How. 22; Christmas *v.* Russell, 5 Wall. 290; Curtis *v.* Whitney,

*420 vent act of New York, passed in April, *1811. This insolvent act was retrospective, and discharged the debtor upon his single petition, and upon his surrendering his property in the manner therein prescribed, without the concurrence of any creditor, from all his pre-existing debts, and from all liability and responsibility by reason thereof.

The Chief Justice, in the opinion which he delivered on behalf of the court, admitted, that until Congress exercised the power to pass uniform laws on the subject of bankruptcy, the individual states may pass bankrupt laws, provided those laws contain no provision violating the obligation of contracts. It was admitted that the states might by law discharge debtors from imprisonment, for imprisonment was no part of the contract, but only a means of coercion. It was also admitted that they might pass statutes of limitation, for such statutes relate to the remedy, and not to the obligation of the contract. (*a*) It was further stated by the court, that the insolvent laws of far the greater number of the states only discharged the person of the debtor, and left the obligation to pay in full force, and to this the Constitution was not opposed. But a law which discharged the debtor from his contract to pay a debt by a given time, without performance, and released him without payment entirely from any future obligation to pay, impaired, because it entirely discharged the obligation of that contract, and, consequently, the discharge of the defendant, under the act of 1811, was no bar to the suit.

The court held that the obligation of a contract was not ful-

(*a*) In the case of Bumgardner *v.* Circuit Court, 4 Mo. 50, it was decided that a statute directing a stay of execution on judgments was unconstitutional, both as it regarded the constitution of Missouri and of the United States.

13 Wall. 68 ; see further, as to statutes of limitations, Bruce *v.* Schuyler, 4 Gilm. (Ill.) 221 ; Edwards *v.* McCaddon, 20 Iowa, 520 ; Berry *v.* Ransdall, 4 Met. (Ky.) 292. It has even been held that an act prohibiting any action on a promise to pay a debt from which the debtor had been discharged in bankruptcy, unless such promise was in writing, was valid as to promises made before the act, but sued on afterwards. Kingley *v.* Cousins, 47 Maine, 91. So an act abolishing imprisonment for debt may be made applicable to existing contracts. Bronson *v.* Newberry, 2 Dougl. (Mich.) 38 ; Donnelly *v.* Corbett, 3 Seld. 500 ; Oriental Bank *v.* Freeze, 18 Maine, 109 ; Fisher *v.* Lacky, 6 Blackf. (Ind.) 373, [Penniman's Case, 103 U. S. 714 ; Ware *v.* Miller, 9 S. C. 13.] So a statute abolishing distress for rent is valid as to leases made before the act was passed. Conkey *v.* Hart, 4 Kern. 22 ; Van Rensselaer *v.* Snyder, 3 Kern. 299.

filled by a *cessio bonorum*, for the parties had not merely in view the property in possession when the contract was made, but its obligation extended to future acquisitions; and to release them from being liable impaired the obligation of the contract. There was a distinction, in the nature of things, between the obligation of a contract, and the remedy to enforce that obligation, and the latter might be modified, as the wisdom of the legislature should direct. But the Constitution intended to restore and preserve public * confidence completely. It intended * 421 to establish a great principle, that contracts should be inviolable.

The case in which this decision was made was one in which the contract was existing when the law was passed; and the court said that their opinion was confined to the case. A distinction has been taken between the case of a contract made before, and one made after, the passing of the act. It was taken by the Supreme Court of New York, in *Mather* v. *Bush*, (*a*) and by the Chief Justice of Massachusetts, in *Blanchard* v. *Russell*, (*b*) and was relied on as a sound distinction by the Court of Chancery of New York, in *Hicks* v. *Hotchkiss*. (*c*) The doctrine of these cases is, that an insolvent act in force when the contract was made did not, in the sense of the Constitution, impair the obligation of that contract, because parties to a contract have reference to the existing laws of the country where it is made, and are presumed to contract in reference to those laws. It is an implied condition of every contract, that the party shall be absolved from its performance if the event takes place which the existing law declares shall dispense with the performance. The decision in *Sturges* v. *Crowninshield* is supposed to be consistent with that distinction, when it establishes the principle, that an insolvent act, discharging a debtor from his contract existing when the law passed, so that his future acquisitions could not be touched, is unconstitutional, and the discharge obtained under it void.

But the Supreme Court of the United States, in *M'Millan* v. *M'Neill*, (*d*) went a step further, and held that a discharge under a state insolvent law existing when the debt was contracted

(*a*) 16 Johns. 233. (*x*)
(*b*) 13 Mass. 1.
(*c*) 7 Johns. Ch. 297.
(*d*) 4 Wheaton, 209.

(*x*) Also 8 Am. Dec. 313, and note.

was equally a law impairing the obligation of contracts, and equally within the principle declared in *Sturges* v. *Crowninshield*. This was a discharge under the insolvent law of a different government from that in which the contract was made. It remains

yet to be settled, whether it be lawful for a state to pass *422 an insolvent law, * which shall be effectual to discharge the debtor from a debt contracted after the passing of the act, and contracted within the state making the law. The general language of the court would seem to reach even this case; but the facts in these cases decided do not cover this ground, and the cases decided are not authority to that extent. (*a*) It will be perceived that the power of the states over this subject is, at all events, exceedingly narrowed and cut down; and, as the decisions now stand, the debt must have been contracted *after* the passing of the act, and the debt must have been contracted *within* the state, and between citizens of the state, or else a discharge will not extinguish the remedy against the future property of the debtor. (*b*) [1]

(*a*) In the case of Bronson *v.* Kinzie, 1 How. 311, it was conceded that contracts made subsequent to the stay laws of Illinois were to be governed by them, if made to be executed in the state; for every state may prescribe the legal and equitable obligations of a contract to be made and executed within it.

(*b*) In Smith *v.* Parsons, 1 Ohio, 236, and in Hempstead *v.* Read, 6 Conn. 480, the power of the states over contracts was understood and declared to be confined within the precise limits mentioned in the text. See also ii. 392, 393. The result of the decisions, says Judge Story (3 Comm. Const. U. S. 15, 256), is, that state insolvent laws lawfully apply, (1) to all contracts made within the state, between citizens of the state; (2) they do not apply to contracts made within the state, between a citizen of the state and a citizen of another state; (3) nor to contracts not made within the state; and the contracts so protected are equally so from prospective as well as retrospective legislation. But if a creditor out of the state voluntarily makes himself a party to the proceedings under the insolvent law of the state, and accepts a dividend, he is bound by

[1] *State Insolvent Laws.* (*x*) — Baldwin *v.* Hale, 1 Wall. 223; Same *v.* Bank of Newbury, ib. 234, have done much to settle the law on this point. B., a citizen of Massachusetts, made a note in Boston, payable there to H., a citizen of Vermont. After the date of the note, and before suit brought, B. obtained a discharge under

(*x*) In Massachusetts a voluntary assignment *in pais* for the benefit of creditors may be set aside as a fraudulent conveyance or preference under the State insolvent law. Steel Edge Stamping & R. Co. *v.* Manchester S. Bank, 163 Mass. 252. In Maryland, such a voluntary conveyance, if it is designed to serve, and does serve, precisely the same end as the insolvent law, is not repugnant thereto unless tainted with actual fraud on the part of both the debtor and the trustee. Pfaff *v.* Prag, 79 Md. 369. See 8 Harvard L. Rev. 265.

And while on this point it may not be amiss to observe that the *cessio bonorum* of the Roman law, introduced by Julius Cæsar, and which prevails at present in most parts of the continent of Europe, only exempted the person of the debtor from imprisonment. It did not release or discharge the debt, nor exempt the future acquisitions of the debtor from execution for the debt. (*c*)

The English statute of 32 Geo. II., commonly called the Lords Act, and the more recent English statutes of 33 Geo. III., 1

his own act, and is deemed to have waived his extra-territorial immunity. In Satterlee *v.* Matthewson, 2 Peters, 380, the Supreme Court of the United States held that no part of the Constitution of the United States applied to *a state law which devested rights which were vested by law in an individual*, provided its effects be not to impair the obligation of a *contract*. It was further held that *retrospective laws* were not within the constitutional prohibition, provided they did not impair the obligation of *contracts*, or partake of the character of *ex post facto* laws. It has also been decided that a state government may tax state banks, *co nomine*, at discretion, and that it would not be a violation of the contracts creating the banks, for no contract was to be implied not to impose such a tax. Providence Bank *v.* Billings, 4 Peters, 514. It has been adjudged in Louisiana and Mississippi, that a state law requiring a bank to receive at par, though under par, its own notes, in payment of debts due to it, is constitutional. 12 Rob. (La.) 125 ; 3 Smedes & Marsh. 661.

(*c*) According to the Spanish law (Partidas, l. 3, tit. 15, part 5), the debtor's property, acquired subsequently to the *cessio bonorum*, was only liable so far as it exceeded the amount necessary for his support. But the law of Louisiana contains no such exception. 3 Martin (La.), 588 ; 4 id. 292, 293.

his state insolvent laws, which were in force when the note was made. The payee took no part in the insolvency proceedings, and it was held that this discharge was no bar to a suit by him in the Circuit Court of Massachusetts. Scribner *v.* Fisher, 2 Gray, 43, was overruled. See also Gilman *v.* Lockwood, 4 Wall. 409 ; Kelley *v.* Drury, 9 Allen, 27 ; Donnelly *v.* Corbett, 3 Seld. 500 ; Crow *v.* Coons, 27 Mo. 512 ; Beer *v.* Hooper, 32 Miss. 246 ; Easterly *v.* Goodwin, 35 Conn. 279 ; Poe *v.* Duck, 5 Md. 1 ; Whitney *v.* Whiting, 35 N. H. 457 ; Stevenson *v.* King, 2 Cliff. 1 ; Hawley *v.* Hunt, 27 Iowa, 303 ; Felch *v.* Bugbee, 48 Me. 9. It has been held further, that a discharge under like circumstances is no bar to a suit in the courts of the state granting the discharge. (The United States court would rather seem to have held an opposite opinion in the cases cited ; and see the dissenting opinion of Hunt, C. J., 39 N. Y. 345.) Soule *v.* Chase, 39 N. Y. 342 ; Kelley *v.* Drury, 9 Allen, 27. And it does not matter that the debt has passed into judgment. Worthington *v.* Jerome, 5 Blatchf. 279 ; Easterly *v.* Goodwin, 35 Conn. 279. But a discharge in Massachusetts will not be prevented from barring a contract made with a citizen of that state by his becoming a citizen of another state. Stoddard *v.* Harrington, 100 Mass. 87. Compare Hawley *v.* Hunt, 27 Iowa, 303. And it has been held that a Massachusetts discharge is a bar to an action on a contract between two citizens of that state, although it was made and to be performed in another state. Marsh *v.* Putnam, 3 Gray, 551. See Whitney *v.* Whiting, 35 N. H. 457, 472.

Geo. IV., 3 Geo. IV., and 5 Geo. IV., have gone no further
* 423 than to discharge the debtor's person; * and it may be laid down as the law of Germany, France, Holland, Scotland, England, &c., that insolvent laws are not more extensive in their operation than the *cessio bonorum* of the civil law. (*a*) In many parts of Germany, as we are informed by Huberus and Heineccius, (*b*) a *cessio bonorum* does not even work a discharge of the debtor's person, and much less of his future property. The cession under the Roman law did not extend to protect the debtor from personal responsibility, for penalties accruing on the commission of crimes. Si in ære non habeat, in pelle luit. But in Germany the *cessio bonorum* has the severe operation of depriving the insolvent of his remedy for a personal trespass, committed prior to the cession, so far as pecuniary compensation is in question. (*c*)

5. The States cannot pass Naturalization Laws. — By the Constitution of the United States, Congress have power to establish a uniform rule of naturalization. It was held, in the Circuit Court of the United States at Philadelphia, in 1792, in *Collet* v. *Collet*, (*d*) that the state governments still enjoy a concurrent authority with the United States upon the subject of naturalization, and that though they could not contravene the rule established by Congress, or "exclude those citizens who had been made such by that rule, yet that they might adopt citizens upon easier terms than those which Congress may deem it expedient to impose." But though this decision was made by two of the judges of the Supreme Court, with the concurrence of the district judge of Pennsylvania, it is obvious that this opinion
* 424 * was hastily and inconsiderately declared. If the construction given to the Constitution in this case was the true one, the provision would be, in a great degree, useless, and the policy of it defeated. The very purpose of the power was exclusive. It was to deprive the states individually of the power of naturalizing aliens according to their own will and pleasure, and

(*a*) Code, 7, 71, 1; Dig. 42, 3, 4, and 6; Voet, ad Pand. 42. 3. 8; Heinecc. Op. v. 620; vi. 384, 387; Code de Commerce, No. 568; Répertoire Universel et Raisonné de Jurisprudence, par Merlin, tit. Cession de Biens; Esprit des Lois, i. 114; 2 Bell's Comm. 580–597; 16 Johns. 244, note.

(*b*) Hub. Prælec. ii. 1454; Heinecc. Elem. Jur. Civ. secund. ord. Pand. pp. 6, 1, 42, tit. 3; Elem. Jur. Ger. lib. 2, tit. 13, sec. 387.

(*c*) Voet, ad Pand. 42, 3, 10.

(*d*) 2 Dallas, 294.

thereby giving them the rights and privileges of citizens in every other state. If each state can naturalize upon one year's residence, when the act of Congress requires five, of what use is the act of Congress, and how does it become a uniform rule?

This decision of the Circuit Court may be considered as, in effect, overruled. In the same circuit court, in 1797, Judge Iredell intimated, that if the question had not previously occurred, he should be disposed to think that the power of naturalization operated exclusively, as soon as it was exercised by Congress. (*a*) And in the Circuit Court of Pennsylvania, in 1814, it was the opinion of Judge Washington, that the power to naturalize was exclusively vested in Congress. (*b*) Afterwards, in *Chirac* v. *Chirac*, (*c*) the Chief Justice of the United States observed, that it certainly ought not to be controverted, that the power of naturalization was vested exclusively in Congress. In *Houston* v. *Moore*, (*d*) Judge Story mentioned the power in Congress to establish a uniform rule of naturalization as one which was exclusive, on the ground of there being a direct repugnancy or incompatibility in the exercise of it by the states. The weight of authority, as well as of reason, may, therefore, be considered as clearly in favor of this latter construction.[1] (*x*)

***6. The States cannot tax National Banks or Stocks.** — *425 The inability of the States to impede or control, by taxation

(*a*) United States *v.* Villato, 2 Dallas, 370.
(*b*) Golden *v.* Prince, 3 Wash. 313.
(*c*) 2 Wheaton, 269. (*d*) 5 Wheaton, 49.

[1] [The obscurity on this subject will be removed by attending to the distinction between local rights of citizenship within a state and citizenship of the United States according to the Constitution. Undoubtedly citizenship at large, in the sense of the Constitution, can be conferred on a foreigner only by the naturalization laws of Congress. But each state, in the exercise of its local and reserved sovereignty, may place foreigners or other persons on a footing with its own citizens, as to political rights and privileges to be enjoyed within its own dominion. But state regulations of this character do not make the persons on whom such rights are conferred citizens of the United States, or entitle them to the privileges and immunities of citizens in another state. Dred Scott's Case, 19 How. 339. — c.] See the Fourteenth Amendment to the Constitution of the United States.

(*x*) Apart from the appellate jurisdiction, Congress, under its constitutional authority to establish a uniform rule of naturalization, cannot require the State courts to act upon applications for naturalization. State *v.* Judges (N. J.), 32 Atl. Rep. 743. See State *v.* Norris, 37 Neb. 299.

or otherwise, the lawful institutions and measures of the national government, was largely discussed and strongly declared in the case of *M' Culloch* v. *The State of Maryland.* (*a*) In that case the State of Maryland had imposed a tax upon the Branch Bank of the United States established in that state, and assuming the bank to be constitutionally created and lawfully established in that state, the question arose on the validity of the state tax. It was adjudged that the state governments had no right to tax any of the constitutional means employed by the government of the Union to execute its constitutional powers, nor to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress, to carry into effect the powers vested in the national government.

To define and settle the bounds of the restriction of the power of taxation in the states, and especially when that restriction was deduced from the implied powers of the general government, was a great and difficult undertaking; but it appears to have been, in this instance, most wisely and most successfully performed. It was declared by the court, that it was not to be denied that the power of taxation was to be concurrently exercised by the two governments; but such was the paramount character of the Constitution of the United States, that it had a capacity to withdraw any subject from the action even of this power; and it might restrain a state from any exercise of it which may be incompatible with, and repugnant to, the constitutional laws of the Union. The great principle that governed the case was, that the Constitution, and the laws made in pursuance thereof, were supreme, and that

they controlled the constitution and laws of the respective
* 426 states, and could not be controlled * by them. It was of

the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their influence. A supreme power must control every other power which is repugnant to it. The right of taxation in the states extends to all subjects over which its sovereign power extends, and no further. The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but it does not extend to those means which are employed by Congress to carry into execution their constitutional

(*a*) 4 Wheaton, 316.

powers. The power of state taxation is to be measured by the extent of state sovereignty, and this leaves to a state the command of all its resources, and the unimpaired power of taxing the people and property of the state. But it places beyond the reach of state power all those powers conferred on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. This principle relieves from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. The power to tax would involve the power to destroy, and the power to destroy might defeat and render useless the power to create. There would be a plain repugnance in conferring on one government the power to control the constitutional measures of another, which other, with respect to those very measures, was declared to be supreme over that which exerts the control. If the right of the states to tax the means employed by the general government did really exist, then the declaration that the Constitution and the laws made in pursuance thereof should be the supreme law of the land would be empty and unmeaning declamation. If the states might tax one instrument employed by the government in the execution of its powers, they might tax *every other *427 instrument. They might tax the mail; they might tax the mint; they might tax the papers of the custom-house; they might tax judicial process; they might tax all the means employed by the government, to an excess which would defeat all the ends of government.

The claim of the states to tax the Bank of the United States was thus denied, and shown to be fallacious; and that there was a manifest repugnancy between the power of Maryland to tax, and the power of Congress to preserve, the institution of the Branch Bank. A tax on the operations of the bank was a tax on the operations of an instrument employed by the government of the Union to carry its powers into execution, and was consequently unconstitutional. A case could not be selected from the decisions of the Supreme Court of the United States, superior to this one of *M' Culloch* v. *The State of Maryland*, for the clear and satisfactory manner in which the supremacy of the laws of the

Union have been maintained by the court, and an undue assertion of state power overruled and defeated.

But the court were careful to declare that their decision was to be received with this qualification, — that the states were not deprived of any resources of taxation which they originally possessed, and that the restriction did not extend to a tax paid by the real property of the bank, in common with the real property within the state; nor to a tax imposed upon the interest which the citizens of Maryland might hold in that institution, in common with other property of the same description throughout the state. (*a*) (*x*)

The decision pronounced in this case against the validity of the Maryland tax was made on the 7th of March, 1819; and it was on the 7th of February preceding that the legislature of the state of Ohio imposed a similar tax, to the amount of fifty thousand dollars annually, on the Branch Bank of the United States established in that state. Notwithstanding this decision, the officers of the State of Ohio proceeded to levy the tax, and that act

brought up before the Supreme Court a renewed discus-
* 428 sion and consideration of the legality * of such a tax. (*a*)

It was attempted to withdraw this case from the influence and authority of the former decision, by the suggestion that the Bank of the United States was a mere private corporation, engaged in its own business, with its own views, and that its great end and principal object were private trade and private profit. It was

(*a*) In Berney *v.* Tax Collector, 2 Bailey (S. C.), 654, a state tax on dividends arising from stock in the Bank of the United States, owned by a citizen of the state, was adjudged to be constitutional. And in the case of The Union Bank *v.* The State, 9 Yerger, 490, it was held that state bank stock, as individual property, might be taxed, when owned by residents of the state; but that the stock held by non-resident stockholders was not subject to the taxing power of the state, for it must be a tax *in personam*, and stock is a chose in action, and has no locality, and follows the person of the owner.

(*a*) Osborn *v.* Bank of the United States, 9 Wheaton, 738.

(*x*) Taxation by a State of stockholders in national banks within its limits is valid. Van Slyke *v.* Wisconsin, 151 U. S. 581; First Nat. Bank *v.* Herbert, 44 Fed. Rep. 158. National bank stock may be sold on execution under state legislation. *In re* Braden's Estate (Penn.), 30 Atl. Rep. 746 (Jan. '95.) The property of a national bank cannot be attached by process from a State court before final judgment, though the bank is insolvent. U. S. Rev. Stats. § 5242; National S. Bank *v.* Butler, 129 U. S. 223; Raynor *v.* Pacific Bank, 93 N. Y. 371; Planters' L. & S. Bank *v.* Berry, 91 Ga. 264.

admitted, that if that were the case, the bank would be subject to the taxing power of the state, as any individual would be. But it was not the case. The bank was not created for its own sake, or for private purposes. It has never been supposed that Congress could create such a corporation. It was not a private, but a public corporation, created for public and national purposes, and as an instrument necessary and proper for carrying into effect the powers vested in the government of the United States. The business of lending and dealing in money for private purposes was an incidental circumstance, and not the primary object; and the bank was endowed with this faculty, in order to enable it to effect the great public ends of the institution, and without such faculty and business the bank would want a capacity to perform its public functions. And if the trade of the bank was essential to its character as a machine for the fiscal operations of the government, that trade must be exempt from state control, and a tax upon that trade bears upon the whole machine, and was, consequently, inadmissible, and repugnant to the Constitution. In *Weston* v. *The City Council of Charleston*, (*b*) it was decided that a state tax on stock issued for loans made to the United States was unconstitutional. The court considered it to be a tax on the power given to Congress to borrow money on the credit of the United States, and thereby to diminish the means of the United States used in the exercise of its powers, and that it was, consequently, repugnant to the Constitution. By declaring the powers of the general government supreme, the Constitution has shielded its action in the * exercise of its powers from * 429 any restraining or controlling action of the local governments. (*a*) [1] (*x*)

(*b*) 2 Peters, 449.

(*a*) A decision upon the same principle was made in the case of Dobbins *v.* The Commissioners of Erie County, 16 Peters, 435, where it was held that an officer of the United States was not liable to be rated and assessed *for his office* by state rates and levies; for this would be to diminish the recompense secured by law to the

[1] *State and United States Taxes.* — McCulloch *v.* Maryland seems to be somewhat limited by other decisions. The power of a state to tax operations of the government, or instruments of the government, created by itself for public and

(*x*) "The only way in which commerce between the States can be legitimately affected by State laws, is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a State provides for the security of the lives,

7. Nor exercise Power over Ceded Places. — The state governments may likewise lose all jurisdiction over places purchased by

officer. In the case of Melcher *v.* The City of Boston, in the Sup. Judicial Court of Massachusetts, March, 1845, [9 Metcalf, 73,] it was stated as a question undecided, whether a tax assessed upon *the income* of an officer of the United States would not be lawful, and not within the case of Dobbins. It was decided in the Massachusetts case, that a *clerk in a post-office* was not an officer exempted from taxation of his income.

constitutional ends, is still denied. But it will be observed that later cases (National Bank *v.* Commonwealth, and Lionberger *v.* Rouse, hereinafter given) come very near the line, and in the case of the Union Pacific Railway Company it was held not enough to exempt their road from state taxation that it was constructed under the direction and authority of Congress for the uses and purposes of the United States, as a part of a system of roads thus constructed; the difference being that this corporation, unlike the Bank of the United States, was created and exercised its franchise under state law, and held its property within state jurisdiction and under state protection. Thomson *v.* Pacific R. R., 9 Wall. 579. The earlier decision of Crandall *v.* Nevada, 6 Wall. 35, that a state tax on every person leaving the state by any vehicle employed in the business of transporting passengers for hire, to be paid by the proprietors, was unconstitutional, was put by the majority of the court largely on the ground that the power to lay such a tax carries with it the power to prohibit the passage of government officers, troops, &c., or of citizens, through the state. But the Chief Justice (who delivered the opinion in Pacific R. R. case, *supra*) thought that the tax was only void as inconsistent with the power of Congress to regulate commerce. *Post*, 439, n. 1; Woodruff *v.* Parham, 8 Wall. 123, 138; Hinson *v.* Lott, ib. 148, 152. The mere fact that a business has been taxed by Congress does not prevent a state from taxing or prohibiting it. Pervear *v.* Commonwealth, 5 Wall. 475, 479; License Tax Cases, ib. 462; *post*, 439, n. 1.

Several important cases have arisen under the present national currency and banking acts. In the first of these the New York Court of Appeals took a distinction between a tax on United States

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limbs, health, and comfort of persons and the protection of property; or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries, and other commercial facilities; the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the imposition of taxes upon persons residing within the State or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce or with some other employment or business exercised under authority of the Constitution and laws of the United States; and the imposition of taxes upon all property within the State, mingled with and forming part of the great mass of property therein. But in making such internal regulations a State cannot impose taxes upon persons passing through the State, or coming into it merely for a temporary purpose, especially

Congress, by the consent of the legislature of the state, for the erection of forts, dock-yards, light-houses, hospitals, military

stock *co nomine*, which was the case of Weston *v.* Charleston, and one on the actual value of the capital stock of a bank, part of whose property was in fact invested in United States stock, and held a tax of the latter description valid. This decision was reversed in Washington. People *v.* Commissioners of Taxes, 2 Black, 620; s. c. 23 N. Y. 192; 26 N. Y. 163. A statute was then passed by the state legislature taxing the banks "on a *valuation equal to* the amount of their capital stock paid in, or secured to be paid in, and their surplus earnings," &c. This also, after having been upheld by the courts of the state, was declared by the Supreme Court to be a tax on the property of the banks, and therefore, like the previous one, invalid, when that property consisted of United States stock. Bank Tax Case, 2 Wall. 200.

On like principles, it has been further held, contrary to the opinion of the New York judges, that certificates of indebtedness issued by the United States for supplies, bearing interest, and payable in a year, or earlier at the option of the government, are exempt from state taxation, The Bank *v.* The Mayor, 7 Wall. 16; see 37 N. Y. 9; as are also legal-tender treasury notes issued under the acts of Feb. 25, 1862, and July 11, 1862; Bank *v.* Supervisors, 7 Wall. 26; see 37 N. Y. 21. The state, however, can tax a bank on its franchise, and the Supreme Court have gone very far in sustaining taxes on this ground. Thus, a tax on savings banks of "a sum equal to three-fourths of one per cent on the total amount of deposits," has been held valid, although part of such deposits were invested in United States stocks. Society for Savings *v.* Coite, 6 Wall. 594; Provident Institution *v.* Massachusetts, ib. 611; Hamilton Co. *v.* Massachusetts, ib. 632. So, a tax on the "excess of the market value of all the capital stock" of a corporation "over the value of its real estate and machinery," the two latter being taxed separately. Hamilton Co. *v.* Massachusetts, 6 Wall. 632; s. c. 12 Allen, 298. See further, Monroe Savings Bank *v.* Rochester, 37 N. Y. 365.

Taxes on the shareholders in national banks stand on a different footing from taxes on the banks. By the act of June 3, 1864, § 41, and act of Feb. 4, 1868, § 1, shares in such a bank may be included in the valuation of the personal property of their owner in the assessment of state taxes in the state within which such bank is located, and not elsewhere. It has been

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if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the State from abroad, or from another State, and not yet become part of the common mass of property therein; and no discrimination can be made, by any such regulations, adversely to the persons or property of other States; and no regulations can be made directly affecting interstate commerce. Any taxation or regulation of the latter character would be an unauthorized interference with the power given to Congress over the subject." Bradley, J., in Robbins *v.* Shelby Taxing District, 120 U. S. 489, 493. Upon such power to tax, see also Philadelphia & S. S. Co. *v.* Pennsylvania, 122 U. S. 326; Leloup *v.* Mobile, 127 U. S. 640; Western U. T. Co. *v.* Alabama, 132 U. S. 472; Ashley *v.* Ryan, 153 U. S. 436; Postal T. C. Co. *v.* Charleston, id. 692; Cleveland, &c. Ry. Co. *v.* Backus, 154 U. S. 439; New York, &c., Ry. Co. *v.* Pennsylvania, 158 U. S. 431; Pittsburgh & S. Coal Co. *v.* Bates, 156 U. S. 577.

academies, and other needful buildings. (*b*) The question which has arisen on the subject was as to the effect of the proviso or reservation, usually annexed to the consent of the state, that all civil and criminal process, issued under the authority of the state, might be executed on the lands so ceded, in like manner as if the cession had not been made. This point was much discussed in the Circuit Court of the United States in Rhode Island, in the case of *The United States* v. *Cornell.* (*c*) It was held that a purchase of lands within the jurisdiction of a state, with the consent of the state, for the national purposes contemplated by the Constitution, did, *ipso facto*, by the very terms of the Constitution, fall within the exclusive legislation of Congress, and that the state jurisdiction was completely ousted. What, then, is the true intent and effect of the saving clause annexed to the cessions? It does not imply the reservation of any concurrent jurisdiction or legislation, or that the state retained a right to punish for acts done within the ceded lands. The whole apparent object of the proviso was to prevent the ceded lands from becoming a sanctuary

(*b*) Const. art. 1, sec. 8.

(*c*) 2 Mason, 60, 91; United States *v.* Davis, 5 Mason, 356, S. P.

held that this section subjects the shares to state taxation without regard to the fact that a part or the whole of the capital of the bank is invested in national securities issued under statutes exempting them from such taxation. Van Allen *v.* The Assessors, 3 Wall. 573; s. c. 33 N. Y. 161; People *v.* The Commissioners, 4 Wall. 244; s. c. 35 N. Y. 423; State *v.* Haight, 2 Vroom (31 N. J.), 399. Furthermore, it may lawfully be provided that the officers of the bank shall pay the tax on the shares. National Bank *v.* Commonwealth, 9 Wall. 353; Lionberger *v.* Rouse, ib. 468. But the act provided against unfavorable discrimination, and therefore shares in national banks cannot be taxed, when state banks are taxed only on capital. Bradley *v.* The People, 4 Wall. 459; s. c. 39 Ill. 130; Van Allen *v.* The Assessors, *supra.* See Austin *v.* The Aldermen, 7 Wall. 694; Hubbard *v.* Board of Supervisors, 23 Iowa, 130; Pittsburg *v.* First National Bank of Pittsburg, 55 Penn. St. 45.

The principle of self-preservation, which was held in McCulloch *v.* Maryland, &c., to invalidate attempts by the state to tax certain instruments and operations of the general government, is considered to also limit the power of the United States to tax instruments and operations of the states; and it has been held that Congress cannot constitutionally tax the salary of a state judge. The Collector (Buffington) *v.* Day, 11 Wall. 113. And the same principle has been thought by several state courts to apply to the requirement of a stamp on the records of state judicial proceedings, &c. Moore *v.* Moore, 47 N. Y. 467.

On the other hand, a tax on circulation by banks of state bank notes, so heavy as to put an end to it, has been upheld. Veazie Bank *v.* Fenno, 8 Wall. 533.

for fugitives from justice, for acts done within the acknowledged jurisdiction of the state; and such permission to execute process is not incompatible with exclusive sovereignty and jurisdiction. The acceptance of a cession, with this reservation, amounts to an agreement of the new sovereign to permit the free exercise of such process, *as being *quoad hoc* his own process. This *430 construction has been frequently declared by the courts of the United States, and it comports entirely with the intention of the parties; and upon any other construction the cession would be nugatory and void. Judge Story doubted whether Congress were even at liberty, by the terms of the Constitution, to purchase lands with the consent of a state, under any qualification of that consent, which would deprive them of exclusive legislation over the place. The courts of the United States have sole and exclusive jurisdiction over an offence committed within a ceded place, notwithstanding the ordinary reservation of the right to execute civil and criminal process of the state. That was no reservation of any sovereignty or jurisdiction.

Congress, in exercising powers of exclusive legislation over a ceded place or district, unite the powers of general with those of local legislation. The power of local legislation carries with it, as an incident, the right to make that power effectual. Congress exercises that particular local power, like all its other powers, in its high character as the legislature of the Union; and its general power may come in aid of these local powers. It is, therefore, competent for Congress to try and punish an offender for an offence committed within one of those local districts, in a place not within such jurisdiction; or to provide for the pursuit and arrest of a criminal escaping from one of those districts after committing a felony there; or to punish a person for concealing, out of the district, a felony committed within it. All these incidental powers are necessary to the complete execution of the principal power; and the Supreme Court, in *Cohens* v. *Virginia*, (*a*) held that they were vested in Congress.

It follows, as a consequence, from this doctrine of the federal courts, that state courts cannot take cognizance of any *offences committed within such ceded districts; and, on *431 the other hand, that the inhabitants of such places cannot exercise any civil or political privileges under the laws of the

(*a*) 6 Wheaton, 426-429.

state, because they are not bound by those laws. This has been so decided in the state courts. (*a*) But if, in any case, the United States have not actually purchased, and the state has not, in point of fact, ceded the place or territory to the United States, its jurisdiction remains, notwithstanding the place may have been occupied, ever since its surrender by Great Britain, by the troops of the United States, as a fort or garrison. The Supreme Court of New York accordingly held, in the case of *The People* v. *Godfrey*, (*b*) that they had jurisdiction of a murder committed by one soldier upon another within Niagara fort. Nor would the purchase of the land by the United States be alone sufficient to vest them with the jurisdiction, or to oust that of the state, without being accompanied or followed with the consent of the legislature of the state. This was so decided in the case of *The Commonwealth of Pennsylvania* v. *Young*. (*c*) (*x*)

(*a*) Commonwealth *v.* Clary, 8 Mass. 72; Same *v.* Young, 1 Hall's Journal of Jurisprudence, 53.

(*b*) 17 Johns. 225.

(*c*) 1 Hall's Journal of Jurisprudence, 47. [It seems that there must be an act of Congress vesting the jurisdiction in the United States courts. *In re* O'Connor, 37 Wis. 379.—B.] The jurisdiction of the United States over the lands within places ceded by a state was fully and learnedly examined by Mr. Justice Woodbury, in the Circuit Court of the United States in Massachusetts in October, 1845, in the case of The United States *v.* Ames, Law Reporter for November, 1846 [1 Woodb. & Minot, 76.] It was adjudged that if the United States own lands in any state, and there be no cession of the jurisdiction, the *lex rei sitæ* applicable to the land-owners of the state, governs, as to rights and remedies, equally applying to non-residents and citizens, when the laws of Congress have not otherwise provided; such, for instance, is the case under an analogous principle, when the United States are the holders of a bill of exchange, United States *v.* Barker, 12 Wheaton, 561, and when liable to damages on

(*x*) See *supra*, 268, n. (*x*). Art. 1, Sect. 8, cl. 17 of the U. S. Constitution applies to land actually purchased, jurisdiction over which has also been ceded by the State, but not to such land as Fortress Monroe, which was ceded directly by the State of Virginia to the United States. In such case the land is held only as prescribed in the act of cession, and State laws reasonably applicable continue in force. Crook *v.* Old Point Comfort Hotel Co., 54 Fed. Rep. 604; Fort Leavenworth R. Co. *v.* Lowe, 114 U. S. 522; Chicago, R. I. & P. Ry. Co. *v.* McGlinn, id. 542. In New York it has been held that where the United States leased part of the land ceded to it for the Brooklyn Navy Yard to the city of Brooklyn for a market, and the city subleased to the plaintiff, an action for trespass committed on the land would lie in the State courts. Barrett *v.* Palmer, 135 N. Y. 336; 16 N. Y. S. 94. Upon cession by a State to the United States of jurisdiction over land within its limits, acceptance of the grant, if beneficial, presumed. Benson *v.* United States, 146 U. S. 325.

8. Power to regulate Commerce. — I proceed next to examine the judicial decisions under the power given to Congress to "regulate commerce with foreign nations, and among the several states;" and it will be perceived that the questions arising under this power have been of the utmost consequence to the interests of the Union, and the residuary claims and sovereignty of the states.

The first question that arose upon this part of the Constitution was respecting the power of Congress to interrupt or destroy the commerce of the United States, by laying a general embargo, without any limitation as to time. By the act *of *432 Congress of 22d December, 1807, an embargo was laid on all ships and vessels in the ports and harbors of the United States, and a prohibition of exportation from the United States, either by land or water, of any goods, wares, or merchandise, of foreign or domestic growth or manufacture. There were several supplementary acts auxiliary to this principal one, and intended more effectually to enforce it, under certain specific exceptions. In the case of *The United States* v. *The Brigantine William*, in the District Court of Massachusetts, in September, 1808, (*a*) it was objected that the act was unconstitutional, for that Congress had no right, under the power to regulate commerce, thus to annihilate it, by interdicting it entirely with foreign nations. But the court decided that the embargo act was within the constitutional provision. The power of Congress was sovereign relative to commercial intercourse, qualified by the limitations and restrictions expressed in the Constitution; and by the treaty-making power of the President and Senate, Congress had a right to control or

foreign bills of exchange, as see *supra*, 297; and as to liability to general average, see *infra*, iii. 171, n. (*a*); and as to alluvions and land deposits, 10 Peters, 662, 717; and as to set-off, see *supra*, 297. But if the ceded lands have been accompanied with a cession of the jurisdiction, the lands are subject to the laws of Congress, and not to those of the state; and those state laws cannot be permitted to thwart or embarrass the object of the cession by taxes, or by overflowing the land with water, or otherwise in any degree to conflict with what is required or provided by the general government of the United States, which may punish offences and trespasses, and remove intruders thereon. On the other hand, if Congress have not provided any adequate and exclusive remedy for injuries to public property, then the common law or laws of the states apply. But the United States have jurisdiction over *its territory*, though the particular lands have not been ceded, inasmuch as the lands are held for special purposes, and are to be protected.

(*a*) 2 Hall's Law Journal, 255.

abridge commerce for the advancement of great national purposes. Non-intercourse and embargo laws are within the range of legislative discretion; and if Congress have the power, for purposes of safety, or preparation, or counteraction, to suspend commercial intercourse with foreign nations, they are not limited as to the duration, more than as to the manner and extent of the measure. (*b*)

A still graver question was presented for the consideration of the federal judiciary, in the case of *Gibbons* v. *Ogden*, (*c*) decided by the Supreme Court of the United States, in February term, 1824. That decision went to declare that several acts of the legislature of New York, granting to Livingston and Fulton the exclusive navigation of the waters of the state in vessels propelled by steam, were unconstitutional and void acts, and *433 repugnant to the power given to *Congress to regulate commerce, so far as those acts went to prohibit vessels licensed under the laws of Congress for carrying on the coasting trade, from navigating the waters of New York.

It had been decided in the Court of Errors of New York, in 1812, (*a*) that five several statutes of the state, passed between the years 1798 and 1811, inclusive, and granting and securing to the claimants the sole and exclusive right of using and navigating boats by steam, in the waters of the state, for a term of years, were constitutional and valid acts. According to the doctrine of the court in that case, the internal commerce of the state by land and water remained entirely and exclusively within the scope of its original sovereignty. It was considered to be very difficult to draw an exact line between those regulations which relate to external, and those which relate to internal commerce, for every regulation of the one will, directly or indirectly, affect the other. But it was supposed that there could be no doubt that the acts of the state, which were then under consideration, were not within any constitutional prohibition, for not one of the restrictions upon state power, contained in the 9th and 10th sections of the 1st article of the Constitution, appeared to apply to the case; nor was there any existing regulation of Congress on the subject of

(*b*) Mr. Justice Story says that the measure of a general embargo, indefinite as to time as that laid in 1807, went to the utmost verge of implied constitutional power. Commentaries, iii. p. 163.

(*c*) 9 Wheaton, 1.

(*a*) Livingston *v.* Van Ingen, 9 Johns. 507.

commerce with foreign nations, and among the several states, which was deemed to interfere with the grant. It was declared to be a very inadmissible proposition, that a state was devested of a capacity to grant an exclusive privilege of navigating a steamboat within its own waters, merely because Congress, in the plenary exercise of its power to regulate commerce, *might* make some future regulation inconsistent with the exercise of that privilege. The grant was taken, undoubtedly, subject to such future commercial regulations as Congress might lawfully prescribe; and to what extent they might lawfully *pre- *434 scribe them was admitted to be a question within the ultimate cognizance of the Supreme Court of the United States. The opinion of the court went no further than to maintain that the grant to Livingston and Fulton was not within any constitutional prohibition upon the states, nor was it repugnant or contradictory to any existing act of Congress on the subject of commerce; and under those two restrictions every state had a right to make its own commercial regulations. It was generally declared that Congress had not, in the understanding of the court, any direct jurisdiction over our interior commerce or waters; and that they had concurrent jurisdiction over our navigable waters, only so far as might be incidental and requisite to the due regulation of commerce between the states and with foreign nations.

In this case, in 1812, the defendants, who objected to the validity of the state grant, did not set up any patent right, or any other right under any particular act of Congress. They rested entirely on the objection, that the statutes conferring the exclusive privilege were absolutely unconstitutional and void. But afterwards, in the case of *Ogden* v. *Gibbons*, (*a*) the defendant set up, by way of right and title to navigate a steamboat upon the waters of New York, in opposition to the grant, that his boats were duly enrolled and licensed under the laws of the United States, at Perth Amboy, in the State of New Jersey, to be employed in carrying on the coasting trade. The question in that case was, whether such a coasting license conferred any power to interfere with the grant; and it was decided in the Court of Chancery, and afterwards in the Court of Errors, (*b*) that the coasting license merely gave to the steamboat an American character for the purpose of revenue, and that it was not intended to decide a question of property, or

(*a*) 4 Johns. Ch. 150. (*b*) 17 Johns. 488.

to confer a right of property, or a right of navigation or
*435 commerce. * The act of Congress regulating the coasting trade was never intended to assert any supremacy over state regulations or claims, in respect to internal waters or commerce. It was not considered by our courts as the exercise of the power of Congress to regulate commerce among the states. The law concerning the coasting trade was passed on the 18th of February, 1793; and it never occurred to any one, during the whole period that the state laws were under consideration before the legislature, and in the council of revision, and in the courts of justice, from 1798 down to and including the judicial investigations in 1812, that the Coasting Act of 1793 was a regulation of commerce among the states prohibitory of any such grant. Such latent powers were never thought of, nor imputed to it. The great objects and policy of the Coasting Act were to exclude foreign vessels from commerce between the states, in order to cherish the growth of our own marine, and to provide that the coasting trade should be conducted with security to the revenue. The register and enrolment of the vessel were to ascertain the national character; and the license was only evidence that the vessel had complied with the requisites of the law, and was qualified for the coasting trade under American privileges. The license did not define the coasting trade. Free trade between the states then existed, subject to local and municipal regulations. The requisitions of the Coasting Act were restrictions upon the general freedom of that commerce, and not the grant of new rights. Steam vessels were subject to those regulations equally with any other vessels. If Congress had intended that a coasting license should confer power and control, and a claim of sovereignty subversive of local laws of the states within their own jurisdictions, it was supposed they would have said so in plain and intelligible language, and not have left their claim of supremacy to be hidden from the observation and knowledge of the state governments, in the unpretending and harmless shape of a coasting license, obviously intended for other purposes.

*436 * It was, therefore, upon considerations like these that the courts of justice in New York did not consider the grant to Livingston and Fulton as disturbed by a coasting license under the act of 1793. They did not, either in the case of *Ogden* v. *Gibbons*, or in any of the cases which preceded it, deny to Con-

gress the power to regulate commerce among the states, by express and direct provision, so as to control and restrict the exercise of the state grant. They only insisted that, without some such explicit provision, the state jurisdiction over the subject remained in full force. This cause was afterwards carried up by appeal to the Supreme Court of the United States, and the decree reversed, on the ground that the grant was repugnant to the rights and privileges conferred upon a steamboat navigating under a coasting license. (*a*)

In the construction of the power to regulate commerce, the court held that the term meant not only traffic, but intercourse, and that it included navigation, and the power to regulate commerce was a power to regulate navigation. Commerce among the several states meant commerce intermingled with the states, and which might pass the external boundary line of each state, and be introduced into the interior. It was admitted that the power did not extend to that commerce which was completely internal, and carried on between different ports of the same state, and which did not extend to or affect other states. The power was restricted to that commerce which concerned more states than one, and the completely internal commerce of a state was reserved for the state itself. The power of Congress on this subject comprehended navigation within the limits of every state; and it might pass the jurisdictional line of a state, and be exercised within its territory, so far as the navigation was connected with foreign commerce, or with commerce among the several states. This power, like all * the other powers * 437 of Congress, was plenary and absolute within its acknowledged limits. But it was admitted that inspection laws relative to the quality of articles to be exported, and quarantine laws, and health laws of every description, and laws for regulating the internal commerce of a state, and those with respect to turnpike roads, ferries, &c., were component parts of an immense mass of legislation, not surrendered to the general government. Though Congress may license vessels to sail from one port to another in the same state, the act is supposed to be necessarily incidental to the power expressly granted to Congress, and it implies no claim of a direct power to regulate the purely internal commerce of a state, or to act directly on its system of police. The court con-

(*a*) Gibbons *v.* Ogden, 9 Wheaton, 1.

strued the word *regulate* to imply full power over the thing to be regulated, and to exclude the actions of all others, that would perform the same operation on the same thing.

After laying down these general propositions, the court proceeded to observe that the acts of New York, granting exclusive privileges to certain steamboats, were in collision with the acts of Congress regulating the coasting trade, and that the acts of the state must, in that case, yield to the supreme and paramount law. If the law of Congress was made in pursuance of the Constitution, the state law must yield to the supremacy of it, even though they were enacted in pursuance of powers acknowledged to remain in the states. A license under the acts of Congress for regulating the coasting trade was an authority to carry on that trade. The words of the act of Congress, directing the proper officer to grant to a vessel qualified to receive it, "a license for carrying on the coasting trade," was considered as conveying an explicit authority for that purpose. It was the legislative grant of a right, and it conferred all the right which Congress could give in the case, and it was not intended to confer merely the national character. It was further held that the power to regulate commerce extended to navigation, car-
*438 ried on by vessels exclusively *employed in transporting passengers, and to vessels propelled by steam, as well as to vessels navigated by other means.

This is the substance of the argument of the Supreme Court of the United States in the steamboat case. The only great point on which the Supreme Court of the United States and the courts of New York have differed, is in the construction and effect given to a coasting license. They did not differ in any general view of the powers of Congress; and the Supreme Court expressly waived any inquiry or decision on the point, whether the exercise of the power assumed by the steamboat laws would have been illegal, provided there was no existing regulation of Congress that came in collision with them. The decision in *Livingston* v. *Van Ingen* rested upon the assumption that there was no such regulation.

The Court of Errors of New York, since the case of *Gibbons* v. *Ogden*, have given to this constitutional power a very liberal extent, by the construction put upon a coasting trade. In that decision, the power to regulate commerce "among the several

states" was supposed to be "very properly restricted to that commerce which concerns more states than one;" and that it did not "comprehend that commerce which was completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states." But in the case in New York alluded to, (*a*) the Court of Errors held that the coasting trade meant, amongst other things, commercial intercourse carried on between different districts in the same state, and between different places in the same district, on the sea-coast, or on a navigable river; and that a voyage from New York to Albany * was * 439 as much a coasting voyage as from Boston to New Bedford. (*a*)

Under the power to regulate commerce, it has been further decided, (*b*) that a state law, requiring every importer of goods

(*a*) Steamboat Company *v.* Livingston, 3 Cowen, 747. See also 1 Wendell, 560.

(*a*) This power in Congress to regulate "commerce among the several states" was well and ably discussed in the United States District Court in Missouri, in the case of The United States *v.* The Steamboat James Morrison, in 1846 (reported in the New York Legal Observer for September, 1846), and the doctrine established in Gibbons *v.* Ogden was reviewed, illustrated, and enforced, with this qualification, not inconsistent with the principle of that leading case, viz., that a steamboat employed only as a ferry-boat on the river Missouri, within the limits of the State of Missouri, was not bound to take out a license from a United States officer, under the act of Congress of 7th July, 1838. The power to regulate commerce with foreign nations and among the several states did not extend to a navigation so perfectly internal, and so totally disconnected from commerce out of the state. The license referred to was one to "carry on the coasting trade," and that ferry business had no connection with the coasting trade. It was admitted, however, that a coasting trade was not less part of commerce among the several states, though a vessel should only navigate from one port to another in the same state, up and down a navigable river, when such commerce was a connected and divisible part of one general commerce between and among two or more states. But there was an earlier decision, directly contrary to this in Missouri, in the case of The United States *v.* Jackson, in the Southern District of New York, in November, 1841 (N. Y. Legal Observer for December, 1846). It was in that case adjudged, upon an elaborate discussion of the subject, that the act of Congress of 7th July, 1838, embraced all vessels of all descriptions, propelled wholly or in part by steam; and that steamboats required to be licensed or inspected, without regard to the business they follow, or the place[s] they run between; and that steamboats wholly engaged on ferries within a state, and owned in such state, are within the requisition of the license law.

(*b*) Brown *v.* State of Maryland, 12 Wheaton, 419; Wynne *v.* Wright, 1 Dev. & Batt. (N. C.) 19, s. p. See also the case of The People *v.* Huntington, N. Y. Legal Observer for May, 1846, p. 187. It was adjudged, in the Ontario sessions, in New York, that a statute prohibiting the sale of spirituous liquors, to be drunk in certain places, was not repugnant to the Constitution of the United States; for that

by wholesale, bale, or package, to take out a license, and pay for it, under certain penalties or forfeitures for neglect or refusal, was repugnant to the Constitution of the United States, and void; inasmuch as it belonged to Congress to regulate foreign commerce, and no state can lay a duty on imports. But it was admitted in that case that, after the goods had become mixed with or incorporated into the general mass of the property of the state, they were liable to state taxation. (*c*) The restriction does not apply to goods imported and in the hands of the retail trader. In connection with this subject it may be further observed, that, by the Constitution of the United States, no "state shall, without the consent of [the] Congress, lay any imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and all such laws shall be subject to the revision and control of [the] Congress." (*d*) In-

the power of Congress had no application to the purely internal commerce of a state, and was to be confined to the period of time during which the act of importation, introduction, and incorporation of a foreign commodity into the mass of the property of the state was going on. The principles involved in this case were drawn from the decisions of the federal courts, and I have referred to it principally on the ground of the clear and able condensation and review of the federal doctrine on the subject, by Judge Smith, who presided in that inferior jurisdiction.

(*c*) In Cumming *v.* Corporation of Savannah, it was decided, by one of the superior courts of Georgia, in 1816, that a levy of a tax under a city ordinance, founded on a state law, on all goods not the produce of the state, and sold on commission, was lawful, as not being a duty on imports. R. M. Charlton, 26. It was further decided, in Green *v.* The City of Savannah, ib. 368, that the right to tax imports as well as exports, for the purpose of executing *inspection* laws, resided in the states. So it has been decided that a state act imposing a duty on the retailers of foreign merchandise was not repugnant to the Constitution of the United States, though the act applied as well to the *importer* as other sellers of foreign merchandise. Biddle *v.* The Commonwealth, 13 Serg. & Rawle, 405. But this decision may be considered as overruled by the decision in Brown *v.* State of Maryland, above mentioned, so far as it goes to prohibit the importer from selling the imported article *in bulk*, for the right to sell is inseparably connected with the law permitting importation. The act of Pennsylvania, on which the decision in S. & R. was founded, was unexceptionable as it originally stood, without the supplementary amendment; for it contained an exception in favor of importers of goods, who sold them in the original bulk or package in which they were imported.

(*d*) Constitution, art. 1, sec. 10. By act of Congress of 27th February, 1801, c. 83, the assent of Congress was declared to an act of the legislature of Maryland appointing a health officer for the port of Baltimore, so far as to enable the state to collect a duty of one per cent per ton on all vessels coming into the district of Baltimore from a foreign voyage, for the purpose intended in the act. This act of Congress is evidence of the restricted sense given to the clause in the Constitution cited in the text.

spection laws are not, strictly speaking, regulations of commerce. Their object is to improve the quality of articles produced by the labor of the country, and to fit them for exportation or for domestic use. These laws act upon the subject before it becomes an article of commerce. Inspection laws, quarantine laws, and health laws, as well as laws for regulating the internal commerce of a state, are component parts of the immense mass of residuary state legislation, and over which Congress have no direct power, though it may be controlled when it directly interferes with their acknowledged powers. (*e*) It has been held, (*f*) that if Congress, in the execution of the power to regulate commerce, should pass a statute controlling state legislation in erect-

(*e*) Marshall, Ch. J., in Gibbons *v.* Ogden, 9 Wheaton, 203. In the case of The City of New York *v.* Miln, 11 Peters, 102, it was decided that a law of New York, of February, 1824, requiring, under a penalty, the master of every vessel from any port out of the state to report in writing, within twenty-four hours after his arrival, the names, ages, and last legal settlement of the passengers, and that the master or owners should give bond with sureties to indemnify the city against the future charges of passengers who were not citizens, was not a regulation of commerce, but of police, and was a constitutional and valid law. The case received a very elaborate discussion; but it is rather difficult, as I apprehend, to exempt the New York law from the character of a regulation of commerce, or to withdraw the case out of the reach of the former doctrines of the court, that the power to regulate commerce with foreign nations is, and necessarily must be, *exclusive* in the government of the United States. In pursuance of the principle of this last decision, it was held, in Norris *v.* City of Boston, 4 Metcalf, 282, that a state law prohibiting the landing of alien passengers, until the owner, master, or consignee of the vessel paid two dollars for each passenger, for the support of foreign paupers, was not repugnant to the Constitution of the United States. It was a regulation of municipal police, and not of commerce. [*Post*, 439, n. 1.] So, in the case of Worsley *v.* Second Municipality of N. O., 9 Rob. (La.) 324, it has been adjudged that an ordinance of the municipality of New Orleans, imposing a wharfage on all packages landed in or shipped from the limits of the same, was valid, and not repugnant to the Constitution of the United States. The Constitution of the United States never intended to authorize Congress to interfere with the laws of the states in relation to wharves and other instruments of trade, and in the preservation of harbors, &c. A contribution to defray the expense of constructing bridges or causeways, or removing obstructions in watercourses, and a retribution for this expense, to be paid by those who are benefited, are not an impost, tax, or duty.

Again, in the case of Howell *v.* The State of Maryland, before the Court of Appeals, in December, 1845, [3 Gill, 14,] it was decided that a state tax on the interest in all ships or other vessels, whether in or out of port, owned by persons resident of the state, was a valid tax, and not protected by the act of Congress licensing vessels, nor repugnant to the Constitution or laws of the United States.

(*f*) Wilson *v.* The Blackbird Creek Marsh Company, 2 Peters, 245; Thompson, J., 11 Peters, 149, 150, s. p.

ing dams over small navigable creeks where the tide ebbs and flows, it would be valid and binding. But until Congress had actually exercised their power over the subject, the state legislation in that case was not considered as repugnant to the power in Congress in its *dormant* state to regulate commerce. (*x*) It is

(*x*) See *supra*, 268, note (*x*). Commerce among the States is both traffic and intercourse, embracing every species of commercial intercourse between the United States and foreign nations and among the States, and including such trade or traffic, buying, selling, and interchange of commodities as directly affect or necessarily involve the interests of the people of the United States. Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196; Kidd *v.* Pearson, 128 U. S. 1; United States *v.* E. C. Knight Co., 156 U. S. 1; Pittsburgh & S. Coal Co. *v.* Louisiana, id. 590; People *v.* Wemple (131 N. Y. 64), 27 Am. St. Rep. 542, and note. Under the power to regulate commerce, Congress can construct, or authorize the construction of, railroads across the States and territories. California *v.* Central Pacific R. Co., 127 U. S. 1. To exclude State legislation, Congress must have acted, if the matter is local and only incidentally affects commerce, since interstate commerce properly relates only to national matters or to matters which require regulation and uniformity in the various States. Rhea *v.* Newport, &c. R. Co., 50 Fed. Rep. 16; Cardwell *v.* American Bridge Co., 113 U. S. 205; Henry *v.* Roberts, 50 Fed. Rep. 902; Robbins *v.* Shelby C. Taxing District, 120 U. S. 489; Walling *v.* Michigan, 116 U. S. 446; Brown *v.* Houston, 114 U. S. 622; Philadelphia &c. S. Co. *v.* Pennsylvania, 122 U. S. 326; Western U. T. Co. *v.* Pendleton, id. 347; Bowman *v.* Chicago & N. W. Ry. Co., 125 U. S. 465; Smith *v.* Alabama, 124 U. S. 465; see also Henderson Bridge Co. *v.* Henderson, 141 U. S. 679; Postal Tel. Co. *v.* Charleston, 153 U. S. 692; Luxton *v.* North River Bridge Co., id. 525; Ashley *v.* Ryan, id. 436; Pittsburgh &c. Ry. Co. *v.* Backus, 154 U. S. 421; Cleveland, &c. Ry. Co. *v.* Backus, id. 439; Covington &c. Bridge Co. *v.* Kentucky, 154 U.S. 204; Waterhouse *v.* Comer, 55 Fed. Rep. 149; *In re* Schechter, 63 id. 695; 33 Cent. L. J. 207; 30 id. 181, n., 302; 32 id. 73; 25 Am. L. Rev. 170; 24 id. 25; 4 Harv. L. Rev. 221. Thus quarantine laws, though regulations of commerce, belong to the class which the States may enact until Congress legislates upon the subject or forbids State laws. Morgan's La. &c. S. Co. *v.* Board of Health, 118 U. S. 455; see 2 Harv. L. Rev. 267, 293; 25 Am. L. Rev. 45; Minneapolis, &c., Ry. Co. *v.* Milner, 57 Fed. Rep. 276. But State pilot laws cannot discriminate between the vessels of its own ports and those of adjoining States. Spraigue *v.* Thompson, 118 U. S. 90; State *v.* Penny, 19 S. C. 218. So a State occupation tax is invalid, if it is so framed as to create a discriminative burden upon the citizens or products of other States. Walling *v.* Michigan, 116 U. S. 446. The constitutional prohibition against the levying of State duties on imports or exports relates to foreign, not to interstate, commerce. Brown *v.* Houston, 114 U. S. 622.

Interstate commerce is interfered with by a State statute which imposes a license tax on travelling salesmen, so far as non-residents' goods are excluded or taxed: Crutcher *v.* Kentucky, 141 U. S. 47; Robbins *v.* Shelby County Taxing District, 120 U. S. 489; Brennan *v.* Titusville, 153 U. S. 289; *In re* Mitchell, 62 Fed. Rep. 576; *Ex parte* Hough, 69 id. 330; see *In re* Spain, 47 id. 208; *Ex parte* Brown, 48 id. 435; State *v.* Pratt, 59 Vt. 590; *Ex parte* Bliss, 63 N. H. 135; State *v.* Stevenson, 109 N. C. 730;

admitted, however, (*g*) that the grant to Congress to regulate commerce on the navigable waters of the several states contains

(*g*) Corfield *v.* Coryell, 4 Wash. 371.

Ficklen *v.* Shelby County, 145 U. S. 1; Overton *v.* Vicksburg, 70 Miss. 558; *Ex parte* Thomas, 71 Cal. 204; *Ex parte* Rosenblatt, 19 Nev. 439; or an Act prohibiting peddling without a license as against the agent of a foreign manufacturer who has with him the goods offered for sale: Emert *v.* Missouri, 156 U. S. 296; American Harrow Co. *v.* Shaffer, 68 Fed. Rep. 750; by an Act requiring goods made by convict labor in other States to be so labelled when exposed for sale: People *v.* Hawkins, 31 N. Y. S. 115; by a State Chinese exclusion law: *Ex parte* Ah Cue, 101 Cal. 197; or one that restricts foreign commerce: Cuban S. Co. *v.* Fitzpatrick, 66 Fed. Rep. 33; by an Act prohibiting the transportation of diseased cattle through the State: Grimes *v.* Eddy, 126 Mo. 168; Rouse *v.* Youard (Kansas), 41 Pac. Rep. 426; by State inspection or license laws, which discriminate against goods from other States or impose onerous fees upon such goods: Minnesota *v.* Barber, 136 U. S. 313; Brimmer *v.* Rebman, 138 U. S. 78; Voight *v.* Wright, 141 U. S. 62; Huffman *v.* Harvey, 123 Ind. 600; Georgia Packing Co. *v.* Macon, 60 Fed. Rep. 774; *In re* Schechter, 63 id. 695; by an Act requiring separate railroad cars for all colored and white passengers, though passing through the State: Anderson *v.* Louisville & N. R. Co., 62 Fed. Rep. 46; by a State law authorizing lands to be reclaimed under important tidal channels: Coxe *v.* State, 144 N. Y. 396; by an Act operating beyond the State and making a carrier liable for connecting carriers' negligence: McCann *v.* Eddy, (Mo.), 27 S. W. Rep. 541; by a city license fee for vessels already licensed under U. S. Rev. Stats. § 4321: Harmon *v.* Chicago, 147 U. S. 396; by applying state-tax laws to corporations possessing national franchises, see Western U. Tel. Co. *v.* Massachusetts, 125 U. S. 530; St. Louis *v.* Western U. T. Co., 148 U. S. 92; McCall *v.* California, 136 U. S. 104; San Francisco *v.* Western U. T. Co., 96 Cal. 140; People *v.* Wemple, 65 Hun, 252; by a law excluding from a State a corporation engaged in interstate or foreign commerce: Postal Tel. Cable Co. *v.* Adams, 155 U. S. 688; Cooper Manuf. Co. *v.* Ferguson, 113 U. S. 727; but not including the business of marine insurance. Hooper *v.* California, 155 U. S. 648. State laws prohibiting the sale of imported intoxicating liquors, &c., in their original packages are invalid prior to the Act of Congress of Aug. 8, 1890 (26 St. at L. 313), which declared that such liquors shall, on arrival in a State, be subject to the police powers of the State. Leisy *v.* Hardin, 135 U. S. 100; Bowman *v.* Chicago & N. W. Ry. Co., 125 U. S. 465; *In re* Rahrer, 140 U. S. 564; *In re* Spickler, 43 Fed. Rep. 653; *In re* Sanders, 52 id. 802; Cantini *v.* Tillman, 54 id. 969; *In re* Langford, 57 id. 570; *Ex parte* Edgerton, 59 id. 115; *In re* Minor, 69 id. 233; State *v.* Lord (N. H.), 29 Atl. Rep. 556; Durkee *v.* Moses (N. H.), 23 id. 793; Indianapolis *v.* Bieler (Ind.), 36 N. E. Rep. 857; State *v.* Kibling, 63 Vt. 636; State *v.* Parsons, 124 Mo. 436; Harrison *v.* State, 91 Ala. 62; Hopkins *v.* Lewis, 84 Iowa, 690; State *v.* Wheelock (Iowa), 64 N. W. Rep. 620.

The following do not unlawfully interfere with interstate commerce: State inspection, fish, and game laws not discriminating against other States: Patapsco Guano Co. *v.* Board of Agriculture, 52 Fed. Rep. 690; Glover *v.* Flour Inspectors, 48 id. 348; Minnesota *v.* Barber, 136 U. S. 313; Manchester *v.* Massachusetts, 139 U. S. 240; Organ *v.* State, 56 Ark. 267; State *v.* Geer, 61 Conn. 144;

no cession of territory, or of public or private property; and that the states may by law regulate the use of fisheries and

Bennett *v.* American Express Co., 83 Maine, 236; the Massachusetts oleomargarine law of 1891 to prevent deception by imitating butter: Plumley *v.* Massachusetts, 155 U. S. 461; see *In re* Worthen, 58 Fed. Rep. 467; *Ex parte* Scott, 66 id. 45; Com'th *v.* Schollenberger, 156 Penn. St. 201; Com'th *v.* Huntley, 156 Mass. 236; an Act imposing a penalty for delay in delivering a telegram: Western U. T. Co. *v.* Bright, 90 Va. 778; an Act forbidding certain kinds of fish caught within the State to be shipped out of the State: Ibid.; State *v.* Northern P. E. Co. (Minn.), 59 N. W. Rep. 1100; suits against carriers in State courts after legislation by Congress upon the subject: Murray *v.* Chicago & N. W. Ry. Co., 62 Fed. Rep. 24; St. Joseph & G. I. R. Co. *v.* Palmer, 38 Neb. 463; State laws prohibiting the sale of foreign bonds, which are a species of lottery: Ballock *v.* State, 73 Md. 1; Acts regulating the running of trains: Chicago & A. R. Co. *v.* People, 105 Ill. 657; State *v.* Gladson (Minn.), 59 N. W. Rep. 487; Lake Shore & M. S. Ry. Co. *v.* State, 8 Ohio Cir. Ct. 220; or rates on railroads within one State: Wabash, &c., Ry. Co. *v.* Illinois, 118 U. S. 557; Stone *v.* Trust Co., 116 U. S. 307; Chicago & G. T. Ry. Co. *v.* Wellman, 143 U. S. 331; an Act imposing penalties for neglect to fence a railroad: Minneapolis & St. L. Ry. Co. *v.* Beckwith, 129 U. S. 26; or in delivering telegrams: Western U. T. Co. *v.* James, 90 Ga. 254; or allowing damages against a railroad for injury by fire: McCandless *v.* Richmond & D. R. Co., 38 S. C. 103; service of a summons on a non-resident passing through the State to attend court in another State as a witness: Holyoke &c. Co. *v.* Ambden, 55 Fed. Rep. 593; an Act making grain elevators public warehouses, and prescribing rates of charges therefor: Brass *v.* North Dakota, 153 U. S. 391; Budd *v.* New York, 143 U. S. 517; State laws taxing the franchise of foreign corporations, or their capital used in the State: People *v.* Wemple, 131 N. Y. 64; Horn S. M. Co. *v.* New York, 143 U. S. 305; Lehigh Valley R. Co. *v.* Pennsylvania, 145 U. S. 192, 205; Maine *v.* Grand Trunk Ry. Co., 142 U. S. 217; Pacific Express Co. *v.* Seibert, id. 339; Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18; Att.-Gen. *v.* Western U. T. Co., id. 40; Pickard *v.* Pullman S. Car Co., 117 U. S. 34; Wabash, &c. Ry. Co. *v.* Illinois, 118 U. S. 557; Ouachita Packet Co. *v.* Aiken, 121 U. S. 444; Fargo *v.* Stevens, id. 220; Pembina C. S. M. Co. *v.* Pennsylvania, 125 U. S. 181; New York, &c. R. Co. *v.* Pennsylvania, 158 U. S. 431; Southern Ry. Co. *v.* Asheville, 69 Fed. Rep. 359; Sanford *v.* Poe, id. 546; or relief granted by the courts to protect a lawful structure like a bridge across navigable waters. Texas & P. Ry. Co. *v.* Interstate Trans. Co., 155 U. S. 585.

The 14th Amendment does not guarantee to the citizen of a State the right to contract therein in violation of its laws; and such a business as that of insurance, including marine insurance, is not commerce in such a sense as to prevent a State from prescribing and enforcing conditions on which a foreign insurance company can do business in the State. Hooper *v.* California, 155 U. S. 648; State *v.* Phipps, 50 Kansas, 609; Philadelphia Fire Ass'n *v.* New York, 119 U. S. 110. The powers conferred upon the general government with respect to interstate commerce and the postal service are not dormant, having been the subject of legislation by Congress, and it may exercise such powers by forcibly removing obstructions to their exercise or appeal to the civil courts for

oyster-beds within their territorial limits, though upon navigable waters, provided the free use of the waters for purposes of navigation and commercial intercourse be not interrupted. (*h*)[1]

(*h*) In the case of Groves *v.* Slaughter, 15 Peters, 449, there was no opinion of the court on the question of the internal commerce of the states as to the slave-trade; but two of the judges (Ch. J. Taney and Mr. Justice McLean) declared their opinion to be, that the power to regulate traffic in slaves between the different states resided in the states separately and exclusively; that each had a right to decide for itself whether it would or would not allow slaves to be brought within its limits from another state, either for sale or otherwise, and to prescribe the manner and mode of their introduction, and the conditions; that the Constitution did not consider slaves as merchandise, and that the action and regulation of the several states on this subject did not trench upon the power of Congress to regulate commerce "among the several states," and could not be controlled by it. It may not be amiss to observe, that in the above case of Groves *v.* Slaughter it was held that the clause in the constitution of the State of Mississippi, of 1832, declaring that the introduction of slaves into that state as merchandise or for sale *should be prohibited* after the 1st of May, 1833, was not operative *per se*, so as to invalidate a contract of sale of a slave introduced in violation

[1] *A. Regulation of Commerce.* — (*a*) *Powers of Congress and of the States.* — The power to regulate commerce in matters requiring a general system and uniform rule is in Congress exclusively, Cooley *v.* Board of Wardens, 12 How. 299, 319; Hinson *v.* Lott, 8 Wall. 148, 152; Gilman *v.* Philadelphia, 3 Wall. 713, 726, 727; Steamship Co. *v.* Portwardens, 6 Wall. 31; Crandall *v.* Nevada, ib. 35; Erie Railway *v.* State, 2 Vroom (31 N. J.), 531, 545; and in all cases the power of Congress is paramount when exercised, Wheeling Bridge Case, *infra;* Silliman *v.* Hudson R. Bridge Co., 4 Blatchf. 74, 395; 1 Black, 582; 2 Wall. 403; Works *v.* Junction R. R., 5 McL. 425; Hinson *v.* Lott, 8 Wall. 148, 151; United States *v.* Duluth, 1 Dillon, 469. But it is difficult to determine in some cases whether Congress has acted in such a way as to exclude state legislation or not. Thus, in the case of Pennsylvania *v.* Wheeling Bridge Co., 13 How. 518, it appeared that Congress had regulated navigation on the Ohio River by licensing vessels, establishing ports of entry, imposing duties on masters of boats, &c., and had sanctioned

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relief by injunction, even though such obstructions consist of acts which violate the criminal law. *In re* Debs, 158 U. S. 564. The police power of a State does not enable it to regulate, at points beyond the State, telegraphic messages received within the State. Western U. T. Co. *v.* Pendleton, 122 U. S. 347. While a State cannot impose a tax or burden upon the privilege of doing the business of interstate commerce, it can place a property tax on the instrumentalities engaged in such commerce, the value of the property being the basis of taxation. Marye *v.* Baltimore & O. R. Co., 127 U. S. 117; Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18; Cleveland &c. Ry. Co. *v.* Backus, 154 U. S. 439.

The obligations assumed by a common carrier engaged in interstate commerce are determined by the common law where it has not been changed by competent legislative action. Murray *v.* Chicago & N. W. Ry. Co., 62 Fed. Rep. 24. The Interstate Commerce Act (24 St. at L. 379; 25 id. 855) limits railroads engaged in interstate commerce to the freight charges named in their published schedules, and

9. Progress of the National Jurisprudence. — I have now finished the second general division of this course of lectures, relating to

of the constitutional provision, and that it was only mandatory upon the state legislature, and required their action to give it effect. The decisions in the state courts of Mississippi were contrary, and they held that the prohibition in the constitution was a declaration of a principle, and binding as a supreme law, without the addition of legislative sanction, and that a contract of sale of a slave in violation of it was void. This question was discussed in a masterly manner by Ch. J. Sharkey, in the case of Brien *v.* Williamson, [7 How. 14,] decided in the High Court of Errors and Appeals of the State of Mississippi, in March, 1843, in favor of the construction and effect already given to the constitution of that state, by the state courts, and in opposition to that given in the case of Groves *v.* Slaughter. The case of Cotton *v.* Brien, 6 Rob. (La.) 115, is to the same effect as the decision in Mississippi. [1. *Power of Congress.* — The

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a compact between Virginia and Kentucky that the use and navigation of the river should be free and common to the citizens of the United States. Defendants, however, by authority of Virginia, put a bridge across the river which at certain states of the water obstructed navigation. The Supreme Court held that Congress had acted sufficiently in the premises, that the power of Congress to regulate commerce included the power to regulate navigation, and that the court had jurisdiction to decree the removal of the bridge at the suit of the State of Pennsylvania. In s. c., 18 How. 421, a statute legalizing the bridge, which had been passed in consequence of the former decision, was held lawful. (Gray *v.* Clinton Bridge, 7 Am. Law Reg. N. S. 149; The Clinton Bridge, 10 Wall. 454.) Gilman *v.* Philadelphia, 3 Wall. 713, was very like the Wheeling Bridge case, but was decided the other way. Mr. Justice Clifford makes it pretty clear by his able dissenting opinion that Congress had regulated navigation on the waters which were crossed by the bridge complained of, and the decision, if consistent with the Wheeling Bridge case, would seem to stand on the ground that in the latter the provision that the navigation of the Ohio should be free, was directly contravened, whereas

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state legislation not consistent therewith is invalid. Gulf, C. & S. Ry. Co. *v.* Hefley, 158 U. S. 98.

Tribunals for adjusting discriminating and unfair interstate rates were provided for by the Act of Congress of Feb. 4, 1887 (24 St. at L. 379.) See *Ex parte* Koehler, 30 Fed. Rep. 867; Missouri & Pac. Ry. Co. *v.* Texas & Pac. Ry. Co., 31 id. 862. Sect. 12 of this Act, enabling the circuit courts to use their process in aid of inquiries before the Interstate Commerce Commission, is constitutional. Interstate Commerce Commission *v.* Brimson, 154 U. S. 447.

The Act of July 2, 1890 (26 St. at L. 209) declares illegal unlawful monopolies, contracts, and combinations in restraint of trade or commerce among the several States or with foreign nations. See *In re* Greene, 52 Fed. Rep. 104; Farmers' L. T. &c. Co. *v.* No. Pac. R. Co., 60 id. 803; Thomas *v.* Cincinnati, &c. Ry. Co., 62 id. 803; *In re* Grand Jury, id. 828, 840; United States *v.* Cassidy, 67 id. 698. The Act of 1890 is not an invasion of the right of trial by jury. Interstate Commerce Commission *v.* Brimson, 154 U. S. 447; United States *v.* Debs, 64 Fed. Rep. 724; 63 id. 436. An injunction against a conspiracy defined in the Act of July 2, 1890, § 5, may be made operative against partic-

the government and constitutional jurisprudence of the United States. Though I have considered the subject in a spirit of free

power vested in Congress to regulate interstate and foreign commerce includes the right to regulate all the means and instruments by which such commerce is carried on, and which might be used by the states to discriminate in any way against such commerce. Thus, it has been held that interstate telegraphic communication may be regulated by Congress. Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1; Telegraph Co. *v.* Texas, 105 U. S. 460. No definite rule has been, or perhaps can be, laid down as to when the power is absolutely exclusive, and when, on the other hand, it depends upon an act of Congress assuming to take control of the subject. It has been said to be thus exclusive when the subject is national in character and admits of a uniform regulation. County of Mobile *v.* Kimball, 102 U. S. 691; Welton *v.* Missouri, 91 U. S. 275; Henderson *v.* Mayor, 92 U. S. 259; Hall *v.* De Cuir, 95 U. S.

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in the other case the regulations of Congress, if they applied to the waters in question, were not inconsistent with the continuance of the bridge. There is a further distinction, that the whole of the Schuylkill River (the river bridged in Gilman's case) lay within the State of Pennsylvania; but the Supreme Court expressly assert that the power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all navigable waters of the United States which are accessible from a state other than those in which they lie. 3 Wall. 724, 725; The Daniel Ball, 10 Wall. 557, 564.

Other decisions are that a state cannot impose restrictions on a licensed coaster in addition to those imposed by Congress, Sinnot *v.* Davenport, 22 How. 227; although the vessel was at the time employed within the waters of a state in lightering vessels in the foreign or coastwise trade, Foster *v.* Davenport, 22 How. 244.

When Congress has not acted, the states have more power, and, at least in matters of local interest, they may make local regulations. Thus, it appears that they may authorize the construction of bridges, &c., over navigable waters within their limits. Gilman *v.* Philadelphia, *su-*

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ipants not named in the order, but within its terms, and served with the writ. United States *v.* Elliott, 64 Fed. Rep. 27; 62 id. 801; see United States *v.* Alger, id. 824.

The judiciary are not entitled to enter upon such purely administrative duties as the framing of rates for carriage, but may restrain that which, in the form of regulating rates, amounts to a denial to property owners engaged in transportation of that equal protection which is the constitutional right of owners of other kinds of property. Reagan *v.* Farmers' Loan Trust Co., 154 U. S. 362.

The decision in the above oleomargarine case (Plumley *v.* Massachusetts, 155 U. S. 461), was that it is within the power of the States to exclude from their markets articles of food of a deceptive or fraudulent character, which are likely or liable to be sold or taken for what they are not; and that such articles, though subjects of interstate commerce, are at all times within the operation of the police regulations of the States. It is also within the police power of a State to require foreign rags arriving at its principal port to be disinfected, and to make the expense thereof a lien on the rags. Train *v.* Boston Disinfecting Co., 144 Mass. 523.

and liberal inquiry, as the series of decisions in the federal courts have been brought under examination, I have uniformly felt, and

485; cases *infra*. It extends to commerce between points in the same state, if such commerce involves transit through outside territory. Lord *v.* Steamship Co., 102 U. S. 541. — 2. *Power of States.* — The states have exclusive control of all matters of purely internal concern. Thus, they have an unlimited right of taxing all the property within their borders, provided they do not so exercise the power as to discriminate against property brought into the state from outside. The question of whether the tax is laid on imported goods in original packages or at a later stage would seem to be immaterial, providing the purpose and effect of the tax is to discriminate against such goods. Thus, a law requiring a license fee from agents selling imported goods which was not required from agents selling goods manufactured in the state, has been held invalid. Webber *v.* Virginia, 103 U. S. 344. See further, Cook *v.* Pennsylvania, 97 U. S. 566; Welton *v.* Missouri, 91 U. S. 275; Marshalltown *v.* Blum, Iowa, 1882; New Orleans *v.* Tow Boat Co., 33 La. Ann. 647; Higgins *v.* Lime, 130 Mass. 1. Comp. Corson *v.* State, 57 Md. 251, where there was no such discrimination. In general, any restrictions, direct or indirect, upon the entry into, exit from, or passage through a state, of persons, property, or communications, is beyond the limit of state power. Cases *supra*; Chy Lung *v.* Freeman, 92 U. S. 275; State Freight Tax, 15 Wall. 232; Indiana *v.* American Express Co., 7 Biss. 227; Council Bluffs *v.* K., C. &c. R. R. Co., 45 Iowa, 338. But a state law is valid the primary purpose and effect of which is to regulate a matter of purely internal concern, though it may incidentally affect interstate and foreign commerce; though Congress may at any time supersede such a law so far as it affects interstate or foreign commerce. Thus, state regulation of the rates to be charged by railroads and warehouses within the state has been held

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pra. See Comm. *v.* New Bedford Bridge, 2 Gray, 339; United States *v.* New Bedford Bridge, 1 W. & M. 401; Silliman *v.* Hudson R. Bridge Co., 4 Blatchf. 74, 395; 1 Black, 582; Albany Bridge Case, 2 Wall. 403; The Passaic Bridges, 3 Wall. 782; Illinois R. Packet Co. *v.* Peoria Bridge Ass., 38 Ill. 467; Woodman *v.* Kilbourn Man. Co., 6 Am. L. Reg. N. S. 238. They may regulate pilotage and impose penalties on vessels not taking pilots. Cooley *v.* Board of Wardens, 12 How. 299. See Cisco *v.* Roberts, 36 N. Y. 292; Steamship Co. *v.* Joliffe, 2 Wall. 450. (But a law entitling portwardens to a fee, whether called on for any service or not, from every vessel arriving in that port, is void. Steamship Co. *v.* Portwardens, 6 Wall. 31. See People *v.* Brooks, 4 Den. 469.) They may protect their oyster fisheries, even by inflicting the forfeiture of a vessel enrolled and licensed under United States laws, for a breach of proper state regulations. Smith *v.* Maryland, 18 How. 71.

Although, as has been said, a stream may be entirely within one state and yet be a highway for commerce with another, and subject to the regulations of Congress for that purpose, it seems to be consistent with this doctrine that a state may grant the exclusive navigation of a river lying wholly within its limits and running into the sea, above the point of navigability from the sea, the waters in question not being part of a line of commerce to points outside the state. Veazie *v.* Moor, 14 How. 568.

(*b*) *Over what Commerce.* — Again, it is always conceded that Congress has no control over commerce which is carried on entirely within the limits of a state, and which does not extend to or affect other states (except, according to Chase,

it has been my invariable disposition to inculcate, a strong sentiment of deference and respect for the judicial authorities

valid. Munn *v.* Illinois, 94 U. S. 113; Chicago, &c. R. R. Co. *v.* Iowa, ib. 155; Peik *v.* Chicago, &c. R. R. Co., ib. 164; W., St. L., &c. Ry. Co. *v.* The People, 105 Ill. 236. A state may also, subject to the superior right of Congress, pass laws in aid of commerce where the subject-matter is essentially local in character; *e. g.*, for building bridges, improving navigable waters, &c. County of Mobile *v.* Kimball, 102 U. S. 691; Pound *v.* Turck, 95 U. S. 459; Wisconsin *v.* Duluth, 96 U. S. 379; South Carolina *v.* Georgia, 93 U. S. 4; Sherlock *v.* Alling, ib. 99; Bridge Co. *v.* United States, 105 U. S. 470; Escanaba Co. *v.* Chicago, 107 U. S. 678; Miller *v.* Mayor 109 U. S. 385. A state has the further power to pass such laws as are reasonably necessary to the regulation of its internal police, though such laws may incidentally affect interstate or foreign commerce. Thus, it may pass inspection laws, Turner *v.* Maryland, 107 U. S. 38; s. c. 55 Md. 240; may make reasonable regulations as to landing-places along the borders of navigable rivers, Packet Co. *v.* Catlettsburg, 105 U. S. 559; Packet Co. *v.* St. Louis, 100 U. S. 423; Vicksburg *v.* Tobin, ib. 430; Packet Co. *v.* Keokuk, 95 U. S. 80; may provide that certain kinds of property shall not be allowed within its borders in such a condition as to be dangerous, Harrigan *v.* Conn. River Lumber Co., 129 Mass. 580; may impose license fees even upon vessels engaged in interstate commerce, Transportation Co. *v.* Wheeling, 99 U. S. 273; Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365. But such laws must not invade the *exclusive* domain of Congress, Foster *v.* Master, &c., 94 U. S. 246; Henderson *v.* Mayor, 92 U. S. 259; Salzenstein *v.* Mavis, 91 Ill. 391. See further on subject, Railroad Co. *v.* Richmond, 19 Wall. 584; King *v.* American Trans. Co., 1 Flip. 1; Sweatt *v.* Boston, &c. R. R. Co., 3 Cliff. 339. — B.]

C. J., as a necessary and proper means for carrying into execution some other power expressly granted or vested. United States *v.* Dewitt, 9 Wall. 41, 44; *ante*, 254, n. 1). On these principles a police regulation of sales of inflammable oils was held to have no constitutional operation on sales within the several states. United States *v.* Dewitt, *supra*. So, a law requiring persons not to engage in certain kinds of business, such as selling liquor by retail, without having obtained a license from the United States, was interpreted as a mere form of imposing a tax, and it was intimated that such a license could not give authority to carry on the business within a state. License Tax Cases, 5 Wall. 462, 471. It would not matter probably that commerce wholly within one state was carried on by means of the navigable waters of the United States. The waters might be subject to the control of Congress, while the particular commerce, as such, was not. The Daniel Ball, 10 Wall. 557, 565; The Bright Star, 1 Woolw. 266, 276. See State Tonnage Tax Cases, 12 Wall. 204, 215.

But a pretty liberal view is taken by the Supreme Court of what constitutes commerce between the several states, at least when it consists of transportation on the navigable waters of the United States. It is enough to subject a vessel to the regulations of Congress that she is engaged in carrying goods destined to a point outside the state over such waters, although she does not run in connection with any of the lines leading to such points, and the waters in question lie wholly within the state. The Daniel Ball, 10 Wall. 557

Commerce by Land, &c. — In the Daniel Ball the court expressly refrained from expressing an opinion upon the power of

of the Union. No point or question of any moment touching the construction of the powers of the government, and which

Congress over interstate commerce when carried on by land transportation, but it has been asserted elsewhere that the power extends to the regulation of railroads which have voluntarily become parts of lines of communication between the states, or to the creation of such roads. The Clinton Bridge, 1 Woolw. 150, 162; s. c. 8 Am. Law Reg. N. s. 149. But see 12 Op. Att-Gen. 337. So it has been thought that it does to the case of the Atlantic telegraphs, 12 Op. Att-Gen. 337; and to telegraphs on land, Western Un. Tel. Co. *v.* Pacific States T. Co., 5 Nev. 102. The right to establish ferries is reserved to the states. Conway *v.* Taylor, 1 Black, 603; Fanning *v.* Gregoire, 16 How. 524; Marshall *v.* Grimes, 41 Miss. 27; Freeholders *v.* State, 4 Zabr. 718.

(*c*) *What is a regulation of commerce* is a question which has arisen in determining the validity of some state laws. It has been held that a state may tax all money and exchange brokers. Nathan *v.* Louisiana, 8 How. 73. And legacies payable to aliens. Mager *v.* Grima, 8 How. 490. So it may require a deposit from insurance companies incorporated in other states before they are licensed to carry on business within its limits. Paul *v.* Virginia, 8 Wall. 168 (this case also decided that corporations are not citizens so far as to be entitled to the privileges of citizens of another state than that wherein they are incorporated); Ducat *v.* Chicago, 10 Wall. 410; Liverpool Ins. Co. *v.* Massachusetts, ib. 566. The case of Crandall *v.* Nevada is stated *ante*, 429, n. 1. And Norris *v.* Boston, stated 439, n. (*c*), was reversed in the Supreme Court, Passenger Cases, 7 How. 283. A state may enforce a law prohibiting the sale of liquors, either domestic or imported, in less than certain large quantities, without a state license, but not affecting the sale by the importer in the original packages. License Cases, 5 How. 504. In Pervear *v.* Commonwealth, 5 Wall. 475, 479, it did not appear that the liquor of which the sale in original packages was prohibited was not home-made (see, also, Downham *v.* Alexandria Council, 10 Wall. 173), or in other hands than those of the importer, and a state may tax sales of goods from abroad in the original packages, by one not the importer, for instance, one who purchased them when at sea, but whose title did not accrue until the goods were in port. Waring *v.* The Mayor, 8 Wall. 110. Under a uniform tax on *all* sales made within its limits, it may tax goods imported from other states. Woodruff *v.* Parham, 8 Wall. 123; Hinson *v.* Lott, ib. 148. So it has been held by state courts that taxes on the gross amount of business of express companies within the state, &c., are valid. Wolcott *v.* The People, 17 Mich. 68; Southern Exp. Co. *v.* Hood, 15 Rich. (S. C.) 66; Reading R. R. *v.* Pennsylvania, 15 Wall. 284; 62 Penn. St. 286. Compare Erie R. Co. *v.* State, &c., *infra*.

On the other hand, a state cannot impose a stamp duty on bills of lading for gold and silver exported from the state. Almy *v.* California, 24 How. 169. This case was discussed as if it had been one of exports to a foreign country, and a duty on the bill was thought to be in effect a duty on the article exported. In a subsequent case it was pointed out that the gold was only transported from one state to another, although over the high seas, and the clause prohibiting the states to tax exports and imports was thought not to apply: but the case was said to be rightly decided within Crandall *v.* Nevada, *ante*, 429, n. 1; and also on the ground that the tax was in conflict with the power of Congress to regulate commerce. Woodruff *v.*

*has received an authoritative determination, has been *440 intentionally omitted. There are several important constitutional questions which remain yet to be settled; but if we recur back to the judicial annals of the United States since the year 1800, we shall find that many of the most interesting discussions which had arisen, and which were of a nature to affect deeply the tranquillity of the nation, have auspiciously terminated.

The definition of direct taxes within the intendment of the Constitution; the extent of the power of Congress to regulate the power to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies; the power of Congress over the militia of the states; the power of exclusive legislation over districts and ceded places; the mass of implied powers incidental to the express powers of Congress, such as the power to institute and protect an incorporated bank, to lay a general and indefinite embargo, and to give to the United States, as a creditor, priority

Parham, 8 Wall. 123, 137. On the latter ground a distinctive state tax on the business of carrying from state to state, in the hands of foreign corporations habitually doing business in the state, graduated by the weight of the goods and the number of passengers carried, was held void. Erie Railway Co. *v.* State, 2 Vroom (31 N. J.), 531; Reading R. R. *v.* Pennsylvania, 15 Wall. 232. Compare Commonwealth *v.* Phil. & Read. R. R., 62 Penn. St. 286, &c., *supra*. A state cannot impose a discriminating tax on non-residents trading within its limits; but the majority of the court put this on article 4, § 2, as to the privileges of citizens of each state, which, as has been seen (Paul *v.* Virginia, *supra*), does not apply to the preceding case of corporations. Ward *v.* Maryland, 12 Wall. 418. See 15 Wall. 300.

B. The clause prohibiting the states to lay any duty on tonnage is admitted by the Supreme Court not to exonerate vessels owned by individuals and belonging to the commercial marine from being taxed by the states as property, with other property of the citizens, on a valuation of them as such. But a state tax on all steamboats and vessels plying the navigable waters of the state, levied on the basis of their registered tonnage, wholly irrespective of their value, is void, although the vessels are owned by citizens of the state, and trade only between places within the state. State Tonnage Tax Cases, 12 Wall. 204. See also Steamship Co. *v.* Portwardens, 6 Wall. 31, 35, *supra*. [A state cannot impose a tonnage tax to obtain means to support police regulations. Peete *v.* Morgan, 19 Wall. 581. The text of the note is supported by Cannon *v.* New Orleans, 20 Wall. 577; Inman Steamship Co. *v.* Tinker, 94 U. S. 238. Comp. Packet Co. *v.* Keokuk, 95 U. S. 80; Packet Co. *v.* St. Louis, 100 U. S. 423. The latter cases hold that a city may collect reasonable fees for the use of wharfage facilities which have been erected by the city, and that such fees may be proportioned to the tonnage of the vessels using such wharves. See further, Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365. — B.]

of payment, — have all received elaborate discussion in the Supreme Court, and they have, to a certain extent, been ascertained and defined by judicial decisions. So, also, the extent of the constitutional prohibitions upon the states not to pass *ex post facto* laws; and not to pass laws impairing the obligation of contracts; and not to impede or control by taxes, or grants, or any other exercise of power, the lawful authorities, or institutions, or rights and privileges depending on the Constitution and laws of the United States, — has been explored and declared by a series of determinations, which have contributed, in an eminent degree, to secure and consolidate the Union, and to elevate the dignity and enlarge the influence of the national government.

The power of the President to remove all executive officers in his sound discretion has been settled, not indeed judicially, but perhaps as effectually by the declared sense of the legislature, and the uniform acquiescence and practice of the government.

* 441 The absolute and uncontrollable * efficacy of the treaty-making power has also been definitively established, after a struggle against it on the part of the House of Representatives, which, at one time, threatened to disturb the very foundations of the Constitution.[1]

The comprehensive claims of the judicial power, as being coextensive with all cases that can arise under the Constitution and laws and treaties of the Union, have, in several instances, been powerfully and successfully vindicated. The appellate jurisdiction of the Supreme Court, over the judgments and decrees of the state courts, under certain circumstances, was defined with great accuracy and precision in the 25th section of the act of 1789, establishing the judicial courts; and the free and independent exercise of that jurisdiction, so essential to the maintenance of the authority and efficiency of the government of the United States, in criminal as well as in civil cases, has been hitherto happily sustained. The means of enforcing obedience, when not voluntarily rendered, to the decision of this appellate jurisdiction, have not been required to be practically applied; and therefore it is a question which the court has not thought it incumbent on them, as yet, to decide, whether the exercise of that jurisdiction would permit compulsory process to the state courts, with the

[1] But see 311, n. 1, as to the President's power of removal now, and as to the treaty-making power, 286, n. 1, *ante*.

ordinary methods of enforcing process. The act of Congress (*a*) provided only that, on appeal from the judgment or decree of a state court, the writ of error should have the same effect as if the judgment or decree had been rendered or passed in a circuit court, and the proceeding upon a reversal should be the same, except that the Supreme Court, instead of remanding the cause for a final decree, may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. And with respect to other branches of the judicial power, it may * be generally observed, that the *442* extensive sway of admiralty and maritime jurisdiction; the character of the parties necessary to give cognizance to the federal courts; the faith and credit which are to be given in each state to the records and judicial proceedings in every other state; the sovereignty of Congress over all its territories, without the bounds of any particular state; and the entire and supreme authority of all the constitutional powers of the nation, when coming in collision with any of the residuary or asserted powers of the states, — have all been declared (as we have seen in the course of these lectures) by an authority which claims our respect and obedience.

In the first ten or twelve years after the institution of the national judiciary, or from 1790 to 1801, the scanty decisions of the Supreme Court are almost all to be found in the third volume of Dallas's Reports. The first great and grave question which came before them was that respecting the liability of a state to be sued by a private creditor; and it is a little remarkable that the court, in one of its earliest decisions, should have assumed a jurisdiction which the authors of the Federalist had a few years before declared to be without any color of foundation. During the period I have mentioned, the federal courts were chiefly occupied with questions concerning their admiralty jurisdiction, and with political and national questions growing out of the Revolutionary War, and the dangerous influence and action of the war of the French revolution upon the neutrality and peace of our country. It was during this portion of our judicial history that the principles of the doctrines of expatriation, of *ex post facto* laws, of constitutional taxes, and of the construction and obligation of the treaty of 1783 upon the rights of the British creditors, were ably discussed and firmly declared.

(*a*) September 24, 1789, sec. 25.

The reports of Mr. Cranch commenced with the year 1801, and the nine volumes of those reports cover the business of a *443 very active period, down to the year 1815. The *Supreme Court was occupied with many great and momentous questions, and especially during that portion of the time in which the United States had abandoned their neutral and assumed a belligerent character. It is curious to observe in these reports the rapid cultivation and complete adoption of the law and learning of the English admiralty and prize courts, notwithstanding those courts had been the constant theme of complaint and obloquy in our political discussions for the fifteen years preceding the war. In the last three volumes of Mr. Cranch, the court was constantly dealing with great questions, embracing the rights and the policy of nations; and the prize and maritime law, not of England only, but of all the commercial nations of Europe, was suddenly introduced, and deeply and permanently interwoven with the municipal law of the United States. We perceive, also, in these volumes, the constant growth and accumulation of cases on commercial law generally, and relating to policies of insurance, negotiable paper, mercantile partnerships, and the various customs of the law merchant. The court was likewise busy in discussing and settling important principles growing out of the limited range of other matters of federal cognizance, and relating to the law of evidence, to frauds, trusts, and mortgages. They were engaged, also, with the doctrine of the limitation of suits, the contract of sale, and with the more enlarged subjects of domicile, of the *lex loci*, of neutrality, and of the numerous points of international law.

By the time of the commencement of Mr. Wheaton's reports, in 1816, the decisions of the Supreme Court had embraced so many topics of public and municipal law, and those topics had been illustrated by so much talent and learning, that, for the first time in the history of this country, we were enabled to perceive the broad foundations and rapid growth of a code of national jurisprudence. That code has been growing and improving ever since, and it has now become a solid and magnificent structure; and it seems destined, at no very distant period of time, to *444 cast a shade *over the less elevated, and, perhaps, we must add, the less attractive and ambitious, systems of justice in the several states. The most interesting part of Mr. Wheaton's

reports are those which contain the examination of those great constitutional questions which we have been reviewing; and I cannot conceive of anything more grand and imposing in the whole administration of human justice, than the spectacle of the Supreme Court sitting in solemn judgment upon the conflicting claims of the national and state sovereignties, and tranquillizing all jealous and angry passions, and binding together this great confederacy of states in peace and harmony, by the ability, the moderation, and the equity of its decisions.

There are several reasons why we may anticipate the still increasing influence of the federal government, and the continual enlargement of the national system of law in magnitude and value. The judiciary of the United States has an advantage over many of the state courts, in the tenure of the office of the judges, and the liberal and stable provision for their support. The United States are, by these means, fairly entitled to command better talents, and to look for more firmness of purpose, greater independence of action, and brighter displays of learning. The federal administration of justice has a manifest superiority over that of the individual states, in consequence of the uniformity of its decisions, and the universality of their application. Every state court will naturally be disposed to borrow light and aid from the national courts, rather than from the courts of other individual states, which will probably never be so generally respected and understood. The states are multiplying so fast, and the reports of their judicial decisions are becoming so numerous, that few lawyers will be able or willing to master all the intricacies and anomalies of local law, existing beyond the boundaries of their own state. Twenty-six independent state courts of final jurisdiction over the same questions, arising upon the same general *code of common and of *445 equity law, must necessarily impair the symmetry of that code.

The danger to be apprehended is, that students will not have the courage to enter the complicated labyrinth of so many systems, and that they will, of course, entirely neglect them, and be contented with a knowledge of the law of their own state, and the law of the United States, and then resort for further assistance to the never-failing fountains of European wisdom.

But though the national judiciary may be deemed pre-eminent in the weight of its influence, the authority of its decisions, and in the attraction of their materials, there are abundant considerations to cheer and animate us in the cultivation of our own local law. The judicial power of the United States is necessarily limited to national objects. The vast field of the law of property, the very extensive head of equity jurisdiction, and the principal rights and duties which flow from our civil and domestic relations, fall within the control, and we might almost say the exclusive cognizance, of the state governments. We look essentially to the state courts for protection to all these momentous interests. They touch, in their operation, every chord of human sympathy, and control our best destinies. It is their province to reward and to punish. Their blessings and their terrors will accompany us to the fireside, and "be in constant activity before the public eye." The elementary principles of the common law are the same in every state, and equally enlighten and invigorate every part of our country. Our municipal codes can be made to advance with equal steps with that of the nation, in discipline, in wisdom, and in lustre, if the state governments (as they ought in all honest policy) will only render equal patronage and security to the administration of justice. The true interests and the permanent freedom of this country require that the jurisprudence of the individual states should be cultivated, cherished, and exalted,

and the dignity and reputation of the state authorities *446 sustained with becoming *pride. In their subordinate relation to the United States, they should endeavor to discharge the duty which they owe to the latter, without forgetting the respect which they owe to themselves. In the appropriate language of Sir William Blackstone, and which he applied to the people of his own country, they should be "loyal, yet free; obedient, and yet independent."

PART III.

OF THE VARIOUS SOURCES OF THE MUNICIPAL LAW OF THE SEVERAL STATES.

LECTURE XX.

OF STATUTE LAW.

MUNICIPAL LAW is a rule of civil conduct, prescribed by the supreme power of a state. Municipal law, or the *jus civile*, is thus explained in the Institutes of Justinian. Quod quisque populus ipse sibi jus constituit, id ipsius proprium est civitatis; vocaturque jus civile, quasi jus proprium ipsius civitatis. This definition is less precise and scientific than that given by Sir William Blackstone. Municipal law is composed of written and unwritten, or of statute and common law. Statute law is the express written will of the legislature, rendered authentic by certain prescribed forms and solemnities.[1]

It is a principle in the English law, that an act of Parliament, delivered in clear and intelligible terms, cannot be questioned, or its authority controlled, in any court of justice. "It is," says Sir William Blackstone, "the exercise of the highest authority that the kingdom acknowledges upon earth." When it is said in the books, that a statute contrary to natural equity and reason, or repugnant, or impossible to be performed, is void, the cases are understood to mean that the courts are to give the statute a reasonable construction. They will not readily presume, out of

[1] For an accurate analysis of the nature of law, the student should consult Bentham's Fragment on Government, Works, i., esp. p. 263, note (*b*), and Austin on Jurisprudence, Lect. I., and *passim*. A short criticism of Austin's views in the American Law Review, vi. 723 *et seq.*, may also be referred to.

The *jus civile* of the Romans was defined as above in contrast to the *jus gentium* explained *ante*, 1, n. 1.

respect and duty to the lawgiver, that any very unjust or absurd consequence was within the contemplation of the law. But if it should happen to be too palpable in its direction to admit of but one construction, there is no doubt in the English law as *448 to the binding * efficacy of the statute. The will of the legislature is the supreme law of the land, and demands perfect obedience. (*a*)

But while we admit this conclusion of the English law, we cannot but admire the intrepidity and powerful sense of justice which led Lord Coke, when Chief Justice of the K. B., to declare, as he did in *Doctor Bonham's Case*, (*b*) that the common law doth control acts of Parliament, and adjudges them void, when against common right and reason. The same sense of justice and freedom of opinion led Lord Chief Justice Hobart, in *Day* v. *Savage*, (*c*) to insist that an act of Parliament, made against natural equity, as to make a man judge in his own case, was void; and induced Lord Chief Justice Holt to say, in the case of *The City of London* v. *Wood*, (*d*) that the observation of Lord Coke was not extravagant, but was a very reasonable and true saying. Perhaps what Lord Coke said in his Reports on this point may have been one of the many things that King James alluded to, when he said, that in Coke's Reports there were many dangerous conceits of his own uttered for law, to the prejudice of the crown, Parliament, and subjects. (*e*)

1. Laws Repugnant to the Constitution Void.—The principle in the English government, that the Parliament is omnipotent, does not prevail in the United States; though, if there be no constitutional objection to a statute, it is with us as absolute and uncontrollable as laws flowing from the sovereign power, under any other form of government. But in this, and all other countries where there is a written constitution, designating the powers and duties of the legislative, as well as of the other departments of the government, an act of the legislature *449 may be void as being against the constitution. * The law with us must conform, in the first place, to the Constitution of the United States, and then to the subordinate constitution of its particular state, and if it infringes the provisions of either,

(*a*) 1 Blackst. Comm. 91, 160, 186; Christian's note to 1 Blackst. Comm. 41.
(*b*) 8 Co. 118.
(*c*) Hob. 87.
(*d*) 12 Mod. 687.
(*e*) Bacon's Works, vi. 128.

it is so far void. The courts of justice have a right, and are in duty bound, to bring every law to the test of the Constitution, and to regard the Constitution, first of the United States, and then of their own state, as the paramount or supreme law, to which every inferior or derivative power and regulation must conform. The Constitution is the act of the people, speaking in their original character, and defining the permanent conditions of the social alliance; and there can be no doubt on the point with that every act of the legislative power, contrary to the true intent and meaning of the Constitution, is absolutely null and void. (*x*)

(*x*) All statutes are presumably constitutional. Grenada County Supervisors *v.* Brogden, 112 U. S. 261. A statute is not unconstitutional simply because it appears to the court not to conform to the general theory upon which the government is founded or the spirit of our institutions. Reeves *v.* Corning, 51 Fed. Rep. 774; Forsythe *v.* Hammond City, 68 id. 774. The courts will not inquire into the question whether, in enacting a law, the legislature had sufficient information or was misled by false representations. Farmers' Loan & T. Co. *v.* Chicago, &c. Ry. Co., 39 Fed. Rep. 143; Soon Hing *v.* Crowley, 113 U. S. 703, 710.

The courts cannot annul a statute on the ground that its passage was procured by fraud. See Carr *v.* Coke (N. C.), 22 S. E. Rep. 16; Wyatt *v.* Wheeler & Wilson M. Co., id. 120; 29 Am. L. Rev. 734. So the motives of the legislature do not affect the validity of its laws. Mayor of Baltimore *v.* Board of Police, 15 Md. 376; Barbier *v.* Connolly, 113 U. S. 27; Soon Hing *v.* Crowley, id. 703; People *v.* Glenn County, 100 Cal. 419; Parker *v.* State, 132 Ind. 419; Wichita *v.* Burleigh, 36 Kansas, 34. When a statute is enacted in accordance with the requirements of the Constitution, questions relating to the observance of legislative procedure are for the legislature and not for the courts. Lyons *v.* Woods, 153 U. S. 649; Hunt *v.* Wright, 70 Miss. 298; McDonald *v.* State, 80 Wis. 407; *In re* Ryan, id. 414; Pelt *v.* Payne, 60 Ark. 637; State *v.* Jones, 6 Wash. 452. A statute which was unconstitutional when enacted, is not reviewed and made effective by a subsequent change in the Constitution authorizing such legislation. Comstock Mill Co. *v.* Allen, 21 Nev. 325. If unconstitutional only in certain sections, which are separable from the other sections and are made valid by amendment, the whole becomes constitutional as if re-enacted. Baldwin *v.* Frank, 120 U. S. 678; Presser *v.* Illinois, 116 U. S. 252; Pollock *v.* Farmers' L. & T. Co., 158 U. S. 601; State *v.* Cincinnati (Ohio), 40 N. E. Rep. 508.

A person who voluntarily asks for the benefit of a statute cannot in the same proceeding aver its unconstitutionality: Collier *v.* Morrow, 90 Ga. 148; nor can one who has procured the passing of a special statute. Treasurer *v.* Martin, 50 Ohio St. 197. A statute which is constitutionally invalid, cannot be ratified and made valid by a constitutional amendment. State *v.* Tufly, 20 Nev. 427.

The legislature cannot make its laws dependent upon their acceptance by a majority vote of the people. State *v.* Hayes, 61 N. H. 264; Justices' Opinion, 160 Mass. 586; 23 L. R. A. 113, and note; see Armstrong *v.* Traylor, 87 Texas, 598. The legislature cannot be compelled to enact laws on a certain subject, though the State constitution requires it. *In re* State Census (S. D.), 62 N. W. Rep. 129.

A State statute yields to a Federal

2. Power of the Judiciary to declare them Void. — The judicial department is the proper power in the government to determine whether a statute be or be not constitutional. The interpretation or construction of the Constitution is as much a judicial act, and requires the exercise of the same legal discretion, as the interpretation or construction of a law. To contend that the courts of justice must obey the requisitions of an act of the legislature when it appears to them to have been passed in violation of the Constitution, would be to contend that the law was superior to the Constitution, and that the judges had no right to look into it, and regard it as a paramount law. It would be rendering the power of the agent greater than that of his principal, and be declaring, that the will of only one concurrent and co-ordinate department of the subordinate authorities under the Constitution was absolute over the other departments, and competent to control, according to its own will and pleasure, the whole fabric of the government, and the fundamental laws on which it rested. The attempt to impose restraints upon the exercise of the legislative power would be fruitless, if the constitutional provisions were

left without any power in the government to guard *450* and enforce them. From the mass of powers necessarily vested in the legislature, and the active and sovereign nature of those powers; from the numerous bodies of which the legislature is composed, the popular sympathies which it excites, and its immediate dependence upon the people by the means of frequent periodical elections, it follows that the legislative department of the government will have a decided superiority of influence. It is constantly acting upon all the great interests in society, and agitating its hopes and fears. It is liable to be constantly swayed by popular prejudice and passion, and it is difficult to keep it from pressing with injurious weight upon the constitutional rights and privileges of the other departments. An independent judiciary, venerable by its gravity, its dignity, and its wisdom, and deliberating with entire serenity and moderation, is peculiarly fitted for the exalted duty of expounding the Constitution, and trying the validity of statutes by that standard. It is only by the free exercise of this power that courts of justice are enabled to repel assaults, and to protect every part of the

statute upon the same subject when it is competent for Congress to enact the latter. Gulf, &c. Ry. Co. *v.* Hefley, 158 U. S. 98.

government, and every member of the community, from undue and destructive innovations upon their chartered rights. (*a*)

It has accordingly become a settled principle in the legal polity of this country, that it belongs to the judicial power, as a matter of right and of duty, to declare every act of the legislature, made in violation of the Constitution, or of any provision of it, null and void. (*x*) The progress of this doctrine, and the manner in which it has been discussed and established, is worthy of notice. It had been very ably examined in the Federalist, (*b*) and its solidity vindicated by unanswerable arguments; but it was not until the year 1792 that it seems to have received a judicial consideration.[1]

(*a*) M. De Tocqueville is of opinion, that if the free institutions of America are to be destroyed, it will be owing to the tyranny of majorities, driving minorities to desperation. The majority constitutes public opinion, which becomes a tyrant, and controls freedom of discussion and independence of mind. This is his view of the question, and English writers on the institutions of society in this country have expressed the same opinion. If there was no check upon the tyranny of legislative majorities, the prospect before us would be gloomy in the extreme. But in addition to the indirect checks of the liberty of the press, and of popular instruction and of manners, religion, and local institutions, there are fundamental rights declared in the constitutions, and there are constitutional checks upon the arbitrary will of majorities confided to the integrity and independence of the judicial department. M. De Tocqueville seems to be deeply impressed with the dangers in a democracy, of the corrupting and controlling power of disciplined faction, and well he may be. The most dangerous and tyrannical of all crafts is party or political craft. The equal rights of a minor party are disregarded in the animated competitions for power; and if it were not for the checks and barriers to which I have alluded, they would fall a sacrifice to the passions of fierce and vindictive majorities. See Tocqueville's De la Démocratie en Amérique, ii. c. 15. The whole work is interesting, startling, profound, liberal, and instructive. The author is remarkably fearless, candid, and unprejudiced in his discussions and reflections.

(*b*) No. 78.

[1] In Den *dem.* Bayard *v.* Singleton, Martin (N. C.), 48, citizens of the United States brought an ejectment for lands held by the defendant under a conveyance from a commissioner of forfeited estates. An act of the *state* legislature required the courts, in all cases where the defendant made affidavit that he held the disputed property under a sale from such a commissioner, to dismiss the suit on motion. The defendant made such an affidavit, and moved that the suit be dismissed. At May term, 1787, "the court, after every reasonable endeavor had been used in vain for avoiding a disagreeable difference between the legislature and the judicial powers of the state, at length, with much apparent reluctance, but with great deliberation and firmness, gave their opinion separately, but unanimously, for overruling the aforementioned motion," on the ground that the act was unconstitutional and void as depriving the citizen of his right to a trial by jury.

(*x*) See *supra*, 296, note (*x*); Thayer's Cases on Const. Law, 146.

In *Hayburn's Case*, which came before the Circuit Court of the United States for the District of New York, in April, 1791, *451 the judges proceeded with the utmost delicacy and *caution to declare an act of Congress, assigning ministerial duties to the circuit courts, to be unconstitutional. The court laid down the position, that Congress cannot constitutionally assign to the judicial power any duties which are not strictly judicial; and that the act in question was not obligatory upon the court. But they nevertheless proceeded, voluntarily and *ex gratia*, as commissioners, to execute the duties of the act.

In Pennsylvania and North Carolina, the circuit courts of the United States, within those districts, equally held the act not binding upon them, because the legislature had no right or power to assign to them duties not judicial; but they were not so accommodating as the Circuit Court of New York, for they declined to act under the law in any capacity. (*a*)

In 1792, the Supreme Court of South Carolina, in the case of *Bowman* v. *Middleton*, (*b*) went further, and set aside an act of the colony legislature, as being against common right and the principles of *magna charta*, for it took away the freehold of one man and vested it in another, without any compensation, or any previous attempt to determine the right. They declared the act to be *ipso facto* void, and that no length of time could give it validity. This was not strictly a question arising upon any special provision of the state constitution; but the court proceeded upon those great fundamental principles which support all government and property, and which have been supposed by many judges in England to be sufficient to check and control the regulations of an act of Parliament. The next case in which the power of the judiciary to disregard or set aside a statute for being repugnant to the Constitution, was one that came before Judge Paterson, at Philadelphia, in April, 1795. (*c*) He asserted the *452 duty of the court, and the paramount authority *of the Constitution, in remarkably clear and decided language. That was a case of an act of Pennsylvania, which he held to be unconstitutional, and not binding. He insisted that the Constitution was certain and fixed, and contained the permanent will of the people, and was the supreme law, and paramount to the

(*a*) 2 Dallas, 410, 411, 412. (*b*) 1 Bay, 252.
(*c*) Van Horne *v.* Dorrance, 2 Dallas, 304.

power of the legislature, and could only be revoked or altered by the authority that made it; that the legislature was the creature of the Constitution, and owed its existence to the Constitution, and derived its powers from the Constitution, and all its acts must be conformable to it, or else they will be void.

The same question afterwards arose before the Supreme Court of South Carolina, in the case of *Lindsay* v. *The Charleston Commissioners*, (*a*) and the power of the legislature to take private property for necessary public purposes, as for a public street, was freely discussed; and though the judges were equally divided on the question whether it was a case in which the party was entitled to compensation, those who held him so entitled held also that the law was unconstitutional and inoperative until the compensation was made. The judges, in exercising that high authority, claimed to be only the administrators of the public will; and the law was void, not because the judges had any control over the legislative power, but because the will of the people, declared in the Constitution, was paramount to that of their representatives expressed in the law. In *Whittington* v. *Polk*, (*b*) it was decided, in 1802, by the general court of Maryland, with great clearness and force, that an act of the legislature repugnant to the Constitution was void, and that the courts had a right to determine when it was so void.

Hitherto this question, as we have seen, was confined to some of the state courts, and to the subordinate or circuit courts of the United States. But in *Marbury* v. *Madison*, (*c*) the subject was brought under the consideration * of the * 453 Supreme Court of the United States, and received a clear and elaborate discussion. The power and duty of the judiciary to disregard an unconstitutional act of Congress, or of any state legislature, were declared, in an argument approaching to the precision and certainty of a mathematical demonstration.

The question, said the chief justice, was, whether an act repugnant to the Constitution can become a law of the land, and it was one deeply interesting to the United States. The powers of the legislature are defined and limited by a written Constitution. But to what purpose is that limitation, if those limits may at any time be passed? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine

(*a*) 2 Bay, 38. (*b*) 1 Harr. & Johns. 236. (*c*) 1 Cranch, 137.

the persons on whom they are imposed, and if acts prohibited, and acts allowed, are of equal obligation. If the Constitution does not control any legislative act repugnant to it, then the legislature may alter the Constitution by an ordinary act. The theory of every government, with a written constitution, forming the fundamental and paramount law of the nation, must be, that an act of the legislature repugnant to the Constitution is void. If void, it cannot bind the courts, and oblige them to give it effect; for this would be to overthrow in fact what was established in theory, and to make that operative in law which is not law. It is the province and the duty of the judicial department to say what the law is; and if two laws conflict with each other, to decide on the operation of each. So if the law be in opposition to the Constitution, and both apply to a particular case, the court must either decide the case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law. If the Constitution be superior to an act of the legislature, the courts must decide between these conflicting rules; and how can they close their eyes on the Constitution, and see only the law?

This great question may be regarded as now finally settled, and I consider it to be one of the most interesting * 454 * points in favor of constitutional liberty, and of the security of property, in this country, that has ever been judicially determined. (*a*) There never was any doubt or difficulty in New York, in respect to the competency of the courts to declare a statute unconstitutional, when it clearly appeared to be so. Thus, in the case of *The People* v. *Platt*, (*b*) the Supreme

(*a*) See decisions in the state courts to the same point, in 1 N. H. 199; 12 Serg. & Rawle, 330, 339; Charlton, [175,] 176; 1 Harr. & Johns. 236; 1 Hayw. 28; 2 Hayw. 310, 374; 1 Murphy, 58; 3 Desaus. 476; 1 Const. R. [Treadway] (S. C.) 267; Le Breton *v.* Morgan, 16 Martin (La.), 138; Hoke *v.* Henderson, 4 Dev. (N. C.) 7. When a law requires a constitutional majority of more than a mere numeral majority, the courts of justice may look beyond the law into the proceedings of the legislature, to see that the prerequisites have been complied with, and that it has passed by the constitutional majorities. The State *v.* McBride, 4 Mo. 303. But this last point was left in doubt, in B. & N. F. Railroad *v.* City of Buffalo, 5 Hill (N. Y.), 209. [So they may to determine the date of an act. Thus, extrinsic evidence of the year in which an act was signed, "Approved, December 24, Abraham Lincoln," was held admissible. Gardner *v.* The Collector, 6 Wall. 499, citing Purdy *v.* The People, 4 Hill, 384; De Bow *v.* The People, 1 Denio, 9, and other cases.]

(*b*) 17 Johns. 195.

Court held that certain statutes affecting the right of Z. Platt and his assigns to the exclusive enjoyment of the river Saranac were in violation of vested rights under his patent, and so far the court held them to be unconstitutional, inoperative, and void. The control which the judicial power of the state had, until the year 1823, over the passing of laws, by the institution of the *council of revision*, anticipated, in a great degree, the necessity of this exercise of duty. A law containing unconstitutional provisions was not likely to escape the notice and objection of the council of revision; and the records of that body will show that many a bill which had heedlessly passed the two houses of the legislature was objected to and defeated, on constitutional grounds. The records to which I refer are replete with the assertion of salutary and sound principles of public law and constitutional policy, and they will for ever remain a monument of the wisdom, firmness, and integrity of the council. (*c*)

3. When a Statute takes effect. — A statute, when duly made, takes effect from its date, when no time is fixed, and this is now the settled rule. It was so declared by the Supreme Court of the United States in *Matthews* v. *Zane*, (*d*) and it was likewise so adjudged in * the Circuit Court in Massachusetts, * 455 in the case of *The Brig Ann.* (*a*) I apprehend that the same rule prevails in the courts of the several states, and that it cannot be admitted that a statute shall, by any fiction or relation, have any effect before it was actually passed. A retroactive statute would partake in its character of the mischiefs of an *ex post facto* law, as to all cases of crimes and penalties; and in every other case relating to contracts or property, it would be

(*c*) An act of Congress having given to the Secretary of the Treasury the right of appeal from the collector of the customs, on his decision relative to unascertained duties, or duties paid under a protest, it was held that the aggrieved merchant was confined to that remedy, and could not sustain a suit at law against the collector. Cary *v.* Curtis, 3 How. 236; [Curtis *v.* Fiedler, 2 Black, 461.] The strong objection to the decision is, that it takes the final construction of statute law from the established courts, and places it in an executive officer, holding at the pleasure of the President. It is the common-law right of the citizen to appeal to the courts, on the authority of laws, and to seek there redress from wrong and oppression. The decision of the same court, in Bend *v.* Hoyt, 13 Peters, 263, recognized principles that seem to be at variance with the above decision.

(*d*) 7 Wheaton, 164.

(*a*) 1 Gall. 62; [1 Fed. Cas. 927.] The same rule is declared in New Jersey by statute. Elmer's Digest, 534.

against every sound principle. It would come within the reach of the doctrine, that a statute is not to have a retrospective effect; and which doctrine was very much discussed in the case of *Dash* v. *Van Kleeck*, (*b*) and shown to be founded not only in English law, but on the principles of general jurisprudence. (*c*) A retrospective statute, affecting and changing vested rights, is very generally considered, in this country, as founded on unconstitutional principles, and consequently inoperative and void. (*d*) [1] But this doctrine is not understood to apply to re-

(*b*) 7 Johns. 477.

(*c*) Nemo potest mutare consilium suum in alterius injuriam, Dig. 50. 17. 75; Taylor's Elements of the Civil Law, 168; Code, 1. 14. 7; Bracton, 1, 4, fo. 228; Code Napoleon, art. 2.

(*d*) Tennessee Bill of Rights, art. 20; New Hampshire Bill of Rights, art. 23; Osborne *v.* Huger, 1 Bay, 179; Ogden *v.* Blackledge, 2 Cranch, 272; Bedford *v.* Shilling, 4 Serg. & Rawle, 401; Duncan, J., in Eakin *v.* Raub, 12 id. 363–372; Society *v.* Wheeler, 2 Gall. 105; Washington, J., in Society for Propagating the Gospel *v.* New Haven, 8 Wheaton, 493; Merrill *v.* Sherburne, 1 N. H. 199; Ward *v.* Barnard, 1 Aikens, 121; Brunswick *v.* Litchfield, 2 Greenl. 28; Proprietors of Ken. Pur. *v.* Laboree, ib. 275; Story, J., in Wilkinson *v.* Leland, 2 Peters, 657, 658; Lewis *v.* Brackenridge, 1 Black. (Ind.) 220; Jones *v.* Wootten, 1 Har. (Del.) 77; Forsyth *v.* Marbury, R. M. Charlton, 333; Boyce *v.* Holmes, 2 Ala. 54; Williamson *v.* Field, 2 Sandf. Ch. 534. [The following are examples of curative statutes held valid. Randall *v.* Kreiger, 23 Wall. 137; Weed *v.* Donovan, 114 Mass. 181. Statutes changing the remedy only have been held valid. Wellshear *v.* Kelley, 69 Mo. 343; Railroad Co. *v.* Commissioners, 35 Ohio St. 1. See Simpson *v.* City Savings Bank, 56 N. H. 466. The legislature cannot make a contract where there was none, N. Y., &c. R. R. Co. *v.* Van Horn, 57 N. Y. 473; nor validate a transaction which the courts have held void, Forster *v.* Forster, 129 Mass. 559 (where the cases are collected and classified); nor validate void judicial proceedings, Maxwell *v.* Goetschius, 40 N. J. L. 383; Lane *v.* Nelson, 79 Pa. St. 407. — B.]

[1] *Retrospective Laws.* — A retrospective state law is not, as such, contrary to the Constitution of the United States. 456, n. (*c*); Baltimore and Susquehanna R. R. *v.* Nesbit, 10 How. 395; Locke *v.* New Orleans, 4 Wall. 172; Drehman *v.* Stifle, 8 Wall. 595, 603. Laws curing defects have been held valid in many cases. Thus, in case of an assessment made under an ordinance void for informality, Schenley *v.* Commonwealth, 36 Penn. St. 29, 57; see Miller *v.* Graham, 17 Ohio St. 1; Abbott *v.* Lindenbower, 42 Mo. 162; Conway *v.* Cable, 37 Ill. 82; of a deed made in good faith, but to the wrong person, Kearney *v.* Taylor, 15 How. 494; of contracts partially invalid for usury, Savings Bank *v.* Allen, 28 Conn. 97; even, in one case, of a conveyance of a married woman's land, void as to her. Goshorn *v.* Purcell, 11 Ohio St. 641. See further, Thomson *v.* Lee County, 3 Wall. 327; Shaw *v.* Norfolk County R. R., 5 Gray, 162, 180. On the other hand, in Hasbrouck *v.* Milwaukee, 13 Wis. 37, it was held, and it would seem on sound reason, that a contract of a municipal corporation, void as *ultra vires*, could not be ratified by the legislature so as to impose a burden on the corporation without its assent.

The constitutions of some states ex-

medial statutes, which may be of a retrospective nature, provided they do not impair contracts, or disturb absolute vested rights, and only go to confirm rights already existing, and in furtherance of the remedy, by curing defects, and adding to the means of *enforcing existing obligations. (a) Such stat- *456

(a) Duncan, J., in Underwood *v.* Lilly, 10 Serg. & Rawle, 101 ; Tate *v.* Stooltzfoos, 16 id. 35 ; Bleakney *v.* F. & M. Bank, 17 id. 64 ; Hepburn *v.* Curts, 7 Watts, 300 ; Foster *v.* Essex Bank, 16 Mass. 245 ; Locke *v.* Dane, 9 id. 360 ; Oriental Bank *v.* Freese, 18 Me. 109 ; Townsend *v.* Townsend, Peck (Tenn.), 16, 17 ; ib. 266 ; State *v.* Bermudez, 22 La. 355. In Patin *v.* Prejean, 7 La. 301, it was admitted that rights acquired under a contract could not be affected or modified by a subsequent statute ; but then it was said that the means of enforcing or insuring the enjoyment of such rights might be extended or restricted by the legislature, as circumstances may require. This is a loose and dangerous admission. The language of the Supreme Court of New York, in Butler *v.* Palmer, 1 Hill, 325, is equally so ; and it seems to be there conceded, that the legislature has unlimited power to interfere with vested rights, unless they be saved by some restriction to be found in the federal or state constitution ! ! Ch. J. Marshall, in Sturges *v.* Crowninshield, 4 Wheaton, 200, 207, spoke on this subject in a general and latitudinary manner, which was rather hazardous. He says, that the distinction between the *obligation* of a contract and the *remedy* given to enforce that obligation exists in the nature of things, and that without impairing the obligation of the contract, the remedy may be modified as the wisdom of the nation shall direct. Imprisonment of the debtor is no part of the contract, and he may be released from imprisonment by the legislature, without impairing the obligation. So statutes of limitation relate to the remedies. It, however, seems to me, that to lessen or take away from the extent and efficacy of the remedy to enforce the contract, legally existing when the contract was made, impairs its value and obligation. The Supreme Court of the United States, in Mason *v.* Haile, 12 Wheaton, 378, adopted and established the above *dictum* of Ch. J. Marshall, but not without a frank and just objection

pressly prohibit retrospective laws. See Rich *v.* Flanders, 39 N. H. 304 ; Goshorn *v.* Purcell, 11 Ohio St. 641 ; De Cordova *v.* Galveston, 4 Texas, 470. And it is always laid down as a rule of construction that, to avoid injustice or unconstitutionality, a statute is to be taken as prospective only, unless its language is inconsistent with that interpretation. [9 Q. B. D. 672 ;] McEwen *v.* Den, 24 How. 242 ; Quackenbush *v.* Danks, 1 Denio, 128 ; s. c. 3 Denio, 594 ; 1 Comst. 129 ; Atkinson *v.* Dunlap, 50 Maine, 111 ; Harvey *v.* Tyler, 2 Wall. 328, 347 ; Plumb *v.* Sawyer, 21 Conn. 351 ; Taylor *v.* Keeler, 30 Conn. 324, 325 ; Torrey *v.* Corliss, 33 Maine, 333 ; Hopkins *v.* Jones, 22 Ind. 310 ; Seamans *v.* Carter, 15 Wis. 548 ; Boston & Maine R. R. *v.* Cilley, 44 N. H. 578 ; Hannum *v.* Bank of Tennessee, 1 Coldw. 398 ; Broom's Legal Maxims, *Nova constitutio futuris formam imponere debet non præteritis.* But see Pardo *v.* Bingham, L. R. 4 Ch. 735.

Further restrictions are sometimes imposed by the state constitutions forbidding the legislature to exercise judicial functions. On this ground it has been held, for instance, that the legislature cannot confirm and declare valid proceedings *in invitum* in insolvency held before a person having no jurisdiction, which the supreme court of the state had adjudged to be void. Denny *v.* Mattoon, 2 Allen, 361. See also Richards *v.* Rote, 68 Penn. St. 48.

utes have been held valid when clearly just and reasonable, and conducive to the general welfare, even though they might operate in a degree upon existing rights, as a statute to confirm former marriages defectively celebrated, or a sale of lands defectively made or acknowledged. The legal rights affected in those cases by the statutes were deemed to have been vested subject to the equity existing against them, and which the statutes recognized and enforced. (*b*) But the cases cannot be extended beyond the circumstances on which they repose, without putting in jeopardy the energy and safety of the general principles. (*c*)

on the part of Mr. Justice Washington. He observed, that the great and intelligible principle upon which the cases of Sturges *v.* Crowninshield and Ogden *v.* Saunders were decided, was, that a *retrospective* state law, so far as it operated to discharge or vary the terms of an existing contract, impaired its obligation, and that a *prospective* law in its operation had not that effect; and that in the last case cited this principle was subverted, and the distinction between retrospective and prospective laws, in their application to contracts, disregarded, and that to abolish imprisonment for debt, and apply it to existing contracts, impaired their obligation. In the subsequent case of Jackson *v.* Lamphire, 3 Peters, 280, it was observed that state legislatures had the undoubted right to pass recording acts, by which the elder grantee should be postponed to a younger, if the prior deed was not recorded within a limited time. They have the like power to pass limitation laws affecting the time of the remedy on existing contracts. [Curtis *v.* Whitney, 13 Wall. 68; *ante*, 419, n. 1.]

(*b*) Goshen *v.* Stonington, 4 Conn. 209; Wilkinson *v.* Leland, 2 Peters, 627; Langdon *v.* Strong, 2 Vermont, 234; Watson *v.* Mercer, 8 Peters, 88; 3 Story's Comm. on the Constitution, 267.

(*c*) *Retrospective* laws, as used in the constitutions of Tennessee, North Carolina, and Maryland, mean laws impairing the obligation of contracts. Peck (Tenn.), 17. The Supreme Court of the United States, in Satterlee *v.* Matthewson, 2 Peters, 413, and in Watson *v.* Mercer, 8 id. 110, declared that the Constitution of the United States did not prohibit the states from passing retrospective laws, devesting antecedent vested rights of property, provided such laws did not impair the obligation of contracts, or partake of the character of *ex post facto* laws. The same doctrine was declared by the Chief Justice of the United States, in Charles River Bridge *v.* Warren Bridge, 11 Peters, 539, 540. But though the Constitution of the United States does not reach such state laws, they remain, nevertheless, to be in most cases strongly condemned, as being contrary to right and justice.

It seems to be settled, as the sense of the courts of justice in this country, that the legislature cannot pass any *declaratory* law, or act declaratory of what the law was before its passage, so as to give it any binding weight with the courts. It is only evidence of the sense of the legislature as to the pre-existing law. (See the case of the acts alluded to, *post*, ii. 23, 24.) The powers of government in this country are distributed in departments, and each department is confined within its constitutional limits. The power that makes is not the power to construe the law. That latter trust belongs to the judicial department exclusively. Kent, Ch. J., in Jackson *v.* Phelps, 3 Caines, 69; Ogden *v.* Blackledge, 2 Cranch, 272; Jones *v.* Wootten, 1 Harr. (Del.) 77; Field *v.* The People, 2 Scam. (Ill.) 79; Cotton *v.* Brien, 6 Rob. (La.) 115. When

The English rule formerly was, that if no period was fixed by the statute itself, it took effect by relation, from the first day of the session in which the act was passed, and which might be some weeks, if not months, before the act received the royal sanction, or even before it had been introduced into Parliament. (*d*) This was an extraordinary instance of the doctrine of relation, working gross injustice and absurdity; and yet we find the rule declared and uniformly adhered to, from the time of Henry VI. (*e*) All the judges agreed, in the case of *Partridge* v. *Strange*, in the 6th Edward VI., (*f*) hat the statute was to be accounted in law a perfect act from the first day of the session; and all persons * were to be punished for an offence done against it * 457 after the first day of the session, unless a certain time was appointed when the act should take effect. In the case of *The King* v. *Thurston*, (*a*) this doctrine of carrying a statute back by relation to the first day of the session was admitted in the K. B.; though the consequence of it was to render an act murder which would not have been so without such relation. The case of *The Attorney-General* v. *Panter* (*b*) is another strong instance of the application of this rigorous and unjust rule of the common law, even at so late and enlightened a period of the law as the year 1772. An act for laying a duty on the exportation of rice *thereafter to be exported*, received the royal assent on the 29th of June, 1767, and on the 10th of June of that year the defendants had exported rice. After the act passed, a duty of one hundred and fifteen pounds was demanded upon the prior exportation, and it was adjudged, in the Irish Court of Exchequer, to be payable. The cause was carried by appeal to the British House of Lords, on the ground of the palpable injustice of punishing the party for an act innocent and lawful when it is done; but the decree was affirmed, upon the opinion of the twelve judges, that the statute,

Lord Bacon composed his admirable aphorisms, De Fontibus Juris, he assumed the proposition that declaratory statutes communicated an interpretation that was as efficacious as if it had been contemporary with the passage of the statute. But in his age, the partition of power among departments was not accurately understood, or precisely defined, or constitutionally limited; and he held, notwithstanding, that they ought not to be passed, except in cases in which a retrospective operation to a statute would be just, — leges declaratorias ne ordinato nisi in casibus ubi leges cum justicia retrospicere possint. Bacon's Works, vii. 450, Aphorism 51.

(*d*) 4 Inst. 25. (*e*) 33 Hen. VI. 18; Bro. Exposition del Terms, 33.
(*f*) 1 Plow. 79. (*a*) 1 Lev. 91. (*b*) 6 Bro. P. C. 553.

by legal relation, commenced from the first day of the session. The K. B., also, in *Latless* v. *Holmes*, (*c*) considered the rule to be too well settled to be shaken, and that the court could not take notice of the great hardship of the case. The voice of reason at last prevailed; and by the statute of 33 Geo. III. c. 13, it was declared that statutes are to have effect only from the time they receive the royal assent; and the former rule was abolished, to use the words of the statute, by reason of "its great and manifest injustice."

There is a good deal of hardship in the rule as it now stands, both here and in England; for a statute is to operate from *458 the very day it passes, if the law itself does not *establish the time. It is impossible in any state, and particularly in such a wide-spread dominion as that of the United States, to have notice of the existence of the law, until some time after it has passed. It would be no more than reasonable and just, that the statute should not be deemed to operate upon the persons and property of individuals, or impose pains and penalties for acts done in contravention of it, until the law was duly promulgated. The rule, however, is deemed to be fixed beyond the power of judicial control, and no time is allowed for the publication of the law before it operates, when the statute itself gives no time. Thus, in the case of *The Brig Ann*, (*a*) the vessel was libelled and condemned for sailing from Newburyport, in Massachusetts, on the 12th of January, 1808, contrary to the act of Congress of the 9th of January, 1808, though it was admitted the act was not known in Newburyport on the day the brig sailed. The court admitted that the objection to the forfeiture of the brig was founded on the principles of good sense and natural equity; and that unless such time be allowed as would enable the party, with reasonable diligence, to ascertain the existence of the law, an innocent man might be punished in his person and property for an act which was innocent, for aught he knew, or could by possibility have known, when he did it. (*b*)

(*c*) 4 T. R. 660. [See Tomlinson *v.* Bullock, 4 Q. B. D. 230. A proclamation by the President was held to go into effect when signed and sealed, in Lapeyre *v.* United States, 17 Wall. 191. See also United States *v.* Norton, 97 U. S. 164. — B.]

(*a*) 1 Gall. 62.

(*b*) Judge Livingston, in 1810, held that the embargo law of December, 1807, did not operate upon a vessel which sailed from Georgia on the 15th January, 1808, before notice of the act had arrived. 1 Paine, 23.

The Code Napoleon (*c*) adopted the true rule on this subject. It declared that laws were binding from the moment their promulgation could be known, and that the promulgation should be considered as known in the department of the imperial residence one day after that promulgation, and in each of the other departments of the French empire * after the expiration of * 459 the same space of time, augmented by as many days as there were distances of twenty leagues between the seat of government and the place. The New York Revised Statutes (*a*) have also declared the very equitable rule that every law, unless a different time be prescribed therein, takes effect throughout the state on, and not before, the 20th day after the day of its final passage. (*b*)

If the statute be constitutional in its character, and has duly gone into operation, the next inquiry is respecting its meaning; and this leads us to a consideration of the established rules of construction, by which its sense and operation are to be understood.

4. Acts, Public and Private. — There is a material distinction between public and private statutes, and the books abound with cases explaining this distinction in its application to particular statutes. It is sometimes difficult to draw the line between a public and private act, for statutes frequently relate to matters and things that are partly public and partly private. The most comprehensive, if not the most precise, definition in the English books is, that public acts relate to the kingdom at large, and private acts concern the particular interest or benefit of certain individuals or of particular classes of men. (*c*) Generally speaking, statutes are public; and a private statute may rather be considered an exception to a general rule. It operates upon a particular thing or private persons. It is said not to bind or include strangers in interest to its provisions, and they are not bound to take notice of a private act, even though there be no general saving clause of the rights of third persons. This is a safe and

(*c*) Art. 1.

(*a*) Vol. I. 157, sec. 12.

(*b*) By the Revised Statutes of Massachusetts, in 1836, it is the thirtieth day after, and by the constitution of Mississippi, as declared in 1833, it is sixty days thereafter. [See Bishop on Written Laws for similar provisions in other states.]

(*c*) Dwarris on Statutes [2d ed. 464]; Gilbert on Ev. 39. [See Holland on the Form of the Law, London, Butterworths, 1870, *passim*, esp. p. 163.]

just rule of construction; and it was adopted by the English courts in very early times, and does great credit to their liberality and spirit of justice. (*d*) It is supported by the opinion of Sir Matthew Hale, in *Lucy* v. *Levington*, (*e*) where he lays down the rule to be, that though every man be so far a party to a private act of Parliament as not to gainsay it, yet he is not so far * 460 a party as to give up his interest. To take the * case stated by Sir Matthew Hale, suppose a statute recites *that whereas there was a controversy concerning land between A and B, and enacts that A shall enjoy it*, this would not bind the interest of third persons in that land, because they are not strictly parties to the act, but strangers, and it would be manifest injustice that the statute should affect them. This rule, as to the limitation of the operation of private statutes, was adopted by the Supreme Court of New York, and afterwards by the Court of Errors, in *Jackson* v. *Catlin*. (*a*)[1] It is likewise a general rule, in the interpretation of statutes limiting rights and interests, not to construe them to embrace the sovereign power or government, unless the same be expressly named therein, or intended by necessary implication. (*b*)

(*d*) 37 Hen. VI. 15; Bro. Parliament, pl. 27; Boswell's Case, 25 & 26 Eliz., cited in Barrington's Case, 8 Co. 138, a. [*Local and Special Laws.* — As to when courts will take notice of, see Aiton *v.* Stephen, 1 App. Cas. 456; Perry *v.* New Orleans, &c. R. R. Co., 55 Ala. 413. Local and special legislation is forbidden by constitutional provision in many states. Van Riper *v.* Parsons, 40 N. J. L. 1; People *v.* Harper, 91 Ill. 357; cases *infra*. For further discussion as to what constitutes special legislation, see Van Riper *v.* Parsons, 40 N. J. L. 123; Sutterly *v.* Camden Common Pleas, 41 N. J. L. 495; Wheeler *v.* Philadelphia, 77 Pa. St. 338; Kerrigan *v.* Force, 68 N. Y. 381. In Gardner *v.* Newark, 40 N. J. L. 297, it is said that the tendency has been to enlarge the class of public acts, and to make it apply to all acts which in any way affect the public at large. So, Village of Winooski *v.* Gokey, 49 Vt. 282. — B.]

(*c*) 1 Vent. 175.

(*a*) 2 Johns. 263; 8 Johns. 520, s. c.

(*b*) 1 Blackst. Comm. 261; Comyns's Dig. tit. Parliament, R. 8; The King *v.* Allen, 15 East, 333; The King *v.* Inhabitants of Cumberland, 6 T. R. 194; Story, J., 2 Mason, 314; Commonwealth *v.* Baldwin, 1 Watts, 54; The People *v.* Rossiter, 4 Cowen, 143; United States *v.* Hewes, U. S. D. C. for Pennsylvania, February, 1840,

[1] McKinnon *v.* Bliss, 21 N. Y. 206; Earl of Shrewsbury *v.* Scott, 6 C. B. N. S. 1, 157. But if a private act in positive and express terms proposes to affect and does affect the rights of parties not before the legislature, a court of law is bound to give effect to the provision. 6 C. B. N. S. 157–160; Edinburgh Railway Co. *v.* Wauchope, 8 Cl. & Fin. 710, 724. It is noticeable that in *ultra vires* cases the English courts are sometimes careful to state that the act of incorporation in question is a public act, of which all are bound to take notice. East Anglian Ry. Co. *v.* Eastern Counties Ry. Co., 11 C. B. 775, 811.

There is another material distinction in respect to public and private statutes. The courts of justice are bound, *ex officio*, to take notice of public acts without their being pleaded, for they are part of the general law of the land, which all persons, and particularly the judges, are presumed to know. Public acts cannot be put in issue by plea. *Nul tiel record* cannot be pleaded to a public statute; the judges are to determine the existence of them

[Crabbe, 307.] In cases of grants by the king, in virtue of his prerogative, the old rule was said to be, that nothing passed without clear and determinate words, and the grant was construed most strongly against the grantee, though the rule was otherwise as to private grants. Stanhope's Case, Hob. 243; Turner & Atkyns B., Hard. 309; Bro. Abr. Patent, pl. 62; 2 Blackst. Comm. 347. But the rule was and is to be taken with much qualifi[illegible]n, and applied to doubtful cases, where a choice is fairly open without any viola[illegible] the apparent objects of the grant. This was the doctrine in Sir John Molyn's Case (6 Co. 5), where it was held that the king's grant should be taken beneficially for the honor of the king and the relief of the subject; and Lord Coke observed in that case on the gravity or wisdom of the ancient sages of the law, who construed the king's grants beneficially, so as not to make any strict or literal construction in subversion of such grants. He also observed, in his commentary on the statute of *quo warranto* (18 Ed. I., 2 Inst. 496, 497), that the king's patents, not only of liberties, but of lands, tenements, and other things, should have no strict or narrow interpretation for the overthrowing of them; but a liberal and favorable construction for the making of them available in law, *usque ad plenitudinem*, for the honor of the king. And it was always conceded in the cases, that if the grant was declared to be made *ex certa scientia et mero motu*, they were to be construed beneficially for the grantee, according to the intent expressed in the grant, and according to the common understanding and proper signification of the words. Alton Wood's Case, 1 Co. 40, b. In the case of Sutton's Hospital (10 Co. 27), the doctrine was, that a grant for a charitable purpose is taken most favorably for the object, and that the usual incidents to a corporation are held to be tacitly annexed to the charter.

And if the royal grant was not in a case of mere bounty or donation, but one founded upon a valuable consideration, the stern rule never applies, and the grant is expounded as a private grant, favorable for the grantee, or rather according to its fair meaning, for the grant is a contract. See a clear and full view of the ancient law on the construction of royal grants, by Mr. Justice Story, in his opinion in Charles River Bridge *v.* Warren Bridge, 11 Peters, 589–598. See also *infra*, ii. 556.

In addition to the restrictions which the common law has imposed upon the operation of private statutes, they are usually laid under special checks by legislative rules, or by law, as to the notice requisite before a private bill can be introduced. See the notice requisite on the application to the legislature of New York for private purposes. N. Y. R. S. 3d ed. i. p. 161. The constitution of New York (art. 7, sec. 9) requires the assent of two thirds of the members elected to each house, to every bill appropriating public moneys or property for private purposes. So the legislature of North Carolina is prohibited by their constitution, as amended in 1835, from passing any private law, without thirty days' previous notice of application for the law. The caution, checks, and course of proceedings, in the English Parliament, on passing private bills, are detailed at large, and with great precision and accuracy, in May's Treatise upon the Law and Proceedings of Parliament, 383–460.

from their own knowledge. (*c*) But they are not bound to take notice of private acts, unless they be specially pleaded, and shown in proof, by the party claiming the effect of them. In England the existence even of a private statute cannot be put in issue to be tried by a jury on the plea of *nul tiel record*, though this may be done in New York under the Revised Statutes. (*d*)

5. Rules for the Interpretation of Statutes. — The title of the act and the preamble to the act are, strictly speaking, no parts of it. (*e*) They may serve to show the general scope and purport of the act, and the inducements which led to its enactment. They may, at times, aid in the construction of it; (*f*) but generally they are loosely and carelessly inserted, and are not safe expositors of the law. The title frequently alludes to the subject-matter of the act only in general or sweeping terms, or it alludes only to a part of the multifarious matter of which the statute is composed. The constitution of New Jersey, in 1844, has added a new and salutary check to multitudinous matter, by declaring (*g*) that every law shall embrace but one object, and that shall be expressed in the title. (*x*) So also in New York, by the revised constitution of 1846, art. 3, sec. 16, no private or local bill shall embrace more than one subject, and that shall be expressed in the title.[2] The title, as it was observed in *United States* v.

(*c*) The Prince's Case, 8 Co. 28, a.
(*d*) Dwarris on Statutes, 520 ; Trotter *v.* Mills, 6 Wend. 612.
(*e*) The King *v.* Williams, 1 W. Bl. 95 ; Mills *v.* Wilkins, 6 Mod. 62.
(*f*) Sutton's Hospital, 10 Co. 23, 24, b ; Boulton *v.* Bull, 2 H. Bl. 463, 500.
(*g*) Art. 4, sec. 7.

[2] The constitutions of many other states contain a similar provision, which, although treated as only directory in California and Ohio, Washington *v.* Murray, 4 Wash. 199 ; Ex parte Maguire, 57 Cal. 604 ; Ex parte Liddell, 93 Cal. 633 ; Ex parte Marx, 99 Cal. 493 ; Ex parte Pfahler, 150 Cal. 71 ; Ex parte Whitwell, 98 Cal. 73 ; Ex parte Wells, 106 Cal. 289 ; Ex parte Ah Peen, 104 Cal. 679 ; Ex parte Ah Pah, 30 Cal. 211 ; Ex parte Ah Shong, 49 Cal. 574 ; Ex parte Ah Yo, 48 Cal. 34 ; Ex parte Ah Tong, 49 Cal. 682 ; Ex parte Ah Jim, 49 Cal. 683 ; Ex parte Ah Fook, 49 Cal. 402 ; Ex parte Ah Pah, 48 Cal. 210 ; Ex parte Ah Peen, 47 Cal. 428 ; Ex parte Ah Yo, 47 Cal. 426 ; Ex parte Ah Fook, 46 Cal. 532 ; Ex parte Ah Pah, 47 Cal. 96 ; Ex parte Ah Fook, 47 Cal. 428

Fisher, (*h*) when taken in connection with other parts, may *assist in removing ambiguities where the intent is *461 not plain; for when the mind labors to discover the intention of the legislature, it seizes everything, even the title, from which aid can be derived. So the preamble may be resorted to in order to ascertain the inducements to the making of the statute; but when the words of the enacting clause are clear and positive, recourse must not be had to the preamble. Notwithstanding that Lord Coke (*a*) considers the preamble as a key to open the understanding of the statute, Mr. Barrington, in his Observations on the Statutes, (*b*) has shown, by many instances, that a statute frequently recites that which is not the real occasion of the law, or states that doubts existed as to the law, when in fact none had existed. The true rule is, as was declared by Mr. J. Buller and Mr. J. Grose, in *Crespigny* v. *Wittenoom*, (*c*) that the preamble may be resorted to in restraint of the generality

(*h*) 2 Cranch, 386.
(*b*) P. 300.
(*a*) Co. Litt. 79, a.
(*c*) 4 T. R. 793.

4 Cal. 388; Pim *v.* Nicholson, 6 Ohio, N. S. 176; Ohio *v.* Covington, 29 Ohio St. 102, is said to have been generally considered as mandatory. Cooley, Const. Lim. c. 4, p. 82; c. 6, p. 150; *post*, 465, n. 1. And it is accordingly laid down that when the title embraces more than one object the whole act will be void, ib. 148; and when the act contained matters not connected with the object named in the title, it has been held to be void as to them, Ryerson *v.* Utley, 16 Mich. 269; Mewherter *v.* Price, 11 Ind. 199; Savannah *v.* Georgia, 4 Ga. 26. [The whole act was held void in State *v.* McCann, 4 Lea, 1, because more was embraced in the act than was referred to in the title. But the better view would seem to be that if the part sufficiently referred to can be separated, it should be held valid. Van Riper *v.* North Plainfield, 43 N. J. L. 349; In the matter of Met. Gas Light Co., 85 N. Y. 526; Jones *v.* Thompson's Exr., 12 Bush, 394. See generally, Montclair *v.* Ramsdell, 107 U. S. 147; Unity *v.* Burrage, 103 U. S. 447; San Antonio *v.* Mehaffey, 96 U. S. 312; Albrecht *v.* State, 8 Tex. App. 216; Dorsey's App., 72 Penn. St. 192; Rader *v.* Township of Union, 39 N. J. L. 509. In construing a statute, the title may be resorted to at least to remove ambiguities in the act. Coomber *v.* Justices of Berks, 9 Q. B. D. 17, 32, 33; In the matter, &c. Village of Middletown, 82 N. Y. 196; In the matter of Boston, &c. Co., 51 Cal. 624. — B.]

The title of an act of Congress has been said to be of especially little weight, owing to the notorious custom of inserting provisions which have nothing to do with the subject-matter of the act as it appears in the title. Hadden *v.* The Collector, 5 Wall. 107. But the reasoning of The Eagle, 8 Wall. 15, 24, looks the other way. [Hadden *v.* The Collector is approved in United States *v.* Union Pac. R. R. Co., 91 U. S. 72, 82.] See Little *v.* Watson, 32 Maine, 214; Commonwealth *v.* Slifer, 53 Penn. St. 71; Ogden *v.* Strong, 2 Paine, 584; Kidder *v.* Stewartstown, 48 N. H. 290, 292.

of the enacting clause, when it would be inconvenient if not restrained, or it may be resorted to in explanation of the enacting clause, if it be doubtful. This is the whole extent of the influence of the title and preamble in the construction of the statute. The true meaning of the statute is generally and properly to be sought from the body of the act itself. But such is the imperfection of human language, and the want of technical skill in the makers of the law, that statutes often give occasion to the most perplexing and distressing doubts and discussions, arising from the ambiguity that attends them. It requires great experience, as well as the command of a perspicuous diction, to frame a law in such clear and precise terms as to secure it from ambiguous expressions, and from all doubt and criticism upon its meaning.

It is an established rule in the exposition of statutes, that the intention of the lawgiver is to be deduced from a view of *462 the whole and of every part of a statute, taken and *compared together. (*a*) The real intention, when accurately ascertained, will always prevail over the literal sense of terms. (*b*) (*x*)

(*a*) Co. Litt. 381, a; Marshall, C. J., 12 Wheaton, 332; Mason *v.* Finch, 2 Scam. 224.

(*b*) Thompson, C. J., in The People *v.* Utica Ins. Co., 15 Johns. 380; Whitney *v.* Whitney, 14 Mass. 92. [It is well settled that a more literal meaning of words in a statute will yield to a less literal, where such meaning is shown by the act itself, viewed with the aid of the outside helps which are allowed to the court, to have been the legislative intent. Caledonian Ry. Co. *v.* North British Ry. Co., 6 App. Cas. 114, *per* Lord Selborne. But it would seem clear that no evidence should be allowed to show a meaning which the words themselves are incapable of bearing; *i. e.*, to show that the legislature intended to enact something else than what they have expressed in the law. Yet the language of some of the courts of this country seems to go almost to this extent. Oates *v.* National Bank, 100 U. S. 239; Perry County *v.* Jefferson County, 94 Ill. 214. But that when the meaning of the words is clear it is conclusive, see Water Commissioners *v.* Brewster, 42 N. J. L. 125; Bentley *v.* Board of Health, 4 Ch. D. 588. Statutes should be construed, where the words permit, so as to work beneficially rather than injuriously; *e. g.*, so as not to take away vested rights. Metropolitan Asylum Dist. *v.* Hill, 6 App. Cas. 193, 208; Dixon *v.* Caledonian, &c. Companies, 5 id. 820, 827. — B.]

(*x*) Every statute is to be so interpreted and applied, so far as its language admits, as not to be inconsistent with the comity of nations or with the established rules of international law. Maxwell on Statutes, 122; Bloxam *v.* Favre, 8 P. D. 101, 107. The state of the law when a statute was enacted may be considered in construing it, but the history of the Act is immaterial when its language is clear. Philipps *v.* Rees, 24 Q. B. D. 17; Reg. *v.* London, id. 213; *Ex parte* Byrne, 20 id. 314; Cooper

When the expression in a statute is special or particular, but the reason is general, the expression should be deemed general. (*c*)

(*c*) 10 Co. 101, b.

v. Adams, [1894] 2 Ch. 557 ; United States *v.* Trans. Mo. F. Co., 58 Fed. Rep. 58. So the policy of a statute is not material if such policy is open to doubt and controversy. Municipal Building Society *v.* Kent, 9 A. C. 273. In interpreting a codified law the earlier law and decisions can only be used to construe provisions which are doubtful, or which have already acquired a technical meaning. Bank of England *v.* Vagliano, [1891], A. C. 107 ; Robinson *v.* Canadian Pac. Ry., [1892] A. C. 481. But in a mere act of consolidation the original provisions have *prima facie* their meaning continued. Mitchell *v.* Simpson, 25 Q. B. D. 183 ; 23 id. 373.

The legislature is presumed to know the decisions existing when a law was enacted. *Ex parte* Kent County Council, [1891] 1 Q. B. 725. The courts, in determining the intent, cannot revert to the views expressed by members of the legislature in debate, or receive testimony from them as to what was intended, although they may consider statements made in debate as to current history, or the special meaning of words employed. United States *v.* Oregon & C. R. Co., 57 Fed. Rep. 426 ; United States *v.* Wilson, 58 id. 768 ; Stewart *v.* Atlanta Beef Co., 93 Ga. 12 ; Sackrider *v.* Supervisors, 79 Mich. 59 ; Cumberland County *v.* Boyd, 113 Penn. St. 52 ; 37 Albany L. J. 428, 449. So the supposed policy of legislature will not prevail against the plain language of a statute. Bate Refrigerating Co. *v.* Sulzberger, 157 U. S. 1 ; Tompkins *v.* First Nat. Bank, 18 N. Y. S. 234. In case of conflict, the enrolled copy of an act of Congress prevails over the printed volume. McLaughlin *v.* Menotti, 105 Cal. 572.

A statute made with one intent cannot be used in construing another statute made with a different intent. Reg. *v.* Income Tax Commissioners, 22 Q. B. D. 296. But the judicial construction given to a particular form of words may be applied to different statutes. Barlow *v.* Teal, 15 Q. B. D. 403. Statutes should be limited in intent to things and persons within the jurisdiction of the legislature. Colquhoun *v.* Heddon, 25 Q. B. D. 129.

Common words have their ordinary popular meaning in a general act ; but in Acts relating to a particular trade, business, or transaction, the words have the meaning given to them therein. Unwin *v.* Hanson, [1891] 2 Q. B. 115 ; Hornsey Local Board *v.* Monarch I. B. Society, 24 Q. B. D. 1 ; Barlow *v.* Ross, id. 381 ; Life Ins. Ass'n *v.* Tucker, 12 id. 186 ; Hough *v.* Windus, id. 224 ; Salmon *v.* Duncombe, 11 A. C. 627 ; Pietermaritzburg *v.* Natal Land Co., 13 id. 478 ; The Dunelm, 9 P. D. 164. A change in the words relating to the same subject-matter is *prima facie* intentional. Brighton Guardians *v.* Strand Union, [1891] 2 Q. B. 156.

In case of doubt, that construction will be adopted which will have the least collateral effect, injurious to third parties, beyond the purpose and policy of the Act: Railton *v.* Wood, 15 A. C. 363 ; or which will not impair rights without compensation : Att.-Gen. *v.* Horner, 14 Q. B. D. 257 ; London, Brighton, & S. C. Ry. *v.* Truman, 11 A. C. 45 ; or which will not enable a person to defeat the obligation of his contract by his own acts. Gowan *v.* Wright, 18 Q. B. D. 201. So a reading will be adopted by which one Act will not conflict with others, if it is reasonably capable of being so read, though the words are not thereby given their ordinary meaning. Reg. *v.* Tunbridge Overseers, 13 Q. B. D. 342. "Or" should be read as "and" only when the context makes that the necessary meaning. Halsbury, L. C., in Mersey Docks *v.* Henderson, 13 A. C. 595,

Scire leges, non hoc est verba earum tenere sed vim ac potestatem, and the reason and intention of the lawgiver will control the

603; United States *v.* Fisk, 3 Wall. 447; Dumont *v.* United States, 98 U. S. 143. In a penal statute "or" will not be given that interpretation when the effect is to aggravate the offence. State *v.* Walters, 97 N. C. 490.

A special section of a statute, which limits the general words of a prior section, governs the latter. *Ex parte* Johnson, [1893] 1 Q. B. 21. In general the whole Act is to be considered together. Colquhoun *v.* Brooks, 14 A. C. 493. Palpable injustice or absurdity will not be deduced from a literal reading when that intention is not manifested by express words. The Duke of Buccleuch, 15 P. D. 86; *Ex parte* Dunn, 23 Q. B. D. 461; Reg. *v.* Clarence, 22 id. 65; Colquhoun *v.* Brooks, 14 A. C. 493; Rector of Holy Trinity Church *v.* United States, 143 U. S. 457, reversing 36 Fed. Rep. 303. But for this purpose a strong case of injustice must appear. *In re* Hall, 21 Q. B. D. 137; Plumstead Board of Works *v.* Spackman, 13 id. 878. New privileges or powers conferred upon a company incorporated for profit will not be extended by implication beyond what is conferred expressly or by necessary inference. Scottish Drainage Co. *v.* Campbell, 14 A. C. 142; Altrincham Union *v.* Cheshire Lines Committee, 15 Q. B. D. 597. So powers conferred upon a local authority will, in case of doubt, be construed to include such only as are necessary to carry out the objects of the statute. Wandsworth Board of Works *v.* United Telephone Co., 13 Q. B. D. 904. A casus omissus will be created by interpretation only in a case of strong necessity. Mersey Docks *v.* Henderson, 13 A. C. 595, 602.

A general expression following certain words, but applicable also to others, applies *prima facie* to all. Great Western Ry. *v.* Swindon & C. Ry., 9 A. C. 787. General expressions in a statute which has a certain and definite scope will, in the absence of a contrary intent clearly indicated, be limited to its object and purpose. United States *v.* Crawford, 6 Mackey, 319; Electro-Magnetic M. & D. Co. *v.* Van Auken, 9 Col. 204. Evidence of the practice of the Legislature as to taking the oath of allegiance was admitted to explain the statutes relating to oaths upon the trial of an information against a member for voting without having taken the oath, in Att.-Gen. *v.* Bradlaugh, 14 Q. B. D. 667. But neither usage nor long-continued practice can be proved to explain statutes relating to tolls. Northam Bridge Co. *v.* The Queen, 55 L. T. 759.

As Americans are historically a religious people by their early grants, constitutions and history, an intention to act against religion will not be imputed to any of our legislatures. Rector of Holy Trinity Church *v.* United States, 143 U. S. 457. The long-continued, uniform practice of the executive department, having the duty to execute a statute, is entitled to great weight in its construction, especially if acquiesced in. Brown *v.* United States, 113 U. S. 568; United States *v.* Philbrick, 120 U. S. 52; Same *v.* Hill, id. 169; Westbrook *v.* Miller, 56 Mich. 244.

Statutory authority to execute certain works includes everything reasonably necessary for their execution. Harrison *v.* Southwalk & V. W. Co., [1891] 2 Ch. 406. Statutory powers conferred upon a corporation, which exist of common right apart from the statute, are interpreted as a prohibition against the exercise of the more extensive rights which the company might have had as an owner. Shipowners' London Ass'n *v.* London & I. D. J. Committee, [1892] 3 Ch. 242. When land or rights are granted by statute for the construction of certain works which necessarily require

strict letter of the law, when the latter would lead to palpable injustice, contradiction, and absurdity. This was the doctrine of Modestinus, Scævola, Paulus, and Ulpianus, the most illustrious commentators on the Roman law.(*d*) When the words are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the objects and the remedy in view; and the intention is to be taken or presumed, according to what is consonant to reason and good discretion. (*e*) These rules, by which the sages of the law, according to Plowden,(*f*) have ever been guided in seeking for the intention of the legislature, are maxims of sound interpretation, which have been accumulated by the experience, and ratified by the approbation of ages.

The words of a statute, if of common use, are to be taken in their natural, plain, obvious, and ordinary signification and import; (*g*) and if technical words are used, they are to be taken in a technical sense, unless it clearly appears from the context, or other parts of the instrument, that the words were intended to be applied differently from their ordinary or their legal acceptation. (*h*) The current of authority at the present day, said Mr. Justice Bronson, (*i*) is in favor of reading statutes according to

(*d*) Dig. 1. 3. 17; ib. lib. 27. 1. 13. 2. Maledicta interpretatio quæ corrodit viscera texti. Lord Coke.

(*e*) 10 Co. 57, b; 3 Co. 7; Plowd. 10, 57, 350, 363; Eyre, C. J., in Boulton *v.* Bull, 2 H. Bl. 490; Marshall, C. J., 9 Wheaton, 189.

(*f*) Plowd. 205.

(*g*) Story, J., 1 Wheaton, 326; Lord Tenterden, 3 B. & Ald. 522.

(*h*) Certainty to a certain intent in general is ordinarily sufficient in the construction of statutes. The words are to be taken in the sense, say the judges in Vermont, that would convey the meaning required, to all men of ordinary discernment alike, and that may be called *certain* without recurring to possible facts which do not appear. Fairlee *v.* Corinth, 9 Vermont, 269.

(*i*) 20 Wendell, 561. In Mallan *v.* May, 13 Mees. & W. 511, the ordinary rule of construction was declared to be, that words were to be construed according to their strict and primary acceptation, unless from the context of the instrument, and the intention of the parties, to be collected from it, they appear to be used in a different sense, or unless in their strict sense they are incapable of being carried into effect.

support, the right to necessary support is implied, if the context does not lead to a contrary construction. London & N. W. Ry. *v.* Evans, [1893] 1 Ch. 16. If a special tribunal created to assess damages is no longer available, the compensation may be determined and enforced by suit. Bentley *v.* Manchester, &c. Ry., [1891] 3 Ch. 222.

the natural and most obvious import of the language, without resorting to subtle and forced constructions, for the purpose of either limiting or extending their operation. A saving clause in a statute is to be rejected, when it is directly repugnant to the purview or body of the act, and could not stand without rendering the act inconsistent and destructive of itself. (*j*) Lord Coke, in *Alton Wood's Case*, (*k*) gives a particular illustration of this rule, by a case which would be false doctrine with us, but which serves to show the force of the rule. Thus, if the manor of Dale be by express words given by statute to the king, saving the right of all persons interested therein, or if the statute vests

the lands of A in the king, saving the rights of A, the * 463 interest of the owner is not * saved, inasmuch as the saving clause is repugnant to the grant; and if it were allowed to operate, it would render the grant void and nugatory. But there is a distinction in some of the books between a saving clause and a proviso in the statute, though the reason of the distinction is not very apparent. It was held by all the barons of the Exchequer, in the case of *The Attorney-General* v. *The Governor, and Company of Chelsea Waterworks* (*a*) that where the proviso of an act of Parliament was directly repugnant to the purview of it, the proviso should stand, and be held a repeal of the purview, because it speaks the last intention of the lawgiver. It was compared to a will, in which the latter part, if inconsistent with the former, supersedes and revokes it. But it may be remarked upon this case of *Fitzgibbon*, that a proviso repugnant to the purview of the statute renders it equally nugatory and void as a repugnant saving clause; and it is difficult to see why the act should be destroyed by the one, and not by the other, or why the proviso and the saving clause, when inconsistent with the body of the act, should not both of them be equally rejected. (*b*)

(*j*) Plowd. 565; 8 Taunt. 13–18. (*k*) 1 Co. 47, a.

(*a*) Fitzg. 195; 4 Geo. II.; [Townsend *v.* Brown, 4 Zabr. 80.]

(*b*) In Savings Institution *v.* Makin, 23 Maine, 360, it was held, in the case which led to a great and able discussion, that a saving clause in a statute, *in the form of a proviso*, restricting in certain cases the operation of the general language of the enacting clause, was not void, though the proviso be repugnant to the general language of the enacting clause. The true principle undoubtedly is, that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and proviso, taken and construed together, is to prevail. If the principal object of the act can be accomplished and stand, under the restriction of the saving clause or proviso, the same is not to be held void for repugnancy.

There is also a technical distinction between a proviso and an exception in a statute. If there be an exception in the enacting clause of a statute, it must be negatived in pleading; but if there be a separate proviso, that need not, and the defendant must show it by way of defence. (*c*)

Several acts *in pari materia*, and relating to the same subject, are to be taken together, and compared, in the construction of them, because they are considered as having one object in view, and as acting upon one system.[1] This rule was declared in the cases of *Rex* v. *Loxdale*, and *The Earl of Ailesbury* v. *Pattison*; (*d*) and the rule applies, though some of the statutes may have expired, or are not referred to in the other acts. The object of the rule is to ascertain and carry into effect the intention; and it is to be inferred *that a code of statutes relating *464 to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. Upon the same principle, whenever a power is given by a statute, everything necessary to the making of it effectual or requisite to attain the end is implied. Quando lex aliquid concedit, concedere videtur et id, per quod devenitur ad illud.

Statutes are likewise to be construed in reference to the principles of the common law;[2] for it is not to be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required. This has been the language of the courts in every age; and when we consider the constant vehement, and exalted eulogy which the ancient sages bestowed upon the common law as the perfection of reason, and the best birthright and noblest inheritance of the subject, we

(*c*) Spieres *v.* Parker, 1 T. R. 141; Abbott, J., 1 B. & Ald. 99; Thibault *v.* Gibson, 12 Mees. & W. 88; ib. 740. The office of a proviso is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of its extent. Story, J., Minis *v.* United States, 15 Peters, 445; Boon *v.* Juliet, 1 Scam. 258.

(*d*) 1 Burr. 445; Doug. 27. See also Vernon's Case, 4 Co. 4; 4 T. R. 447, 450; 5 id. 417; Dwarris on Statutes, 569; Thompson, C. J., 15 Johns. 380, s. P.

[1] Huber *v.* Reily, 53 Penn. St. 112. This is especially so in the case of the revenue laws. United States *v.* Collier, 3 Blatchf. 325.

[2] The rule for the construction of acts of Congress is the same, although there is no common law of the United States. Rice *v.* Railroad Co., 1 Black, 358, 374. See McCool *v.* Smith, ib. 459.

cannot be surprised at the great sanction given to this rule of construction. It was observed by the judges, in the case of *Stowell* v. *Zouche*, (*a*) that it was good for the expositors of a statute to approach as near as they could to the reason of the common law; and the resolution of the barons of the Exchequer, in *Heydon's Case*, (*b*) was to this effect. For the sure and true interpretation of all statutes, whether penal or beneficial, four things are to be considered: What was the common law before the act; what was the mischief against which the common law did not provide; what remedy the Parliament had provided to cure the defect; and the true reason of the remedy. It was held to be the duty of the judges to make such a construction as should repress the mischief and advance the remedy. (*c*)

In the construction of statutes, the sense which the contemporary members of the profession had put upon them is deemed of some importance, according to the maxim that * 465 * *contemporanea expositio est fortissima in lege.* (*a*) Statutes that are remedial, and not penal, are to receive an equitable interpretation, by which the letter of the act is sometimes restrained, and sometimes enlarged, so as more effectually to meet the beneficial end in view, and prevent a failure of the remedy. They are construed liberally, and *ultra* but not *contra* the strict letter. (*b*) This may be illustrated in the case of the registry acts, for giving priority to deeds and mortgages, according to the dates of the registry. If a person claiming under a registered deed or mortgage had notice of the unregistered prior deed when he took his deed, and procured the registry of it in order to defeat the prior deed, he shall not prevail with his prior registry, because that would be to counteract the intent and policy of the statutes, which were made to prevent and not to

(*a*) Plowd. 365. (*b*) 3 Co. 7.

(*c*) This is especially the case as to statutes which relate to matters of public utility, as to establishments of piety, charity, education, and public improvements. Magdalen College Case, 11 Co. 71, b.

(*a*) Where the penning of a statute is dubious, long usage is a just medium to expound it by; for *jus et norma loquendi* are governed by usage. The meaning of things spoken or written must be, as it hath been constantly received to be, taken from common acceptation. Ch. J. Vaughan, in Sheppard *v.* Gosnold, Vaugh. 169. A contemporary exposition, even of the Constitution of the United States, practised and acquiesced in for a period of years, fixes the construction. Stuart *v.* Laird, 1 Cranch, 299; Martin *v.* Hunter, 1 Wheaton, 304; Cohens *v.* Virginia, 6 Wheaton, 264.

(*b*) Dwarris on Statutes, 615 *et seq.*

uphold frauds. Statutes are sometimes merely directory, and, in that case, a breach of the direction works no forfeiture or invalidity of the thing done; but it is otherwise if the statute be imperative. (*c*) [1]

6. Effect of Temporary Statutes. — If an act be penal and temporary by the terms or nature of it, the party offending must be prosecuted and punished before the act expires or is repealed. Though the offence be committed before the expiration of the act, the party cannot be punished after it has expired, unless a particular provision be made by law for the purpose. (*d*) If

(*c*) To interpret a statute strictly, is to adhere precisely to the words or letter of the law, which include, of course, fewer particulars than a freer construction. To interpret it liberally, largely, or comprehensively, is to carry the meaning of the lawgiver into more complete effect than a confined interpretation would allow. It may be termed the rational interpretation. Rutherforth's Inst. b. 2, c. 7, secs. 3–11. The general rule, even in the construction of a *constitution*, is, that where it gives a general power, or enjoins a duty, it gives by implication every particular power necessary for the exercise of the one, or the performance of the other. But if the means for the exercise of the power be also granted, no other or different means or powers can be implied. Field *v.* The People, 2 Scam. 79 ; [*ante*, 254, n. 1.]

(*d*) Miller's Case, 1 Wm. Bl. 451 ; Marshall, C. J., in Yeaton *v.* United States, 5 Cranch, 281 ; The Irresistible, 7 Wheaton, 551 ; The United States *v.* Passmore, 4 Dallas, 372 ; United States *v.* Preston, 3 Peters, 57 ; The State *v.* Cole, 2 McCord, 1 ; Anon., 1 Wash. 84 ; The State *v.* The Tombecbee Bank, 1 Stewart (Ala.), 347; Pope *v.* Lewis, 4 Ala. 487 ; Commonwealth *v.* Marshall, 11 Pick. 350 ; Allan *v.* Furrow, 2 Bayley (S. C.) 584. The same as to judicial proceedings *begun* under an act, and not finished when it is repealed. They cannot be pursued. 1 Wm. Bl.

[1] People *v.* Cook, 14 Barb. 259, 290 ; s.c. 4 Seld. 67 ; Wheeler *v.* Chicago, 24 Ill. 105 ; State *v.* Lean, 9 Wis. 279, 292. But it is said that it is difficult to treat any *constitutional* provision as merely directory and not imperative. People *v.* Lawrence, 36 Barb. 177, 186 ; Cooley, Const. Limit. c. 4, p. 74 *et seq.* Cases of legislative construction of a state constitution are Mayor of Baltimore *v.* State, 15 Md. 376 ; Moers *v.* Reading, 21 Penn. St. 188 ; State *v.* Mayhew, 2 Gill, 487 ; Johnson *v.* Joliet & Chicago R. R., 23 Ill. 202, 207. But see Sadler *v.* Langham, 34 Ala. 311. The contemporaneous construction of a statute by public officers, including the Attorney-General, who are required to aid in carrying it out, is important, and perhaps decisive when the error is not plain. Union Ins. Co. *v.* Hoge, 21 How. 35, 66. See United States *v.* The Recorder, 1 Blatchf. 218; United States *v.* Gilmore, 8 Wall. 330 ; United States *v.* Lytle, 5 McLean, 9. So, a construction which has been adopted by the inferior courts. Plummer *v.* Plummer, 37 Miss. 185. And it has become a principle of general adoption that when a statute of one state has received a construction there, and is afterwards adopted by another, the construction is part of the law. Commonwealth *v.* Hartnett, 3 Gray, 450 ; Adams *v.* Field, 21 Vt. 266 ; Whitcomb *v.* Rood, 20 Vt. 49 ; Myrick *v.* Hasey, 27 Me. 9 ; Hess *v.* Pegg, 7 Nev. 23.

a statute be repealed, and afterwards the repealing act be * 466 * repealed, this revives the original act;(*a*)[1] and if a statute be temporary, and limited to a given number of years, and expires by its own limitation, a statute which had been repealed and supplied by it is *ipso facto* revived.(*b*) If, before the expiration of the time, a temporary statute be continued by another act, it was formerly a question under which statute acts and proceedings were to be considered as done. In the case of the *College of Physicians*, (*c*) it was declared, that if a statute be limited to seven years, and afterwards by another statute be made perpetual, proceedings ought to be referred to the last statute, as being the one in force. But this decision was erroneous, and

451; 4 Yeates, 392; Wharton's Dig. [tit. Statutes, A.] n. 6; Butler *v.* Palmer, 1 Hill (N. Y.), 324. The proceeding must have been executed, and not executory, to save it from being lost by the repeal. But it seems that a seaman in the navy, put under arrest before his term of service expired, may be retained for trial by a court-martial after his term has expired. This rule of construction is indispensable to the discipline of the navy. Case of Walker on *habeas corpus*, American Jurist, No. 6, p. 281. [The following are further examples of the means, outside of the words of the statute, which may be resorted to to aid in its interpretation: — (1.) Previous construction of similar laws. Greaves *v.* Tofield, 14 Ch. D. 563; The Abbotsford, 98 U. S. 440. (2.) History of the statute, including circumstances under which it was passed, previous state of law, &c. State *v.* Nicholls, 30 La. An. Pt. 2, 980; The Queen *v.* Most, 7 Q. B. D. 244; Yewens *v.* Noakes, 6 Q. B. D. 530. (3.) Long-continued official usage. Wetmore *v.* State, 55 Ala. 198; Hahn *v.* United States, 14 Ct. of Cl. 305; Swift, &c. Co. *v.* United States. ib. 481. Comp. In the matter of Manhattan Savings Institution, 82 N. Y. 142. (4.) Legislative construction. Georgia, &c. Co. *v.* Nelms, 65 Ga. 67; People *v.* Dayton, 55 N. Y. 367. — B.]

(*a*) Case of the Bishops, 12 Co. 7; 2 Inst. 686; Doe *v.* Naylor, 2 Blackf. (Ind.) 32; M'Nair *v.* Ragland, 1 Bad. & Dev. Eq. 525; Commonwealth *v.* Churchill, 2 Metcalf, 118; Wheeler *v.* Roberts, 7 Cowen, 536. A statute in Ohio, of February 14, 1809, and of Illinois, of 19th of January, 1826, abolished the rule of the common law stated in the text, as to the constructive revival of repealed statutes.

(*b*) Collins *v.* Smith, 6 Wharton, 294.

(*c*) Littleton's Rep. 212.

[1] Hastings *v.* Aiken, 1 Gray, 163. But it is not infrequently provided that the repeal of a repealing act shall not have the effect mentioned in the text. Cases of repeal by implication arising from the passage of later acts containing provisions repugnant to or the same as those in the act repealed are United States *v.* Tynen, 11 Wall. 88; Commonwealth *v.* Kelliher, 12 Allen, 480. See The Reform, 3 Wall. 617, 633.

With regard to the repeal of a statute by disuse, mentioned in note (*k*), see O'Hanlon *v.* Myers, 10 Rich. (S. C.) 128, a case standing on its peculiar circumstances, and not to be extended in its application. An act of 1691, which had been declared obsolete by an authoritative compilation of 1736, and which prescribed a manner of punishment which could not now be followed, was held inoperative.

contrary to what had been said by Popham, Ch. J., in *Dingley* v. *Moor*; (*d*) and all acts, civil and criminal, are to be charged under the authority of the first act. Thus, in the case of *Rex* v. *Morgan*, (*e*) on an indictment for perjury, in an affidavit to hold to bail, it was laid to have been taken by virtue of the statute of 12 Geo. I., which was a temporary law for five years, and which was afterwards, and before the expiration of it, continued by the act of 5 Geo. II., with some alterations. Lord Chief Justice Hardwicke said, that when an act was continued by a subsequent act, everybody was estopped to say the first act was not in force; and as the act in question was not altered in respect to bail, the offence was properly laid to have been done against the first act. In *Shipman* v. *Henbest*, (*f*) the King's Bench held, that if a statute be permitted even to expire, and be afterwards revived by another statute, the law derives its force from the first statute, which is to be considered as in operation by means of revival. If, however, a temporary act be revived after it has expired, the intermediate time is lost, without a special provision reaching to the intermediate time. (*g*)

***7. Statute Penalties.** — If a statute inflicts a penalty for *467 doing an act, the penalty implies a prohibition, and the thing is unlawful, though there be no prohibitory words in the

(*d*) Cro. Eliz. 750.

(*e*) Str. 1066.

(*f*) 4 T. R. 109.

(*g*) Statutes are not considered to be repealed by implication, unless the repugnancy between the new provision and a former statute be plain and unavoidable. Foster's Case, 11 Co., 56, 63 a; 1 Rol. 91; 10 Mod. 118, *arg.*; Bacon's Abr. tit. Statute, D. A construction which repeals former statutes or laws by implication, and devests long-approved remedies, is not to be favored in any case. Cowen, J., 3 Hill, 472. A statute cannot be repealed by non-user, White *v.* Boot, 2 T. R. 274; Dwarris on Statutes, 672; though it is said to have been held in the Scotch law that statutes lose their force by desuetude after sixty years. See Dr. Irving's Introduction to the Study of the Civil Law, 123–127, on the doctrine in Scotland derived from the civil law, that laws may be abrogated by long disuse. [*Repeal by Implication.* — Repeal by implication is very much disfavored. Dobbs *v.* Grand Junction Waterworks Co., 9 Q. B. D. 151, 158; Wragg *v.* Penn Township, 94 Ill. 11. In general, the later law must be so repugnant to the earlier that they cannot reasonably stand together. Walker *v.* The State, 7 Tex. App. 245. It has also been held that where a later law appears to be intended to cover the same subject as a former, the former is impliedly repealed. United States *v.* Claflin, 97 U. S. 546; United States *v.* Tynen, 11 Wall. 88. See Bishop on the Written Laws, §§ 158–162. A repeal suspends the penalties imposed, even in respect to cases pending at the time. Speckert *v.* Louisville, 78 Ky. 287. As to the effect of revision and consolidation, see Scheftels *v.* Tabert, 46 Wis. 439. — B.]

statute. (*x*) Lord Holt, in *Bartlett* v. *Viner*, (*a*) applied this rule to the case of a statute inflicting a penalty for making a particular contract, such as a simoniacal or usurious contract; and he held

(*a*) Carth. 251 ; Skinner, 322.

(*x*) Statutes in derogation of common-law rights, especially when permissive only, are usually construed strictly. Metropolitan Asylum District *v.* Hill, 6 A. C. 193 ; London, Brighton, & S. C. Ry. *v.* Truman, 11 A. C. 45 ; see The Warkworth, 9 P. D. 20. Provisos in a statute are strictly construed. Clark's Appeal, 58 Conn. 207. Penal statutes are also construed strictly. Scott *v.* Morley, 20 Q. B. D. 126 ; Globe Pub. Co. *v.* State Bank, 41 Neb. 175 ; *In re* McDonough, 49 Fed. Rep. 360. The method provided by a statute for recovering a penalty must be followed with all possible strictness. Smith *v.* Wood, 23 Q. B. D. 380 ; 24 id. 23. Penalties incurred under a statute prior to its repeal are sometimes enforceable thereafter. See North Dakota Nat. Bank *v.* Lemke, 3 N. D. 154 ; McCann *v.* Mortgage Co., id. 172 ; Gorman *v.* McArdle, 67 Hun, 484 ; U. S. Rev. Stats. § 13 ; United States *v.* Keokuk & H. Bridge Co., 45 Fed. Rep. 178 ; Snell *v.* Campbell, 24 id. 880 ; Com'th *v.* Sullivan, 150 Mass. 315 ; Pusey *v.* Com'th, 84 Ky. 276.

In England, crimes are not created by the retrospective operation of an act of Parliament, unless such intention by the Legislature is clearly expressed. Reg. *v.* Griffiths, [1891] 2 Q. B. 145. Statutes penal in their nature are not construed retrospectively, if their language admits of a prospective effect only. Reg. *v.* Vine, L. R. 10 Q. B. 195, 199 ; *In re* Pulborough School Board, [1894] 1 Q. B. 725. And, in general, a prospective construction will always be preferred, when possible. Warshung *v.* Hunt, 47 N. J. L. 256 ; McGeehan *v.* Burke, 37 La. Ann. 156. Hence a statutory increase in the rate of interest affects only future rights. Cummings *v.* Howard, 63 Cal. 503. *Prima facie* all statutes are prospective only. Allhusen *v.* Brooking, 26 Ch. D. 564. So a statute will not be so construed as to have a greater retrospective operation than its language renders necessary. Knight *v.* Lee, [1893] 1 Q. B. 41 ; *Ex parte* Board of Trade, 2 id. 369 ; Dibb *v.* Walker, [1893] 2 Ch. 429 ; *Ex parte* Todd, 19 Q. B. D. 195 ; Lauri *v.* Renad, [1892] 3 Ch. 402 ; Reid *v.* Reid, 31 Ch. D. 102. A civil damage law does not, without express words, apply to persons injured before it was enacted. Reinhardt *v.* Fritzsche, 69 Hun, 565. Declaratory acts may in general operate retrospectively. Jones *v.* Bennett, 63 L. J. 705. So of Acts relating to procedure: Curtis *v.* Stovin, 22 Q. B. D. 513 ; Singer *v.* Hasson, 50 L. T. 326 ; and of Acts intended to remedy an existing evil and giving a new remedy to parties injured. Reg. *v.* Birwistle, 58 L. J. M. C. 158.

Statutes of taxation are construed in favor of the tax-payer. *In re* Thorley, [1892] 2 Ch. 613 ; American Net & Twine Co. *v.* Worthington, 141 U. S. 468 ; Rice *v.* United States, 53 Fed. Rep. 910. But statutory grants of property, franchises, or privileges in which the government is interested, will be strictly construed in its favor. Coosaw Mining Co. *v.* State, 144 U. S. 550. Statutes relating to frauds upon the revenue, though imposing penalties, are not construed strictly in the defendant's favor, like penal laws, but in such manner as to carry out the intent of the legislature. United States *v.* Stowell, 133 U. S. 1 ; United States *v.* Brown, Deady, 566 ; United States *v.* The Coquitlam, 57 Fed. Rep. 706.

that the contract was void under the statute, though there was a penalty imposed for making it. The principle is now settled, that the statutory prohibition is equally efficacious, and the illegality of a breach of the statute the same whether a thing be prohibited absolutely or only under a penalty. (*b*) The New York Revised Statutes (*c*) make the doing an act contrary to a statute prohibition a misdemeanor, though no penalty be imposed. Whether any other punishment can be inflicted than the penalty given by the statute has been made a serious question. (*d*) The Court of K. B., in *Rex* v. *Robinson*, (*e*) laid down this distinction, that where a statute created a new offence, by making unlawful what was lawful before, and prescribed a particular sanction, it must be pursued, and none other; but where the offence was punishable at common law, and the statute prescribed a particular remedy, without any negative words, express or implied, the sanction was cumulative, and did not take away the common-

(*b*) Bensley *v.* Bignold, 5 B. & Ald. 335; De Begnis *v.* Armistead, 10 Bing. 107, s. p.; Dwarris on Statutes, [2d ed. 536]; The State *v.* Fletcher, 5 N. H. 257. Every statute made to redress an injury, grievance, or mischief gives an action to the party aggrieved, either expressly or by implication. Van Hook *v.* Whitlock, 2 Edw. Ch. 304. Affirmatives in statutes that introduce a new rule imply a negative of all that is not within the purview. Hob. 298. And when a statute limits a thing to be done in a particular form, it includes in itself a negative, viz. that it shall not be done otherwise. Plowd. 206, b. Affirmative words in a statute do sometimes imply a negative of what is not affirmed, as strongly as if expressed. Nott, J., in Cohen *v.* Hoff, 2 Tredway, 661. The word *may*, in a statute, means *must* or *shall*, when the public interest or rights are concerned, or the public or third persons have a claim, *de jure*, that the power shall be exercised. [Supervisors *v.* United States, 4 Wall. 435; Galena *v.* Amy, 5 Wall. 705; Mason *v.* Fearson, 9 How. 248;] Alderman Blackwell's Case, 1 Vern. 152; King *v.* Barlow, 2 Salk. 609; King *v.* Inhabitants of Derby, Skinner, 370; The King *v.* Mayor of Hastings, 1 Dowl. & Ry. 148; Newburgh Turnpike Co. *v.* Miller, 5 Johns. Ch. 113. See also 5 Cowen, 193; 1 Peters, 64; 9 Porter, [Ala.] 390. Though penal statutes are said to be construed strictly, yet the courts are bound to give effect to their plain and obvious meaning, and not narrow the construction. They must search out and follow the true intent of the lawgiver. Buller, J., in 1 T. R. 101; Story, J., in 3 Sumner, 209; Pike *v.* Jenkins, 12 N. H. 255. [Revenue laws are not penal laws in the sense that requires them to be construed with great strictness in favor of the defendant. Cliquot's Champagne, 3 Wall. 114; Taylor *v.* United States, 3 How. 197, 210.]

(*c*) ii. 696, sec. 39.

(*d*) If a statute creates an offence, and does not make it indictable, but prescribes a penalty, a resort to an indictment is precluded. The State *v.* Maze, 6 Humph. (Tenn.) 17.

(*e*) 2 Burr. 799; Almy *v.* Harris, 5 Johns. 175; Stafford *v.* Ingersoll, 3 Hill, 38, s. p.

law punishment, and either remedy might be pursued.(*f*) (*y*) The same distinction had been declared long before;(*g*) and the proper inquiry in such cases is, was the doing of the thing for which the penalty is inflicted lawful or unlawful, before the passing of the statute? If it was no offence before, the party offending is liable to the penalty, and to nothing else. (*h*)[1]

(*f*) By common law, acts *contra bonos mores* are indictable; but in Louisiana there is no such mass of undefined indictable offences, and no act is indictable that is not made a statute offence and indictable. The State *v.* Williams, 7 Rob. (La.) 252.

(*g*) Castle's Case, Cro. Jac. 644; Regina *v.* Wigg, 2 Salk. 460.

(*h*) A question was raised in the N. Y. District Court of the United States, in the case of The United States *v.* Gates (New York Legal Observer for January, 1846), how far a penal statute was to be deemed cumulative, or a mere repeal of a prior statute, and only the substitution of another penalty, leaving both penalties or punishments to be inflicted. The question in most cases resolves itself into an inquiry as to the intention of the subsequent law. Cumulative penalties merely do not repeal a former statute; but when new qualifications or modifications are added, the repeal may be inferred; and if the case be not clear, such ought to be the inference, lest a person might be twice punished for the same offence.

[1] That is, to nothing else so far as the public wrong or criminal aspect of the act is concerned. But the offender may also be liable to a civil action at the hands of a party in whose favor the duty was imposed, and who has suffered special damage by its infraction. Couch *v.* Steel, 3 El. & Bl. 402; Atkinson *v.* Newcastle & Gateshead W. W. Co., L. R. 6 Ex. 404. [Atkinson *v.* Newcastle Water Works was reversed on appeal (2 Ex. D. 441), and Couch *v.* Steel was doubted. The court held that the mere fact of a statutory duty did not imply a duty to private persons.

(*y*) When a special form of remedy is given by statute for a common-law liability, the plaintiff has an election of remedies in the absence of words excluding that at common-law. Vallance *v.* Falle, 13 Q. B. D. 109. If the statute creating a liability provides no remedy, an action of debt, or other common-law remedy to enforce it, may be adopted. Vallance *v.* Falle, 13 Q. B. D. 109. An action of debt on a statute is an ancient common-law remedy, and a statute may enable a third person to sue upon an obligation which it creates. *In re* Rotherham Alum & C. Co., 25 Ch. D. 103. When a statute creating a new obligation gives a remedy to compel its performance, this is generally exclusive of other remedies. Lamplugh *v.* Norton, 22 Q. B. D. 452; Vallance *v.* Falle, 13 id. 109; see Bailey *v.* Bailey, id. 855; Pietermaritzburg *v.* Natal Land Co., 13 A. C. 478. An enabling statute does not curtail other previously existing remedies. Brockwell *v.* Bullock, 22 Q. B. D. 567. Statutes authorizing towns to abate nuisances do not preclude them from their common-law right to resort to the Courts for the same purpose. American Furniture Co. *v.* Batesville, 139 Ind. 77. The party for whose benefit a statute was enacted may waive it and thereby legalize a past act in disregard thereof. Goldsmid *v.* Great Eastern Ry., 25 Ch. D. 511; see Baddeley *v.* Granville, 19 Q. B. D. 426. *Contra*, when the statute is in pursuance of a general policy. Phinney *v.* Mutual L. Ins. Co., 67 Fed. Rep. 493.

The distinction between statutory offences, which are *mala prohibita* only, or *mala in se*, is now exploded, and a breach of the statute law, in either *case, is equally unlawful *468 and equally a breach of duty; and no agreement founded on the contemplation of either class of offences will be enforced at law or in equity. (*a*)

There are a number of other rules of minor importance, relative to the construction of statutes, and it will be sufficient to observe, generally, that the great object of the maxims of interpretation is to discover the true intention of the law; and whenever that intention can be indubitably ascertained, and it be not a violation of constitutional right, the courts are bound to obey it, whatever may be their opinion of its wisdom or policy. (*b*) But it would be quite visionary to expect, in any code of statute law, such precision of thought and perspicuity of language as to preclude all uncertainty as to the meaning, and exempt the community from the evils of vexatious doubts and litigious interpretations. Lord Coke complained, (*c*) that in his day great

(*a*) Aubert *v.* Maze, 2 Bos. & Pull. 371; Cannan *v.* Bryce, 3 B. & Ald. 179; Daniels, *Ex parte*, 14 Vesey, 191.

(*b*) Lord Mansfield, in Pray *v.* Edie, 1 T. R. 313; Willes, 397; United States *v.* Fisher, 2 Cranch, 399. Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba expressa fienda est. The English judges have frequently observed, in answer to the remark that the legislature meant so and so, that they in that case have not so expressed themselves, and therefore the maxim applied, *quod voluit non dixit.* "Where I find the words of a statute perfectly clear, I shall adhere to the words," said Denman, C. J., in 4 Nev. & Man. 426.

(*c*) Pref. to 2 Co.

See also Gorris *v.* Scott, 9 L. R. Ex. 125. Comp. Borough of Bathurst *v.* Macpherson, 4 App. Cas. 256. — B.]

With regard to a point mentioned a few sentences earlier, it is undoubtedly a true rule of construction that the imposition of a penalty on a certain act leads to the inference that it is absolutely prohibited. But it is only a rule of construction, for it is obvious that even what is called a penalty in a statute may be no more than a tax on a certain course of conduct which is permitted if the tax is paid. Thus, in The Creole, 2 Wall. Jr. 485, a statute providing that certain vessels should be "obliged" to employ a pilot, or "forfeit and pay" a sum spoken of as "a penalty" to the use of an eleemosynary institution, was held to leave the employment optional subject to a tax, — whether rightly or not is immaterial here. See notes on Shipping in vol. iii. An act cannot be called illegal unless it is absolutely prohibited and put outside the protection of the law in all connections, which is shown by such consequences as the invalidity of contracts to do the act in question, the rule *in pari delicto potior est conditio defendentis*, and the denial of relief when the illegal act is part of the plaintiff's case. See a fuller statement, 6 Am. L. Rev. 723–725.

questions had oftentimes arisen "upon acts of Parliament, overladen with provisos and additions, and many times on a sudden penned or corrected, by men of none, or very little judgment in law." (*d*)

(*d*) In Douglass *v.* Howland, 24 Wendell, 45–47, Mr. Justice Cowen has expressed himself with a justice, strength, and truth on the subject of the interpretation of statutes, worthy to be transcribed. "We cannot," he observes, "escape the power of construction, so long as we have a judicial system. Well known rules in the construction of statutes ought not to be departed from. Statutes in affirmance of the common law, or in affirmance of judicial construction upon a former statute, ought not to be holden a deviation from the former law, unless it be obviously so. There is scarcely any branch of legal policy more worthy of being enforced, than that which aims to keep the laws of a nation the same in all respects from one age to another, except in points where change becomes absolutely necessary. Time, says Lord Hale, is wiser than all the wits in the world, and the law which has been tried by it has the highest possible evidence in its favor. Time is the schoolmaster which teaches law most effectually, and without which it cannot be generally known. In the New York Revised statutes of 1830, a vast deal is made up of enactments intended merely to repeat what had been decided by our own or the English courts. But changes in the language of the reports, or rules of court, or the old statutes, occur at every step of the revision. All the general acts were remodelled. An arrangement more scientific, a style improved in elegance and simplicity, were sought to be introduced throughout the whole; hence short paragraphs, made up of short sentences, generalities, ellipses, complications, equivalent words or translations, for old and well defined technical terms. In short, the old costume was dismissed, and that of the civil code of France adopted as nearly as could be. Yet I take it that the main substance of what we had before was always intended to be retained. The revision was mainly a re-enactment or codification of the substance, the principle of what we had before, though I admit the identity cannot easily be ascertained in very many instances. It cannot be that the formal changes I have mentioned meant a change in substance. The transmutation of a principle of the common law, or a rule of practice, into a statute, or an old statute, or its received construction into a new one, without a palpable design to depart from the former, ought not to be considered as a departure. We are then left where we were, with all the old helps about us, the old lights burning. It has been a settled rule, in respect to the revision, in 1801, of the old statutes, that where the law was antecedently settled by clear expressions or adjudications, the mere change of phraseology was not to be construed a change of the law, unless such phraseology evidently purported an intention to work a change. Case of Yates, 4 Johns. 359; Taylor *v.* Delancey, 2 Caines's Cases, 150, 151. If such was the rule of construction under the revision of 1801, which proceeded by cautious and prudent steps, fearful to go even beyond a change of orthography, what shall we say of an age when there is literally a mania for changing every law in some way?"

We are reminded by these remarks of the principles of Solon, the Athenian lawgiver, that it was better to retain old laws, even though in some respects objectionable, than to be always eager to change them for new ones, though possibly superior. Little or no confidence can be placed in the authority of laws which are incessantly altered, remodelled, and exchanged; and that those only which have been sanctioned and established by long usage, and under which the citizens had, as it were, been born

Various and discordant readings, glosses, and commentaries will inevitably arise in the progress of time, and, perhaps, as often from the want of skill and talent in those who comment, as in those who make the law. Though the French codes digested under the revolutionary authority are distinguished for sententious brevity, there are numerous volumes of French reports already extant, upon doubtful and difficult questions arising within a few years after those codes were promulgated. (*e*)

*The Emperor Justinian, in one of the edicts which he *469 published in confirmation of the authority of the Pandects, and prefixed to that work, expressly prohibited the civilians of his time, and those of all future ages, from writing any commentary upon his laws. (*a*) The history of Justinian's reign shows the folly and absurdity of this attempt to bar all future innovation. Greater changes took place in a few years in the laws and jurisprudence of Justinian, said Montesquieu, than in the three hundred years of the French monarchy immediately preceding his time; and those changes were so incessant and so trifling, that the inconstancy of the emperor can only be explained by

and educated, are likely to be religiously observed. Schömann's Dissertations on the Assemblies of the Athenians, Cambridge, 1837, p. 240.

(*e*) The Journal du Palais, présentant la jurisprudence de la Cour de Cassation, et des Cours Royales, sur l'application de tous les codes français aux questions douteuses et difficiles, had amounted, in 1818, to fifty volumes and upwards. From the time of the French Revolution down to 1828 there were one hundred volumes of statutory law made in France.

(*a*) Secunda Præfatio Digestorum, sec. 21. In imitation of Justinian, the King of Bavaria, by his royal mandate of October 19, 1813, prohibited the publishing of any commentaries on his penal code, by officers of state or private scholars. The code of Frederick II. of Prussia referred all dubious constructions of law to the interpretation of a law committee, and the professors of law were not allowed to lecture on the code. Doctor Lieber says that M. de Savigny was the first Prussian jurist who delivered lectures on that code, and he justly observes that interpretation cannot be dispensed with wherever human language is used, except in mathematics. The necessity of it lies in the nature of things, of our mind, and of our language. No code can provide for all specific cases, or be so constructed as to close all further inquiry. In France, Bavaria, Austria, Prussia, &c., some authority is always designated, from which, in doubtful cases, explanations shall be obtained; and in France and Prussia many large volumes of additions and explanations have been officially published and added to their codes. See Legal and Political Hermeneutics, by Francis Lieber, 2d ed., Boston, 1839, pp. 40–46, and which is a treatise replete with accurate logic, and clear and sound principles of interpretation, applicable to the duties of the lawgiver, and the science of jurisprudence.

having recourse to the secret history of Procopius, where he is charged with having sold equally his judgments and his laws. (*b*) (*x*)

(*b*) Grandeur des Romains et leur Décadence, c. 20. The best digest that I have seen of the rules and of the examples in the English law concerning the construction of statutes is to be found in Dwarris's General Treatise on Statutes, London, 1830, [2d ed. 1848,] and published since the first edition of these commentaries. The rules are illustrated by cases drawn from the whole body of the reports, ancient and modern, in a full and satisfactory manner. See Dwarris, c. 12 and 13, [c. 9, 10,] from p. 688 to 780, [550 to 694.] Mr. (now Sir F.) Dwarris has added to his work an excellent statutory history of English law, from Magna Charta down to the end of the reign of George IV. It is a running commentary on the principal statutes, in which Lord Coke's celebrated exposition of the statutes, in his 2d Institutes, as far as it extends, is essentially incorporated.

(*x*) *Repeal of Statutes.* — A repeal by implication is effected only when the later enactment is so inconsistent with or repugnant to an earlier one that the two cannot stand together. Kutner *v.* Phillips, [1891] 2 Q. B. 267 ; Fortescue *v.* St. Matthew, id. 170 ; West Ham *v.* Fourth City M. B. Society, [1892] 1 Q. B. 654 ; see *In re* Busfield, 32 Ch. D. 123 ; Wigram *v.* Fryer, 36 Ch. D. 87 ; Pollock *v.* Land Imp. Co., 37 Ch. D. 661 ; Reg. *v.* Licensing Justices, 14 Q. B. D. 13. The party claiming such a repeal has the burden of proof. Lybbe *v.* Hart, 29 Ch. D. 8. The repeal of a statute by implication is not favored, and different laws upon the same subject will, if possible, be permitted to stand together. Kollenberger *v.* People, 9 Col. 233; *Re* Hall, 38 Kansas, 670 ; Lyddy *v.* Long Island City, 104 N. Y. 218 ; Hearn *v.* Brogan, 64 Miss. 334 ; People *v.* Gustin, 57 Mich. 407. The later of two hopelessly repugnant laws must prevail. State *v.* Howe, 28 Neb. 618. A statute is not affected by a later one, which is constitutionally invalid, though it contains a repealing clause. *In re* Rafferty, 1 Wash. St. 382.

A later special statute can repeal a former general one only when they cannot be harmonized. London County Council *v.* London School Board, [1892] 2 Q. B. 606 ; City & S. L. Ry. *v.* London County Council, id. 513. But the provisions of special legislation are not necessarily repealed by subsequent general legislation inconsistent therewith. *In re* East London Ry., 24 Q. B. D. 507 ; Seward *v.* The Vera Cruz, 10 A. C. 68 ; *In re* Smith, 35 Ch. D. 589 ; *In re* Williams, 36 Ch. D. 573 ; McKenna *v.* Edmundstone, 91 N. Y. 231 ; State *v.* Cleland, 68 Maine, 258 ; Harrisburg *v.* Sheck, 104 Penn. St. 53 ; Com'th *v.* Macferron, 152 id. 244 ; Cook County *v.* Gilbert, 146 Ill. 268 ; 44 Ill. App. 69 ; Black River Imp. Co. *v.* La Crosse Booming Co., 54 Wis. 659 ; Justices *v.* Com'th, 81 Va. 209 ; Bogardus *v.* Gordon (N. J. Ch.), 30 Atl. Rep. 812 ; State *v.* Archibald, 43 Minn. 328. But a general statute made applicable to all cities is held to control special statutes applying to particular cities. Kennedy *v.* Board of Education, 82 Cal. 483. Parties to a pending suit have not necessarily any greater vested right than others under a statute the terms of which are clear and express. Att.-Gen. *v.* Theobald, 24 Q. B. D. 557.

A statute amending a prior Act "so as to read as follows," and restating it at length, does not repeal and re-enact like sections or clauses, but continues them. State *v.* Mines, 38 W. Va. 141 ; Com'th *v.* Kenneson, 143 Mass. 418 ; State *v.* Wish, 15 Neb. 448 ; see People *v.* Upson,

79 Hun, 87. It impliedly repeals omitted or inconsistent provisions in the amended Act. *In re* Prime's Estate, 136 N. Y. 347. If, in such case, the amended statute has previously been repealed, it is re-enacted by the amending statute. People *v.* Jefferson County Board, 77 Hun, 372; 143 N. Y. 84. A statute which contains the above-quoted clause, and expressly repeals all laws conflicting therewith, is not *in pari materia* with the amended Act, but will be construed independently. Cortesy *v.* Territory (New Mex.), 32 Pac. Rep. 504. Upon the re-enactment of a statute which had a settled judicial construction, that construction should be followed. Harvey *v.* Travelers' Ins. Co., 18 Col. 354. So when statutes are adopted from another State or country, the previous construction thereof in that State is binding. Sanger *v.* Flow, 48 Fed. Rep. 152; Coulter *v.* Stafford, id. 266; Interstate Commerce Commission *v.* Baltimore & O. R. Co., 43 id. 37.

Changes in a general revision of the statutes are not construed as changing the law, unless manifestly so intended. Clark *v.* Powell, 62 Vt. 442. A statute of general revision, when clearly intended to be complete, repeals all prior Acts on the same subject, even though not repugnant thereto, and not containing words of repeal. Jernigan *v.* Holden, 34 Fla. 530; Little *v.* Cogswell, 20 Oregon, 345; Keese *v.* Denver, 10 Col. 112; Clay County Supervisors *v.* Chickasaw County Supervisors, 64 Miss. 534; Com'th *v.* Mason, 82 Ky. 256. A new proceeding for a new offence created by statute is a bar to an indictment. Reg. *v.* Hall, [1891] 1 Q. B. 747. A statute making those who misapply certain money liable to a penalty and repayment on pain of imprisonment makes a proceeding thereunder a bar to a civil suit to recover the same moneys. Vernon *v.* Watson, [1891] 2 Q. B. 288.

LECTURE XXI.

OF REPORTS OF JUDICIAL DECISIONS.

HAVING considered the nature and force of written law, and the general rules which are applied to the interpretation of statutes, we are next to consider the character of unwritten or common law, and the evidence by which its existence is duly ascertained.

The common law includes those principles, usages, and rules of action applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature. According to the observation of an eminent English judge,(*a*) a statute law is the will of the legislature in writing, and the common law is nothing but statutes worn out by time; and all the law began by the consent of the legislature. (*x*)

(*a*) Lord Chief Justice Wilmot, 2 Wils. 348, 351.

(*x*) Judge Dillon, in his Laws and Jurisprudence of England and America, pp. 19, 381, says: "Legislation belongs to or is a branch of ethics; the legislator in the exercise of the function of legislation not only regards ethical considerations, but such considerations are generally the foundation or animating principle of his enactment. In modern times the judicial and legislative functions are not only discriminated, but separated. Yet the separation, while theoretically complete, is perhaps never actually so; and therefore judges, in and by the very exercise of their duty of adjudication, are obliged in many cases, where the legislative will is silent and the case is novel, to legislate. . . . The evolution of our law impresses me with the conviction of the general truths which underlie the leading doctrines of Savigny and the historical jurists; namely, that law is largely the outcome of all of the past conditions, circumstances, and customs of a people; that it ordinarily originates in or is introduced by custom (using this word in the broad sense of including judiciary law), and is supplemented by legislation, direct or oblique, when, and in general only when, the law is otherwise inadequate to meet difficult and complex or new situations and exigencies."

In an address before the American Bar Association at Saratoga Springs in August, 1888, Hon. George Hoadley said (38 Albany L. J. 165): "The duty to strive for an ideal jurisprudence, for a perfect

1. Source of the Common Law. — This is laying down the origin of the common law too strictly. A great proportion of the rules

procedure, is of perpetual obligation. . . . Lawyers live too often intellectually in England only, and not in the world. They are provincial, not cosmopolitan. . . . No one can overestimate the value of historical research. But the case lawyer, in using historic examples as patterns on which to fashion, or moulds into which to run, the conduct of our present and future lives, is trying to turn time backward and arrest the progress of man. The real student of legal history reads it with eyes open to the faults as well as to the merits of the past. But, with the case lawyer, a case in point once found, excludes all argument to the contrary, and the only appeal is to the legislature, and this of course without benefit to the suitors in pending controversies. . . . The result is practically that individuals provide laws for the community, not the community for individuals. . . . The progress of mankind is marked by the conversion of the unwritten into written law by the crystallization of the uncertain into the definite."

In Pollock and Maitland's recent and valuable History of English Law it is said in the Introduction: "The philosophical analysis and definition of law belongs, in our judgment, neither to the historical nor to the dogmatic science of law, but to the theoretical part of politics. . . . The matter of legal science is not an ideal result of ethical or political analysis ; it is the actual result of facts of human nature and history. Common knowledge assures us that in every tolerably settled community there are rules by which men are expected to order their conduct. Some of these rules are not expressed in any authentic form, nor declared with authority by any person or body distinct from the community at large, nor enforced by any power constituted for that purpose. Others are declared by some person or body having permanently, or for the time being, public authority for that purpose, and, when so declared, are conceived as binding the members of the community in a special manner. In civilized states there are officers charged with duty and furnished with the means of enforcing them. Of the former kind are the common rules of morals and manners, in so far as they do not coincide with rules of law. We shall find that in England, as elsewhere, and in times which must be called recent as compared with the known history of ancient civilization, many things were left to the rule of social custom, if not to private caprice or uncontrolled private force, which are now, as matter of course, regulated by legislation, and controlled by the courts of justice. . . . Our laws have been formed in the main from a stock of Teutonic customs, with some additions of matter, and considerable additions or modifications of form received directly or indirectly from the Roman system."

Common Law. — "We have long given up the attempt to maintain that the common law is the perfection of reason. Existing human institutions can only do their best with the conditions they work in. If they can do that within the reasonable margin to be allowed for mistakes and accidents, they are justified in their generation. Even their ideal is relative. What is best for one race or one society, at a given stage of civilization, is not necessarily best for other races and societies at other stages. . . . The courts cannot contradict what has already been settled as law, but the power of taking up fresh material is still alive." Sir Frederick Pollock (Address at Harvard, 1895), 11 Law Quart. Rev. 328, 334 ; See also 10 id. 228 ; Holmes, Common Law, p. 2 ; 5 Harv. L. Rev. 172 ; 8 id. 328.

and maxims which constitute the immense code of the common law grew into use by gradual adoption, and received, from time to time, the sanction of the courts of justice, without any legislative act or interference. It was the application of the dictates of natural justice and of cultivated reason to particular cases.(*y*) In the just language of Sir Matthew Hale, (*b*) the common law of England is, "not the product of the wisdom of some one man, or society of men, in any one age; but of the wisdom, counsel, experience, and observation of many ages of wise and observing men." And his further remarks on this subject would be well worthy the consideration of those bold projectors, who can think of striking off a perfect code of law at a single essay. "Where the subject of any law is single, the prudence of one age may go far at one essay to provide a fit law; and yet, even in the wisest provisions of that kind, experience shows us that new and unthought of emergencies often happen, that necessarily require new supplements, abatements, or explanations. But the body of laws that concern the common justice applicable to a great kingdom is vast and comprehensive, consists of infinite particulars, and must meet with various emergencies, and therefore requires much time and much experience, as well as much wisdom and prudence, successively to discover defects and inconveniences, and to apply apt supplements and remedies for them; and such

(*b*) Preface to Rolle's Abridgment.

(*y*) In a lecture delivered before the Senior Law Class of the University of the City of New York, in April, 1894, Judge Charles P. Daly said (Pamphlet, pp. 21, 30) in approving this passage: "Accepting this as conveying a tangible idea of what it is, it may, as respects England, be said to be the whole body of the English law with the exception of that which has, since the beginning of the reign of Richard the First, been of parliamentary origin, and that which is administered in the ecclesiastical, equity and admiralty tribunals; although Blackstone (1 Bl. Com. 79, 80) and a later writer, Flintoff (Rise and Progress of the Laws of England and Wales, 2, 3), embrace, under the general head of the unwritten or common law, the canon and the civil law, so far as either are admitted in English courts of ecclesiastical and admiralty jurisdiction; not, they say, because they were enacted or confirmed by imperial or papal authority, but because of their having been received and admitted by immemorial usage and custom, or the consent of Parliament. Blackstone does so, he says, after the example of Sir Matthew Hale. . . . The common law appears to have derived its name from the fact that it became the general law of the realm, as contradistinguished from local laws, that were different, but recognized as continuing in force, in certain localities."

are the common laws of England, namely, the productions of much wisdom, time, and experience." (*c*)

But though the great body of the common law consists of a collection of principles, to be found in the opinions of sages or deduced from universal and immemorial usage, and receiving progressively the sanction of the courts, it is, nevertheless, true, that the common law, so far as it is applicable to our situation and government, has been recognized and adopted, as one entire system, by the constitutions of Massachusetts, New York, New Jersey, and Maryland. It has been assumed by the courts of justice, or declared by statute, with the like modifications, as the law of the land in every *state. It was imported *473 by our colonial ancestors, as far as it was applicable, and was sanctioned by royal charters and colonial statutes. (*a*) It is

(*c*) Cicero, in like manner, ascribes the excellent Institutes of the Roman republic to the gradual and successive improvement of time and experience; and he held that no one mind was equal to the task. Nostra respublica non unius esset ingenio sed multorum; nec una hominis vita sed aliquot constituta sæculis et ætatibus — neque cuncta ingenia conlata in unum tantum posse uno tempore providere, ut omnia complecterentur sine rerum usu et vetustate. De Repub. lib. ii. 1. Nec temporis unius nec hominis esse constitutionem reipublicæ. Ib. 2, 21. The Roman system of law, says M. Valette, was not the result of philosophical theories conceived *a priori*, but slowly elaborated by every-day experience, and conformed, under the influence of magistrates and jurisconsults, to all the necessities of society.

(*a*) *Vide supra*, 342, 343, and the opinions of Judge Chase, in the case of The United States *v.* Worrall, 2 Dallas, 394, and of M'Kean, C. J., in Morris *v.* Vanderen, and Respublica *v.* De Longchamps, 1 Dallas, 67, 111; Statutes of Pennsylvania, 1718, 1777; Laws of Vermont, c. 6, p. 57; Statute of North Carolina, 1778, c. 5; Revised Statutes of North Carolina, 1837, i. 110; State *v.* Rollins, 8 N. H. 550; Statute of South Carolina, 1712; Parsons, C. J., in Commonwealth *v.* Knowlton, 2 Mass. 534; Story, J., in Town of Pawlet *v.* Clark, 9 Cranch, 333; State *v.* Buchanan, 5 Harr. & Johns. 355, 356; McLearn *v.* McLellan, 10 Peters, 631, 635. The constitution of New York, of 1777, declared that such parts of the common law of England, and of the statute law of England and Great Britain, as, together with the acts of the colonial legislature, formed the law of the colony on the 19th of April, 1775, should continue to be the law of the state, subject, &c. So the common law and statute law of England were referred to in Missouri by the statute of 14th January, 1816, as part of the known and existing law of the territory, so far as the same was consistent with the law of the territory, and which, in a modified degree, was the Spanish law. The common and statute law of England, prior to the fourth year of James I., and of a general nature, were adopted by the convention of Virginia, in 1776, and in 1795 and 1805, by the government of Ohio; and such is the substance of the statute law of Arkansas. 2 Ark. 206. But the Ohio statute was repealed in 1806. In the Revised Statutes of Illinois, published in 1829, it was declared that the common law of England, and the English statutes of a general nature made in aid of it, prior to the fourth year of James I., with the exception of those concerning

also the established doctrine, that English statutes, passed before the emigration of our ancestors, and applicable to our situation, and in amendment of the law, constitute a part of the common law of this country. (*b*) (*x*)

usury, were to be rules of decision until repealed. In 1818, the common law was adopted by statute in the State of Indiana, and in 1835, in Missouri, under the same limitations; and it is understood that the common law and the statute law of England, down to the year 1776, and applicable to their constitution and circumstances, are the law in the states of Mississippi and Georgia. In the latter state the same was declared to be in force by the statute of February 25, 1784. So the common law of England and the statute law of England, prior to 1760, were adopted by statute in Vermont, so far as they were not repugnant to the constitution or statute law of the state.

(*b*) Patterson *v.* Winn, 5 Peters, 233; Sackett *v.* Sackett, 8 Pick. 309; Opinion of Cranch, C. J., in the case *Ex parte* Watkins, 7 Peters, [576, 577;] Bogardus *v.* Trinity Church, 4 Paige, 198; The Heirs of Girard *v.* The City of Philadelphia, 4 Rawle, 333, Gibson, C. J. Statute of North Carolina, 1778, and see the preface to the first volume of the Revised Statutes of North Carolina, 1837. About the year 1750, the general assembly of Rhode Island adopted the principal statutes of England relative to property and to the colony, from the statute of Merton down to the 4th and 5th Anne, c. 16. In Georgia, the principal English statutes relative to the essential

(*x*) See McKennon *v.* Winn (Okla.), 22 L. R. A. 501, and note. The general rule is that English acts of Parliament, when dealing with property in general, do not apply to foreign or colonial property. Colquhoun *v.* Brooks, 19 Q. B. D. 406; Jex *v.* McKinney, 14 A. C. 77; Pitt *v.* Dacre, 3 Ch. D. 295. But when the scope and purpose of an Imperial statute show that it was intended to affect a colony, and the words used are calculated to have that effect, it will be so construed. Callender *v.* Lagos, [1891] A. C. 460, 466. If Congress adopts the language of a foreign statute, it is presumed also to adopt the construction placed thereon by the local courts. Interstate Commerce Commission *v.* Baltimore & O. R. Co., 145 U. S. 263. So of statutes adopted by one State from another. Duval *v.* Hunt, 34 Fla. 85; Coffield *v.* State (Neb.), 62 N. W. Rep. 875; Everding *v.* McGinn, 23 Oregon, 15.

The common law is not presumed to be in force in the Creek nation. Davison *v.* Gibson, 56 Fed. Rep. 443. But as it is the law of the Indian Territory, the Federal courts there sitting presume it to apply in the absence of evidence. Pyeatt *v.* Powell, 51 Fed. Rep. 551. In the absence of evidence as to the law of another State, whose jurisprudence is founded upon the common law, it is presumed to be the same as the common law of the domestic State in most jurisdictions. See, *e. g.*, *In re* Hamilton, 76 Hun, 200; Brown *v.* Wright, 58 Ark. 20; Bollinger *v.* Gallagher, 144 Penn. St. 205; Scroggin *v.* McClelland, 37 Neb. 644; Mortimer *v.* Marder, 93 Cal. 172; Ufford *v.* Spaulding, 156 Mass. 65. As between the States of the Union, a cause of action which arose in one State, under the common law as there understood and administered, and which governs the conduct of the parties, may be enforced in another State by whose law it would not be a cause of action, if the variance in these laws does not amount to a fundamental difference of policy. Walsh *v.* New York & N. E. R. Co., 160 Mass. 571.

2. Force of Adjudged Cases. — The best evidence of the common law is to be found in the decisions of the courts of justice, con-

rights of person and property, from Magna Charta inclusive down to the period of colonial legislation in this country, have been copied and adopted almost literally. It gives the appearance of stability, dignity, and certainty to their statutory jurisprudence. Hotchkiss's Codification of the Statute Law of Georgia, 1845. The Revised Statutes of New Jersey, published in 1847, constitute a plain, practical, and excellent code of statute law, incorporating all the essential parts of the English and colonial statutes prior to our Revolution, applicable to our circumstances, and leaving the settled principles of the common law undisturbed, or more accurately defined. This has been done in several of the other states, with great ability, and under the same enlightened and chastened spirit of moderation. It was the same policy that dictated the statute revisions of New York, in 1801 and 1829. The rage for bold, reckless, and presumptuous innovation, so prevalent at this day, acting in contempt of the usages and wisdom of the common law, does not seem to have reached those statesmen who adopted the statute codes to which I have alluded. A new and improved digest of the statute law is quite a practicable and salutary reform, and is to be wholly distinguished from the visionary scheme and attempt to disturb and remodel the long-established institutions and usages of the whole body of the common law, as is now directed to be done by the revised constitution of New York, in 1846. (See *infra*, 475.) The Revised Statutes of Massachusetts, in 1836, furnish an instructive model of a revision of the statute law, with such arrangements and improvements as the reasonable spirit of reform dictated. Though I would rather prefer (perhaps from early prepossessions) the old and simple division of statutes into chapters and sections, with the title and date of each law, in historical and chronological order, to the complex subdivisions into parts, and titles, and sections, with interminable numbers, on the plan of the continental civilians. The Congress of 1774 claimed to be entitled to the benefit, not only of the common law of England, but of such of the English statutes as existed at the time of their colonization, and which they had by experience respectively found to be applicable to their several local and other circumstances. Journals of Congress, October 14, 1774. This was only declaratory of the principle in the English law, that English subjects going to a new and uninhabited country carry with them, as their birthright, the laws of England existing when the colonization takes place. Blankard *v.* Galdy, 2 Salk. 411; The Decision of the Lords of the Privy Council, 2 P. Wms. 75; Dutton *v.* Howell, Show. Parl. Ca. 31, 32; 1 Blackst. Comm. 107. See also Commonwealth *v.* Leach, 1 Mass. 60; Same *v.* Knowlton, 2 id. 534. The rule is different upon the conquest of a country; the conqueror may deal with the inhabitants, and give them what law he pleases, but until an alteration be made, the former laws continue. Calvin's Case, 7 Co. 17. The civil code of Louisiana, art. 3521, and the statute of that state of 1828, repealed the Spanish, Roman, and French laws in force when Louisiana was ceded to the United States. But it was held, in Reynolds *v.* Swain, 13 Louisiana Rep. 193, that this repeal only extended to the positive, written, or statute laws of those nations, introductory of a new rule, and not to those which were merely declaratory, and that it was not intended to abrogate those *principles of law* which had been established or settled by the decisions of the courts of justice. It was therefore the daily practice, in the courts of Louisiana, to resort to the laws of Rome and France, and the commentaries on those laws, for the elucidation of principles applicable to analogous cases.

tained in numerous volumes of reports, and in the treatises and digests of learned men, which have been multiplying from the earliest periods of the English history down to the present time. (*c*) The reports of judicial decisions contain the most certain evidence, and the most authoritative and precise application of the rules of the common law. Adjudged cases become precedents for future cases resting upon analogous facts, and brought within the same reason; and the diligence of counsel, and the labor of judges, are constantly required, in the study of the reports, in order to understand accurately their import, and the principles they establish. But to attain a competent knowledge of the common law in all its branches has now become a very serious undertaking, and it requires steady and lasting perseverance, in consequence of the number of books which beset *474 and encumber the path of the student. (*d*) *The grievance is constantly growing, for the number of periodical law reports and treatises which issue from the English and American press is continually increasing; and if we wish to receive assistance from the commercial system of other nations, and to become acquainted with the principles of the Roman law, as received and adopted in continental Europe, we are in still greater danger of being confounded, and of having our fortitude subdued, by the immensity and variety of the labors of the civilians. (*a*) It is necessary that the student should exercise much

(*c*) In 1840, the legislature of Connecticut declared that the reports of the judicial decisions of other states and countries should be judicially noticed as evidence of the common law in such state or country.

(*d*) The number of volumes of English reports, exclusive of reports relating to the courts of admiralty, elections, settlement cases, and Irish reports, amount (1826) to 364; and to render their contents accessible, the digested indexes of the modern reports amount to 33 volumes. The text-books or treatises amount to 184 volumes, and the digests and abridgments to 67 volumes, making, in the whole, a copious library of 648 volumes, in addition to the statute law. See Humphreys on Real Property, 163. To these, we may add upwards of 200 volumes of American reports, treatises, and digests. In 1839, there were 536 volumes of American reports.

(*a*) M. Camus annexed to his Lettres sur la Profession d'Avocat a catalogue of select books for a lawyer's library, which he deemed the most useful to possess and understand; and that catalogue, in the edition of 1772, included nearly 2,000 volumes, and many of them ponderous folios, and not one of them had anything to do with the English statute or common law. It is now a complaint in France, that the crowd of reports of decisions encumber the law libraries; and M. Dupin, in his Jurisprudence des Arrêts, ed. 1822, alludes to the immensity of such collections, and the great abuses to which that species of jurisprudence is subject. His select law library, for the use

discretion and skill in the selection of the books which he is to peruse. To encounter the whole mass of law publications in succession, if practicable, would be a melancholy waste or misapplication of strength and time.

*Lord Bacon, in the aphorisms annexed to his treatise *475 De Augmentis Scientiarum, speaks of the necessity of a revision and digest of the law, in order to restore it to a sound and profitable state, whenever there has arisen a vast accumulation of volumes, throwing the system into confusion and uncertainty. He even made a proposition to King James, "touching the compiling and amendment of the laws of England," and offered his services "to compile a digest of the laws." The evils resulting from an indigestible heap of laws and legal authorities are great and manifest. They destroy the certainty of the law, and promote litigation, delay, and subtilty. The professors of the law cannot afford the expense and time necessary to collect and study the volumes, and they are obliged to rely too much on the second-hand authority of digests — *ipse advocatus, cum tot libros perlegere et vincere non possit, compendia sectatur — glossa fortasse aliqua bona.* (*a*)[1] The period anticipated by Lord Bacon seems now to have arrived. The spirit of the present age, and the cause of truth and justice, require more simplicity in the system, and that the text authorities should be reduced within manageable limits; and a new digest of the whole body of the American common law, upon the excellent model of Comyns's of law students and young advocates, contained 343 volumes. One great abuse in the practice of reporting is, that there is no very careful selection of decisions which are only worthy to be reported, but every adjudication, though upon commonplace learning, and upon points which have been again and again decided, is usually given in one promiscuous mass. Lord Bacon, in his proposition for the amendment of the law, wisely recommended "that *homonymiæ*, as Justinian called them, that is, cases merely of iteration and repetition, be purged away."

(*a*) Bacon's Aphorisms, *De accumulatione legum nimia*, Aph. No. 53–58; *De novis digestis legum*, Aph. No. 59–64; *De scriptoribus authenticis*, Aph. No. 78.

[1] A short account of the different attempts at codification may be found in the Edinburgh Review for October, 1869, No. 258, reprinted among "Essays on the Form of the Law," by T. E. Holland, London, Butterworths, 1870. The subject is partially discussed by Mr. Austin in his 39th lecture, and the notes at the end of his published works, and by Lord Westbury's speech of June 12, 1863. Hansard, clxxi. 776. [See also an essay on "The Proposed Codification of the Common Law," by James C. Carter, of New York City.]

Digest, and executed by a like master artist, retaining what is applicable, and rejecting everything that is obsolete and inapplicable to our institutions, would be an immense public blessing. (*b*) A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature delibera- *476 tion, the presumption is in *favor of its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it. It would therefore be extremely inconvenient to the public, if precedents were not duly regarded and implicitly followed. It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them; and people in general can venture with confidence to buy and trust, and to deal with each other. If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has been once deliberately adopted and declared, it ought not to be disturbed, unless by a court of appeal or review, and never by the same court, except for very cogent reasons, and upon a clear manifestation of error; and if the practice were otherwise, it would be leaving us in a

(*b*) In the Revised Constitution of New York, of 1846, art. 1, sec. 17, there is a provision made for the digest of the whole body of the laws of the state which makes it the duty of the legislature to appoint three commissioners, to reduce into a written and systematic code the whole body of the law of the state, or so much and such parts thereof as to the commissioners shall seem practical and expedient, and to report thereon to the legislature. The legislature is likewise to appoint three commissioners, who are to revise, reform, simplify, and abridge the rules of practice, pleadings, forms, and proceedings of the courts of record in New York, and report thereon. Art. 6, sec. 24. In England, the statute of 1 & 2 Vict. c. 110, empowered the judges to devise and frame the forms of writs to be used in the practice of the courts. This provision in the English statute shows wisdom in the selection of the agents who are to reform the practice, and a cautious moderation in guiding and limiting their discretion. The Report of the Commissioners appointed to revise the civil code of Pennsylvania, January, 1835, also showed much caution in touching the law of real property; and they appeared solicitous rather to expand and mould the old law and the old actions to existing circumstances and the state of society, than to abolish them. Their object clearly appeared to reform and not to innovate, and this is what good sense and sage experience dictate.

state of perplexing uncertainty as to the law. (*a*) The language of Sir William Jones (*b*) is exceedingly forcible on this point. "No man," says he, "who is not a lawyer, would ever know how to act; and no man who is a lawyer would, in many instances, know what to advise, unless courts were bound by authority as firmly as the Pagan deities were supposed to be bound by the decrees of fate."

Throughout the whole period of the Year Books, from the reign of Edward III. to that of Henry VII., the judges were incessantly urging the sacredness of precedents, and that a counsellor was not to be heard who spoke against them, and that they ought to judge as the ancient sages taught. If we judge against former precedents, said Ch. J. Prisot, (*c*) it will be a bad example to the barristers and students at law, and they will not give any credit to the books, or have any faith in them. So the Court of King's Bench observed in the time of James I., (*d*) that the point which had been often adjudged *ought to rest *477 in peace. The inviolability of precedents was thus inculcated at a period which we have been accustomed to regard as the infancy of our law, with as much zeal and decision as at any subsequent period.

But I wish not to be understood to press too strongly the doctrine of *stare decisis*, when I recollect that there are more than one thousand cases to be pointed out in the English and American books of reports, which have been overruled, doubted, or limited in their application. It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error. Even a series of decisions are not always conclusive evidence of what is law; and the revision of a decision very often resolves itself into a mere question of expediency, depending upon the consideration of the importance of certainty in the rule, and the extent of property to be affected by a change of it. Lord Mansfield frequently observed, that the certainty of a rule was often of much

(*a*) 16 Johns. 402; 20 id. 722; Lord Chancellor Parker, 1 P. Wms. 452; Ashhurst, J., 7 T. R. 419; Lord Tenterden, 3 B. & Ad. 17; Best, C. J., 3 Bing. 588; Cowen, J., 23 Wendell, 341.

(*b*) Jones's Essay on Bailments, 46. (*c*) 33 Hen. VI., 41. (*d*) Cro. Jac. 527.

more importance in mercantile cases than the reason of it, and that a settled rule ought to be observed for the sake of property; and yet, perhaps, no English judge ever made greater innovations and improvements in the law, or felt himself less embarrassed with the disposition of the elder cases when they came in his way, to impede the operation of his enlightened and cultivated judgment. The law of England, he observed, would be an absurd science, were it founded upon precedents only. Precedents were to illustrate principles and to give them a fixed certainty. His successor, Lord Kenyon, acted like a Roman dictator, appointed to recall and reinvigorate the ancient discipline. He controlled or overruled several very important decisions of Lord Mansfield, as dangerous innovations, and on the ground that they had departed from the precedents of former times, and disturbed the landmarks of property, and had unauthorizedly superadded equity powers to a court of law. "It is my wish and my comfort," said that venerable judge, "to stand *super antiquas vias.* I *478 cannot legislate, but by my *industry I can discover what our predecesors have done, and I will tread in their footsteps." The English courts seem now to consider it to be their duty to adhere to the authority of adjudged cases, when they have been so clearly, and so often, or so long established, as to create a practical rule of property, notwithstanding they may feel the hardship, or not perceive the reasonableness, of the rule. There is great weight in the maxim of Lord Bacon, (*a*) that *optima est lex, quæ minimum relinquit arbitrio judicis; optimus judex, qui minimum sibi.* The great difficulty as to cases consists in making an accurate application of the general principle contained in them to new cases, presenting a change of circumstances. If the analogy be imperfect, the application may be erroneous. The expressions of every judge must also be taken with reference to the case on which he decided; we must look to the principle of the decision, and not to the manner in which the case is argued upon the bench, otherwise the law will be thrown into extreme confusion. (*b*) The exercise of sound judgment is as necessary in the use, as diligence and learning are requisite in the pursuit, of adjudged cases. (*c*)

(*a*) Bacon's Works, ii. 448, Aphor. 46.

(*b*) Best, Ch. J., 2 Bing. 229; Marshall, Ch. J., 6 Wheaton, 399.

(*c*) M. Dupin, in his Jurisprudence des Arrêts, has given us many excellent rules

Considering the influence of manners upon law, and the force of opinion, which is silently and almost insensibly controlling the course of business and the practice of the courts, it is impossible that the fabric of our jurisprudence should *not *479 exhibit deep traces of the progress of society, as well as of the footsteps of time. The ancient reporters are going very fast, not only out of use, but out of date, and almost out of recollection. The modern reports, and the latest of the modern, are the most useful, because they contain the last, and, it is to be presumed, the most correct exposition of the law, and the most judicious application of the abstract and eternal principles of right to the refinements of property. They are likewise accompanied by illustrations best adapted to the inquisitive and cultivated reason of the present age. But the old reporters cannot be entirely neglected, and I shall devote the remainder of this lecture to a short historical review of the principal reporters prior to the present times. No one ought to read a book, said M. Lami, (*a*) (and the remark has peculiar application to law books) unless he knows something of the author, and when he wrote, and the character of the work, and the character of the edition.

The division line between the ancient and the modern English reports may, for the sake of convenient arrangement, be placed at the revolution in the year 1688. The distinction between the old and new law seems then to be distinctly marked. The cumbersome and oppressive appendages of the feudal tenures were abolished in the reign of Charles II., and the spirit of modern improvement and of commercial policy began then to be more sensibly felt and more actively diffused. The appointment of that great and honest lawyer, Lord Holt, to the station of Chief Justice of the King's Bench gave a new tone and impulse to the vigor of the common law. The despotism of the Stuarts was abolished for ever, and the civil and political liberties of the English nation were more explicitly acknowledged and defined, at

and observations on the value and on the abuse of the authority of reports of judicial decisions. He admits the force of them when correctly stated, and applied with discernment and sobriety; and that they have the force of law when there has been a series of uniform decisions on the same point, because they then become conclusive evidence of the law. The immense collection by M. Merlin, in his Répertoire, and especially in his Questions de Droit, he would say, had the stamp of Papinian, if it were permitted to compare any lawyer to Papinian.

(*a*) Entretiens sur les Sciences et sur la Manière d'étudier.

the accession of the house of Orange. The old reporters
*480 * will include all the reports from the Year Books down to that period; and we will, in the first place, bestow upon those of them which are the most distinguished a cursory glance and rapid review.

3. Notice of the Principal Reports at Law. — The oldest reports extant on the English law are the Year Books, which consist of eleven parts or volumes, written in law French, and extend from the beginning of the reign of Edward II. to the latter end of the reign of Henry VIII., a period of about two hundred years.

There are a few broken cases, which may be gleaned from the old abridgments, and particularly from Fitzherbert, which go back to the reign of Henry III.[1] The Year Books were first printed in the reign of James I., and were again printed by subscription in 1679; but they have never been translated, and they are not worth the labor and expense either of a new edition or a translation. The substance of the Year Books was afterwards included in the great abridgments of Statham, Fitzherbert, and Brooke, and those compilations superseded, in a considerable degree, the use of them. The Year Books were very much occupied with discussions touching the forms of writs, and the pleadings and practice in real actions, which have gone entirely out of use. In a late case in the C. B., the judges spoke with some sharpness of reproof against going back to the Year Books in search of a precedent in the case of levying a fine. (*a*) The great authenticity and accuracy of the Year Books arose from the manner in which they were composed. There were four reporters appointed to that duty, and they had a yearly stipend from the crown, and they used to confer together, and the reports being settled by so many persons of approved diligence and learning, deservedly carried great credit with them. (*b*) But so great have been the changes since the feudal ages, in the character of prop-

(*a*) 2 Taunt. 201.

(*b*) Preface to Plowden's Reports.

[1] Year Books of 20 and 21, 30 and 31, 32 and 33 Edward I. have now been published, with a translation under the direction of the Master of the Rolls. Earlier still is the Placitorum Abbreviatio, which goes back to the reign of Richard I. The case of Battle Abbey, which was heard before Henry II. in person, with many of his magnates, including the Chancellor Thomas à Becket, will be found in 2 Palgrave's Eng. Comm. xxviii.-lxiv. *Vide* ib. lxv., lxxiii.

erty, the business of civil life, and the practice of the courts, that the *mass of curious learning and technical questions *481 contained in the Year Books have sunk into oblivion; and it will be no cause of regret if that learning be destined never to be reclaimed. The Year Books have now become nearly obsolete, and they are valuable only to the antiquary and historian, as a faithful portrait of ancient customs and manners. (*a*)

The Year Books ended in the reign of Henry VIII., because persons were no longer appointed to the task of reporting, with the allowance of a fixed salary. Private lawyers then undertook the business of reporting for their own use, or for the purpose of publication. Many English lawyers have regretted that the practice of appointing public reporters, with a stipulated compensation, as is now the American practice, was not continued, as it would have relieved the profession from many hasty and inaccurate reports, which have greatly increased the uncertainty of the law. The reports of Dyer relate to the reigns of Henry VIII., Edward VI., Mary, and Elizabeth. They have always been held in high estimation, for Dyer presided as Chief Justice in the C. B. for upwards of twenty years, and was distinguished for learning, ability, and firmness. His reports were afterwards enriched by marginal notes of Chief Justice Treby, and which are said, by Mr. Justice Buller, (*b*) to be good law. The work was compiled in law French, and published in an English translation, in 1793, with the notes.

Plowden's Commentaries embraced the same period as the reports of Dyer. They bear as high a reputation for accuracy as any ancient book of reports, though Lord Coke said he had discovered four cases in Plowden which were erroneous. (*c*) Plowden gives the pleadings in those cases in *which judg- *482 ment was entered, and the arguments of counsel, and the decisions on the bench, very much at large. They were first published in 1578, and taken originally, as he says, for his private use. But he took great pains in rendering his work accurate, and he reported nothing but what had been debated and decided upon demurrer or special verdict; and his reports were likewise

(*a*) In 1 Barn. & Cress. 410, the Court of King's Bench decided a case chiefly upon the authority of a citation from the Year Book of 42 Edw. III., but such a reference is rare.

(*b*) 2 T. R. 84.

(*c*) Bacon's Works, vi. 122.

submitted to the inspection of the sergeants and judges. The work is, therefore, distinguished for its authenticity and accuracy; and though not of so dramatic a character as much of the Year Books, it is exceedingly interesting and instructive, by the evidence it affords of the extensive learning, sound doctrine, and logical skill of the ancient English bar.

Lord Coke's Reports, in thirteen parts or volumes, are confined to the reigns of Elizabeth and James, and deservedly stand at the head of the ancient reports, as an immense repository of common-law learning. The first eleven books of his reports contain about five hundred cases, and were published in his lifetime, and he took care to report and publish only what he calls leading cases, and conducive to the public quiet. Lord Bacon said, that had it not been for Sir Edward Coke's Reports, the law in that age would have been almost like a ship without ballast; and that though "they had extrajudicial resolutions, they did contain infinite good decisions." Much of the various and desultory learning in these reports is law to this day; and the most valuable of the cases reported have been selected, and recommended to the attention of the American student, by Professor Hoffman, of the University of Maryland, in his "Course of Legal Study." When these reports were published, between 1600 and 1615, there were no other prior reports but the Year Books, Dyer, and Plowden. Lord Coke said, that he endeavored, in his reports, to avoid obscurity, ambiguity, and prolixity. It is singular that he should have so egregiously failed in his purpose. The want of methodical arrangement and lucid order is so manifest in his
* 483 reports, * and he abounds so greatly in extrajudicial *dicta* and collateral discussions, that he is distinguished above most other reporters for the very defects he intended to avoid. It is often very difficult to separate the arguments of counsel from the reasons and decisions of the court, and to ascertain precisely the point adjudged. This, probably, gave occasion to Ireland and Manley's Abridgment of Lord Coke's Reports, in which they undertake to detach from the work all the collateral discussion and learning, and to give only the "very substance and marrow" of the reports. A work of this kind may be convenient in the hurry of research, but I believe no accurate lawyer would ever be contented to repose himself upon such a barren account of a decision, without looking into the reason and authorities on

which it was founded. (*a*) With all their defects, Lord Coke's Reports are a standard work of that age, and they alone are sufficient to have discharged him from that great obligation of duty with which he said he was bound to his profession. When Coke's Reports were first published, they gave much offence to King James, as containing many doctrines which were deemed too free and injurious to the prerogative of the crown; and the king commanded Lord Coke to strike out the offensive parts, and he also referred the work to his judges to be corrected. (*b*) But Lord Coke was too independent in spirit, and he had too high a regard to truth and law, to gratify the king on this subject; and he was, for this and other causes, removed from the office of Chief Justice of the K. B.

Hobart's reports of cases in the time of James I. were printed in 1646, and, in a subsequent age, they were revised *and corrected by Lord Chancellor Nottingham. Like *484. the reports of Lord Coke, they are defective in method and precision, and are replete with copious legal discussions. Hobart was Chief Justice of the C. B., and a great lawyer. Judge Jenkins, the contemporary of Coke and Hobart, has given us, in the preface to his reports, an exalted eulogy on those distinguished men, and the biographical sketch of their characters is peculiarly animated and lively. Jenkins compiled his reports or centuries (as he quaintly terms them) during the tumult of the civil wars under Charles I. and the commonwealth, and they resemble more a digest of decisions after the manner of Fitzherbert and Brooke than regular reports of adjudged cases. From his intemperate language and hard fate, it is evident he was a zealous royalist, and had provoked the resentment of his enemies. He composed his work, as he says, when he was "broken with old age and confinement in prison, where his fellow-subjects, grown wild with rage, had detained him for fifteen years, and that he was surrounded with an odious multitude of barbarians." He renders a just tribute of veneration to the memory of Lord Coke and Lord Hobart, as two men who had furnished surpass-

(*a*) We have Lord Coke's authority on the very point. "The advised and orderly reading over of the books at large, I absolutely determine to be the right way to enduring and perfect knowledge; and to use abridgments as tables, and to trust only to the books at large." Dedication of Coke's Reports to the Reader, 11.

(*b*) Lord Bacon's Works, vi. 121, 128, 132, 173.

ing light to the professors of the law. They were judges of great authority and dignity, who to the most accurate eloquence joined a superlative knowledge of the laws, and consummate integrity, and whose names, he said, would flourish as long as the laws and the kingdom should endure. Lord Hobart, as he continues to observe, was adorned with the brightest endowments, and a piercing understanding, and he had always equity before his eyes. Lord Coke was a judge whom power could not break nor favor bend. He received the smiles and frowns of the court by turns, and possessed an immense fortune, which he had honestly acquired. The only thing objected to him as a fault was, that he was thought to go to too great lengths with the republican party; but he admits that he died in the highest estimation.

*485 *Croke's reports of decisions in the courts of law in the reigns of Elizabeth, James, and Charles are a work of credit and celebrity among the old reporters. They commenced about the time that Dyer ended, and were first published under the protectorate of Cromwell. From the character of the judge, his gravity, learning, diligence, and advantages, and from the precision and brevity of his cases, these reports have sustained their character in every succeeding age, and are, to this day, familiarly referred to as an authentic depository of the rules of the common law.

The reports of Yelverton are a small collection of select cases, in the latter part of the reign of Elizabeth, and the first ten years of the reign of James. He was a judge of the C. B., and one of the most eminent lawyers of that age, which was truly the Augustan age of the old common-law learning. These reports have been lately recommended to the notice of the American lawyer by a new edition, published in this country, and enriched with copious, valuable, and accurate notes by Mr. Metcalf.

In the reign of Charles II., the most distinguished of the reports are those of Chief Justice Saunders. They are confined to decisions in the K. B. for the space of six years, between the 18th and 24th years of the reign of Charles II., and contain the pleadings and entries in cases decided, as well as the arguments of counsel, and the judgments of the court. They are recommended for the accuracy of the entries, and the concise, clear, and pointed method of decision; and are particularly valuable to the practising lawyer, as a book of precedents as well as of deci-

sions. They have always been esteemed the most accurate and valuable reports of that age, and this is the character which has been repeatedly given of them by the judges in modern times. (*a*) A new edition of these reports was published in 1799, by Sergeant Williams, with very copious notes, which, in many *instances, are distinct and elaborate essays on the sub- *486 jects of which they treat. Lord Eldon has said, in reference to this edition, that to any one in a judicial situation it would be sufficiently flattering to have said of him, that he was as good a common lawyer as Sergeant Williams, and that no man ever lived to whom the character of a great common lawyer more properly applied. I have no doubt of the merit of the edition, and of the great learning of the editor. The authorities, new and old, applicable to the subject, are industriously collected and methodically arranged. But with all the praise justly due to the edition, it is liable to the great objection of making one of the old reporters the vehicle of voluminous dissertations. They introduce perplexity and confusion by their number and length. If such treatises were published by themselves, the student would know better where to find them; but when appended to a plain reporter, they seem to be out of place. Notes would appear to be more appropriate, if they were confined simply and dryly to the illustration of the case in the text, and to show, by a reference to other decisions, how far it might still be regarded as an authority, and when and where it had been confirmed, or questioned, or extended, or restricted, or overruled. The convenience and economy of the profession would certainly be well consulted by this course. This edition of Saunders so far surpasses in extent and variety of learning the original work, as to become a new work of itself, which might properly be denominated Williams's notes; and the venerable simplicity of the reporter is obscured and lost, in the commentaries of the annotator. (*a*)

The reports of Chief Justice Vaughan contain some very interesting cases. He was a grave and excellent judge, and his reports consist chiefly of his own arguments and opinions deliv-

(*a*) Burr. 1730; 2 Bos. & Pul. 23.

(*a*) The distinguished Reports of Saunders, edited by Sergeant Williams, appeared in a 5th edition, by Mr. Justice Paterson, of the Q. B., and afterwards, in 1847, in a 6th edition, by Edward Vaughan Williams, in 3 vols. octavo. [In 1871, the notes were published separately, continued to date by Mr. Justice E. V. Williams.]

ered while he was Chief Justice, and they are distinguished for great variety of learning. The Reports of Sir Thomas Jones, who was also Chief Justice in the reign of Charles II.; of * 487 Sir Creswell Levinz, who was a judge of the * C. B.; of Sir Gefrey Palmer, who was Attorney-General under Charles II.; of Lord Chief Justice Pollexfen, whose reports consist of cases argued by him while he was at the bar; and of Sir William Jones, who was for twenty-two years a judge, are all of them works of authority, though a considerable part of the discussions and decisions which they record ceases at this day to excite much attention, or to be very applicable to the new and varied course of human affairs. And, indeed, it may be here observed, that a very large proportion of the matter contained in the old reporters, prior to the English revolution, has become superseded, and is now cast into the shade by the improvement of modern times; by the disuse of real actions, and of the subtleties of special pleadings; by the cultivation of maritime jurisprudence; by the growing value and variety of personal contracts; by the spirit of commerce, and the enlargement of equity jurisdiction; by the introduction of more liberal and enlightened views of justice and public policy; and, in short, by the study and influence of the civil law.

In perusing the old reports, we cannot but be struck with the long, laborious, and subtle arguments, and the great delay which accompanied the investigation of points of law. Thus, for instance, the case of *Stowel* v. *Zouch*, in Plowden, was argued twice in the C. B.; and then twice in the Exchequer Chamber, before all the judges in England. *Calvin's Case*, in Coke, was argued first at the bar of the K. B. by counsel, then in the Exchequer Chamber, first by counsel, and then by all the judges. It was afterwards argued by counsel at two different times, and then by all the judges at the next term, upon four different days; and at another term thereafter by all the judges on four different days. So again in *Manby and Richards* v. *Scott*, in Levinz, the case was argued at the bar three several times, by distinct counsel each time, and afterwards by all the judges at the bench. It was quite common in former times to have a case spoken to at two, and three, and four several times, and each time at a different * 488 term, before judgment was rendered. In * Lord Chief Justice Willes's Reports, in the reign of George II., we

find a case which was argued five times, and at five distinct terms, and the judgment was not rendered until the space of five years had elapsed from the first argument. It was not until the time of Lord Mansfield that such repeated arguments were disused, and great despatch and unexampled facility and vigor given to the administration of justice. There were some advantages attending repeated discussions, which served as a compensation for the delay and expense attending them. They tended to dissipate shadows and doubts, and to unite the opinions on the bench, and prevent that constant division among the judges which has much weakened the authority of some of our American courts.

From the era of the English revolution, the reports increase in value and importance; and they deal more in points of law applicable to the great change in property, and the commerce and business of the present times. I shall not undertake to speak critically of the particular merits of the modern reports, for this would lead me into too extensive details. Those of Lord Raymond and Sergeant Salkeld embrace the reigns of William and Mary, and Queen Anne; and during that period Lord Chief Justice Holt gave lustre to the jurisprudence of his country. The reports of Sir John Strange, of Lord Chief Baron Comyns, of Lord Chief Justice Willes, and a part of the reports of Sergeant Wilson, occupy the reigns of George I. and II.; and they are all respectable, and the reports of Willes and Wilson, in particular, very accurate repositories of the judicial decisions of those reigns. The reports of Lord Raymond and of Sergeant Wilson are also peculiarly valuable to the pleader, for the many useful entries and forms of pleadings which accompany the cases. From that period the English reports are to be read and studied with profound attention. The reports of Burrow, Cowper, and Douglass contain the substance of Lord Mansfield's judicial decisions, and they are among the most interesting reports in the English *law. All the courts of law at Westminster have been *489 filled with very eminent men since the time of the accession of George III.; and we need only refer to the Term Reports and to East and his successors, as reporters to the King's Bench, and to Wilson, Henry Blackstone, Bosanquet & Puller, Taunton, and their successors in the C. B., for views and sketches of the English law in its most correct and cultivated state.

A still deeper interest must be felt by the American lawyer in the perusal of the judicial decisions of his own country. Our American reports contain an exposition of the common law, as received and modified in reference to the genius of our institutions. By that law we are governed and protected, and it cannot but awaken a correspondent attachment. But I need not undertake the invidious task of selection and discrimination among the numerous volumes of the reports of American decisions. Their relative character must be familiar to the profession, and it will be sufficient to advise the student to examine thoroughly, and obtain the mastery of the principles of law as expounded and declared by our more important tribunals, whether they be of federal or of state jurisdiction.

4. Notice of the Principal Reports in Equity. — We have hitherto confined our attention to the reports of cases in the courts of common law. But the system of equity is equally to be found embodied in the reports of the adjudged cases; and the rules and usages of the Court of Chancery are as fixed as those which govern other tribunals. They have been regarded as a kind of secondary common law, framed or promulgated by the Court of Chancery within the two last centuries. That court is as much bound as a court of law, by a series of decisions, applicable to the case, and establishing a rule. It has no discretionary power over principles and established precedents; and chancery has grown to be a jurisdiction of so much strict technical rule, that it is said by a distinguished writer on equity doctrines, that there are now many settled rules of equity which require to be moderated by the rules of good conscience, as much as the most rigorous rules of law did, before the chancellors interfered *490 on equitable *grounds. (*a*) A court of equity becomes, in the lapse of time, by gradual and almost imperceptible degrees, a court of strict technical jurisprudence, like a court of law. The binding nature of precedents in a court of equity was felt and acknowledged by Lord Keeper Bridgman, in the reign of Charles II.; (*b*) and in the case of *The Earl of Mountague* v. *Lord Bath*, (*c*) soon after the revolution, Lord Chief Justice Treby, who sat for the Lord Chancellor, declared that the Court of Chancery was limited by the precedents and practice of former

(*a*) Sugden's Letters to a Man of Property, 4.
(*b*) 1 Mod. 307.
(*c*) 3 Ch. Cas. 95.

times, and that it was dangerous to extend its authority further. At this day, justice is administered in a court of equity upon as fixed and certain principles as in a court of law; and Lord Eldon has secured to himself a title to the reverence of his countrymen, by resisting the temptation, so often pressed upon him, to make principles and precedents bend to the hardship of a particular case. (*d*) In this country it is at least as important as in any other, that the administration of justice, both legal and equitable, should be stable and uniform; and especially if there be any weight in the opinion of an ancient English lawyer, that "variety of judgments and novelty of opinions were the two plagues of a commonwealth." (*e*)

We have no reports of chancery decisions until subsequent to the time of Lord Bacon.[1] Anciently the Court of Chancery administered justice according to what appeared to be the dictate of conscience as applied to the case, without any regard to law or rule; and great inconvenience and mischief must have been produced in the infancy of the court, by reason of the uncertainty and inconsistency of its decisions, flowing from the want of settled principles. The jurisdiction of the court was greatly enlarged in the time of Cardinal Wolsey, who was chancellor under Henry VIII.; *and he maintained his *491 equitable jurisdiction with a high hand, and exercised his authority over everything which could be a subject of judicial inquiry, and decided with very little regard to the common law. This conduct in his judicial capacity was one of the grounds of accusation against him when he was impeached. Under his successor, Sir Thomas More, who is said to have been the first

(*d*) Lord Chancellor Hart has observed, however (and he had been familiar with the English Chancery practice), that Lord Eldon was not the slave of authority, for his doctrine was, that everything in equity turns on the circumstances, and what the court had to see was, whether the circumstances took the case out of the usual rule. In equity there is no rule so inflexible as not to bend to the special circumstances of a particular case. Moore *v.* McKay, 2 Molloy, 134. See also Montesquieu *v.* Sandys, 18 Vesey, 302.

(*e*) Pref. to Jenkins's Centuries.

[1] The British government has published with the calendars of the proceedings in chancery during the reign of Queen Elizabeth examples of such proceedings going back as far as Richard II. These calendars were much referred to in Vidal *v.* Girard, 2 How. 127, 196, to prove the jurisdiction of chancery over charities before the Statute 43 Eliz.

chancellor that ever had the requisite legal education, (*a*) business rose again with rapidity, and to such an extent as to require the assistance of a Master of the Rolls. He allowed injunctions so freely as to displease the common-law judges, though he acted always with great ability and integrity. (*b*) To show how wonderfully business in chancery had increased by the time of Lord Bacon, we need only recur to the fact which he gives us himself, (*c*) that he made two thousand orders and decrees in a year; and yet we have not a single decision of his reported.

Those decisions, if well and faithfully reported, would doubtless have presented to the world a clear illustration and masterly display of many principles of equity since greatly considered and discussed; for even upon dry technical rules and points of law he shed the illuminations of his mighty mind.

In West's Symboleography, a work published at the close of Elizabeth's reign, we have divers curious and authentic precedents of the process, and bills, and answers in chancery, prior to the time of Bacon. We have, also, in the same work, a brief digest of the powers and jurisdiction of the court, from which it would appear, that equity was regarded in that day as a matter of arbitrary conscience, unincumbered by any rules or principles of law. No cases are cited to show what the authority was, but

such as were gleaned from the Year Books, and the trea-
* 492 tises of the Doctor * and Student, and of the Diversity of

Courts. (*a*) It was not until after the restoration that any reports of adjudged cases in chancery were published. The volumes entitled "Reports of Cases taken and adjudged in the Court of Chancery, in the reigns of Charles I., Charles II., James II., William III., and Queen Anne," commence with the reign of Charles I., and contain the earliest adjudged cases in

(*a*) But Lord Campbell, in his Lives of the Lord Chancellors, mentions some distinguished chancellors taken from the common-law courts in much earlier times. [And the ecclesiastical chancellors were educated in the Roman law. 1 Spence, Eq. 347.]

(*b*) Reeves's History of the English Law, iv. 368–377.

(*c*) Bacon's Works, iv. 530.

(*a*) The Diversity of Courts and their Jurisdictions is a very brief treatise, compiled in law French, under Henry VIII., and translated into English by William Hughes, under Charles I. It stated that in chancery "a man shall have remedy for that for which he can have no remedy at the common law; and it is called by the common people the *court of conscience*." It is printed at the end of the Mirror of Justices.

equity. But that work, and another contemporary work of the same character, entitled "Cases argued and adjudged in the High Court of Chancery," are both of them, in their general character, loose, meagre, and inaccurate reports, of not much weight or authority. The reports of some cases decided by Lord Chancellor Cowper, in the third and last volume of the Reports in Chancery, and the great case of the *Duke of Norfolk*, and the case of *Bath and Mountague*, at the conclusion of the Cases in Chancery, are distinguished exceptions to this complaint, and those great cases are fully and very interestingly reported. In the latter part of the reign of Charles II., Lord Chancellor Nottingham raised the character of the court to high reputation, and established both its jurisprudence and its jurisdiction upon wide and rational foundations. We have but few reports of his decisions that are worthy of his fame. They are dispersed through several works of inferior authority. It is from his time, however, that equity became a regular and cultivated science, and the judicial decisions in chancery are to be carefully studied.

Vernon's Reports are the best of the old reports in chancery. They were published from his manuscripts, after his death, by order of Chancellor King, and were found to be quite imperfect and inaccurate. In 1806, Mr. Raithby favored the profession with a new and excellent edition of Vernon, enriched by learned notes and accurate extracts from the register's books, so that the volumes assumed a new dress, and more unquestionable authenticity. Those reports include part of the judicial administration of Lord Nottingham, and the whole of the time of Lord Somers; * but they give us nothing equal to the reputa- * 493 tion of those great men. They bring the series of equity decisions down to the conclusion of Lord Chancellor Cowper's judicial life.

Precedents in Chancery is a collection of cases between 1689 and 1722; and the author of those reports, and of the first volume of Equity Cases Abridged, is generally supposed to be the same person. They are works which contain very brief cases, in comparison with the voluminous details of modern reports; but they are of respectable authority. (*a*) Peere Williams's Reports extend from the beginning of the last century to the year 1735,

(*a*) 1 Vesey, 547; 3 Vesey, 285; 5 Vesey, 364.

and they embrace the period of the decisions of a succession of eminent men, who presided in chancery in the former part of that century. The notes of Mr. Cox to the fourth edition of these reports gave to that edition the character of being the best edited book on the law. Even before his learning and industry had given new character and value to the reports of Peere Williams, they were regarded as one of the most perspicuous, useful, and interesting repositories of equity law to be found in the language.

Moseley's reports of cases during the time of Lord King have received a various and contradictory character and treatment. Lord Mansfield said it was a book not to be quoted; but Lord Eldon, who is presumed to have been a better judge of the merits of the work, says that Moseley is a book of considerable accuracy. (*b*) It is fortunate that we have even so imperfect a view of the decisions of Lord King, who was an eminent scholar, and to whom Mr. Locke bequeathed his papers and library.

Lord Talbot presided in chancery but a very few years. He was a pure and exalted character, who died in the vigor of his age, and his loss was lamented as a great national calamity. The cases during his time, under the title of "Cases tempore Talbot," are well reported, and have a reputation for accuracy.

*494 *Lord Hardwicke, the successor of Lord Talbot, held the great seal for upwards of twenty years, and the present wise and rational system of English equity jurisprudence owes more to him than perhaps to any of his predecessors. His decisions are reported in the elder Vesey and Atkyns, and partly in Ambler and Dickens; and though none of them are eminent reporters, either for accuracy or precision in the statements of the cases, or in giving the judgment of the court, (*a*) yet the value of his opinions, and the great extent of his learning, and the solidity of his judgment, have been sufficiently perceived and understood. There is no judge in the judicial annals of England whose judicial character has received greater and more constant homage. His knowledge of the law, said a very competent judge, was most extraordinary, and he was a consummate master of the profession. (*b*) His decisions, at this day, and in our own courts,

(*b*) 3 Anst. 861; 5 Burr. 2629; 1 Meriv. 92.

(*a*) Buller, J., in 6 East, 28, n.; Sir J. Mansfield, in 5 Taunt. 64; 4 Vesey, 138, n. Preface to Eden's Rep.; 1 Sch. & Lef. 240.

(*b*) Lord Kenyon, 7 T. R. 416.

do undoubtedly carry with them a more commanding weight of authority than those of any other judge; and the best editions of the elder Vesey and Atkyns will continue to fix the attention and study of succeeding ages.

Eden's Reports of the decisions of Lord Northington, the successor to Lord Hardwicke, are very authentic and highly esteemed. They surpass in accuracy the reports either of Ambler or Dickens within the same period; and the authority of Lord Northington is very great, and it arose from the uncommon vigor and clearness of his understanding. The next book of reports of deserved celebrity is Brown, commencing with Lord Thurlow's appointment to the office of chancellor; and the high character of the court at that period gave to those reports a very extensive authority and circulation, for which they were indebted more to the reputation of the chancellor than to any merit in the execution of the work. Cox's Cases in Chancery give us the * decisions of Lord Kenyon, while he was Master of the * 495 Rolls under Thurlow, as well as the decisions of the Lord Chancellor during the same period. They were intended as a supplement to the reports of Brown and the younger Vesey, so far as those reports covered the period embraced by the cases, and they are neat, brief, and perspicuous reports, of unquestionable accuracy. A new and greatly improved edition has lately been published in New York, under the superintendence of one of the masters in chancery.

The reports of the younger Vesey extend over a large space of time, and contain the researches of Sir Richard Pepper Arden, as Master of the Rolls, and the whole of the decisions of Lord Loughborough, and carry us far into the time of Lord Eldon. These reports are distinguished for their copiousness and fidelity. The same character is due to the reports of his successors; and though great complaints have been made at the delay of causes, arising from the cautious and doubting mind of the present (*a*) venerable Lord Chancellor of England, it seems to be universally conceded, that he bestows extraordinary diligence in the investigation of immense details of business, and arrives in the end at a correct conclusion, and displays a most comprehensive and familiar acquaintance with equity principles. It must, nevertheless, be admitted that the reports of Lord Eldon's administration

(*a*) 1826.

in equity, amounting to perhaps thirty volumes, and replete with attenuated discussion, and loose suggestions of doubts and difficulties, are enough to task very severely the patience of the profession.

There are recent reports of decisions in other departments of equity which are deserving of great attention. The character of those branches of the equity jurisdiction is eminently sustained; and the reported decisions of Lord Redesdale and Lord Manners, in the Irish Court of Chancery, are also to be placed on a level, in point of authority, with the best productions of the English bench. (*b*)

Upon our American equity reports I have only to observe, that, being decisions in cases arising under our domestic * 496 * laws and systems, they cannot but excite a stronger interest in the mind of the student; and from their more entire application to our circumstances, they will carry with them the greater authority.[1]

(*b*) The Lives of the Lord Chancellors of England, from the earliest times till the reign of George IV., in 5 vols. 8vo, London, 1846, by Lord Campbell, is the most instructive and attractive work on legal biography that is extant, and equally distinguished for its truth, its candor, and its freedom.

[1] [The reports of judicial decisions, to which the attention of the American lawyer is directed, have become too numerous even to be designated in a limited note. The English reports still retain their high rank in the lawyer's library. The alterations of our forms of pleadings, and in the rules of procedure, and the differences of our political systems, indeed, render many of the English decisions inapplicable to our circumstances; but the mass of legal questions will always remain alike in both countries. The essential principles of civil liberty belong to both; the mode of legislation in each is the same; and the system of evidence, the rights of persons, and the great body of commercial law, are common to England and America. The reports of the courts of England seemed for a while to languish, after the retirement of Lord Ellenborough, but they never exhibited the science of the law in so high and cultivated a state as at the present time. If it be not presuming in an American annotator to pretend to discriminate among the contemporary decisions, he may point out to the student, among the common-law reports, the decisions of the Court of Exchequer, since Baron Parke and his very learned associates became the judges, as worthy of the brightest period of English jurisprudence.

Since the last edition of the Commentaries appeared, the Court of Chancery of New York has ceased to exist, and with it has closed a series of equity reports which reflected lustre on the state, and the influence of which has pervaded the jurisprudence of the nation. The reports containing the decisions of the two most distinguished chancellors of New York, Johnson's Reports, Paige's Reports, and Barbour's Chancery Reports,

5. Interesting Character of Reports. — I have now finished a succinct detail of the principal reporters; and when the student has been thoroughly initiated in the elements of legal science, I would strongly recommend them to his notice. The old cases, prior to the year 1688, need only be occasionally consulted, and the leading decisions in them examined. Some of them, however, are to be deeply explored and studied, and particularly those cases and decisions which have spread their influence far and wide, and established principles which lie at the foundations of English jurisprudence. Such cases have stood the scrutiny of contemporary judges, and been illustrated by succeeding artists, and are destined to guide and control the most distant posterity. The reports of cases since the middle of the last century ought, in most instances, to be read in course, and they will conduct the student over an immense field of forensic discussion. They contain that great body of the commercial law, and of the law of contracts, and of trusts, which governs at this day. They are worthy of being studied even by scholars of taste and general literature, as being authentic memorials of the business and manners of the age in which they were composed. Law reports are dramatic in their plan and structure. They abound in pathetic incident, and displays of deep feeling. They are faithful records of those "little competitions, factions, and debates of mankind"

comprise the whole system of equity law, and will always be the resort and study of the American lawyer.

Of the first of those chancellors it is unnecessary to speak to the reader of his volumes. Most of his decisions have been transferred to his Commentaries. "Lector, si monumentum requiris circumspice!"

But it may be permitted to the editor to render his tribute of homage to Chancellor Walworth. It has been his privilege to practise under the Chancellor during his whole term of office, and to observe those high judicial qualities which have rarely been equalled. If in his demeanor on the bench the Chancellor was sometimes open to criticism, it was that only which has been applied to kindred genius, that "he was prevented, by his inconceivable rapidity in apprehending the opinions of others, from judging accurately of their reasonableness." This criticism, however, never approached his matured decisions, embracing the whole circle of equity. Never, perhaps, were so many decisions made, where so few were inaccurate as to facts or erroneous in law.

If it was destined that the Court of Chancery should fall under a reform which apparently designs to obliterate the history as well as the legal systems of the past, it is a consolation to reflect that it fell without imputation on its purity or usefulness, and that no court was ever under the guidance of a judge purer in character or more gifted in talent than the last chancellor of New York. — W. K.]

that fill up the principal drama of human life; and which are engendered by the love of power, the appetite for wealth, the allurements of pleasure, the delusions of self-interest, the melancholy perversion of talent, and the machinations of fraud. They give us the skilful debates at the bar, and the elaborate opinions on the bench, delivered with the authority of oracular wisdom. They become deeply interesting, because they contain true portraits of the talents and learning of the sages of the law. *497 * We should have known but very little of the great mind and varied accomplishments of Lord Mansfield, if we had not been possessed of the faithful reports of his decisions. It is there that his title to the character of "founder of the commercial law of England" is verified. A like value may be attributed to the reports of the decisions of Holt, Hardwicke, Willes, Wilmot, DeGrey, Camden, Thurlow, Buller, Kenyon, Sir William Scott, Grant, and many other illustrious names, which will be immortal as the English law. Nor is it to be overlooked as a matter of minor importance, that the judicial tribunals have been almost uniformly distinguished for their immaculate purity. Every person well acquainted with the contents of the English reports must have been struck with the unbending integrity and lofty morals with which the courts were inspired. I do not know where we could resort, among all the volumes of human composition, to find more constant, more tranquil, and more sublime manifestations of the intrepidity of conscious rectitude. If we were to go back to the iron times of the Tudors, and follow judicial history down from the first page in Dyer to the last page of the last reporter, we should find the higher courts of civil judicature, generally, and with rare exceptions, presenting the image of the sanctity of a temple, where truth and justice seem to be enthroned, and to be personified in their decrees.

LECTURE XXII.

OF THE PRINCIPAL PUBLICATIONS ON THE COMMON LAW.

THE reports of adjudged cases are admitted to contain the highest and most authentic evidence of the principles and rules of the common law; but there are numerous other works of sages in the profession which contribute very essentially to facilitate the researches and abridge the labor of the student. These works acquire by time, and their intrinsic value, the weight of authority; and the earlier text-books are cited and relied upon as such, in the discussions at the bar and upon the bench, in cases where judicial authority is wanting.

One of the oldest of these treatises is Glanville's Tractatus de Legibus Angliæ, composed in the reign of Henry II., in which he was chief justiciary, and presided in the *aula regis*. It is a plain, dry, perspicuous essay on the ancient actions and the forms of writs then in use. It has become almost obsolete and useless for any practical purpose, owing to the disuse of the ancient actions; but it is a curious monument of the improved state of the Norman administration of justice. (*a*) It is peculiarly venerable, if it be, as it is said, the most ancient book extant upon the laws and customs of England. It has been cited, and commented upon, and extolled, by Lord Coke, Sir Matthew Hale, Sir Henry Spelman, Selden, Blackstone, and most of the eminent lawyers and antiquaries of the two last centuries. Mr. Reeves says that he incorporated the whole of Glanville into his History of the English Law.

Bracton wrote his treatise, De Legibus et Consuetudinibus

(*a*) In the History of the Boroughs and Municipal Corporations of the United Kingdom, by Messrs. Merewether & Stephens (i. Int. 18), all that is contained in the earlier Saxon laws, and in those of William I. and Henry I., and the charters of those periods, is said to be in a great degree repeated in Glanville, and again in Britton. Ib. i. 476. Dr. Irving, in his Introduction to the Study of the Civil Law, 93, says that Glanville's Treatise is under considerable obligation to the civil law.

Angliæ, in the reign of Henry II., and he is said to have been a judge itinerant in that reign, and professor of law at *500 *Oxford. He is a classical writer, and has been called, by a perfect judge of his merits, (*a*) the father of the English law, and the great ornament of the age in which he lived. His work is a systematic performance, giving a complete view of the law in all its titles, as it stood at the time it was written; and it is filled with copious and accurate details of legal learning. It treats of the several ways of acquiring, maintaining, and recovering property, much in the manner of the Institutes of Justinian. The style, clear, expressive, and sometimes polished, has been ascribed to the influence of the civil and canon law, which he had studied and admired; and the work evinces, by the freedom of the quotations, that he had drank deep at those fountains.

Sir William Jones says, he is certainly the best of our juridical classics, though he is perfectly aware that Bracton copied Justinian almost word for word. (*b*)[1] In the reign of Edward I., Bracton was reduced into a compendium by Thornton, which shows, says Selden, (*c*) how great the authority of Bracton was in the time of Edward I. He continued to be the repository of ancient English jurisprudence, and the principal source of legal authority, down to the time of the publication of the Institutes of Lord Coke.

Staunforde, in his Pleas of the Crown, published about the time

(*a*) Reeves's History of the English Law, iv. 570.

(*b*) Mr. Spence, in his Equitable Jurisdiction of the Court of Chancery, i. 118–132, considers that Bracton drew the learning of his treatise, not from the Anglo-Saxon or Anglo-Norman jurisprudence, but essentially from the Roman law.

(*c*) Dissertation annexed to Fleta, c. ii. sec. 1.

[1] See the very interesting treatise on Bracton and his Relation to the Roman Law, by Professor Carl Guterbock, translated by Brinton Coxe. Philadelphia: Lippincott & Co., 1866.

A new and critical edition of Britton, by Mr. F. M. Nichols, with variorum readings and a translation, has been published from the Clarendon Press.

Mr. Finlason, the editor of the last edition of Reeves's History of the English Law, in his notes to that work, makes very large use of the Mirror of Justices, *post*, 501, n. (*e*), which, he says, "though in its present form as recent as the reign of Edward I., incorporates an earlier work of the age of Alfred." Vol. i. introduction, lxiii, n. 2. See also p. 24, n. (*b*), and especially ii. 232, n. (*a*). "On the whole there is no book on the law of greater use and value to a legal historian." But we have the much greater authority of Palgrave (2 English Commonwealth, cxiv) that "we are compelled to reject it as evidence concerning the early jurisprudence of Anglo-Saxon England;" and he calls it "a very curious specimen of the apocrypha of the law," ib. note.

of Philip and Mary, bears strong testimony to the merits and to the authority of Bracton. It is stated in Plowden, (*d*) that neither Glanville nor Bracton were to be cited as authorities, but rather as ornaments to the discourse; and in several other books the same thing was said. (*e*) But Mr. Reeves, in his History of the English Law, (*f*) justly * vindicates the character of Bracton from such unmerited aspersion; and what * 501
is as much, and perhaps more to the purpose, the learned Selden, whose knowledge of English legal antiquities was unrivalled, declares that this notion is founded in error. Glanville and Bracton are authors of great service to all who apply themselves to the study of the law, and are desirous of knowing its origin and progress from the very foundation. (*a*) They contain numberless things, said Selden, which in his day either remained entire, or were only partially abrogated; and they contain such information on ancient customs and laws, as to carry with them authority as well as illustration. Lord Holt, in the great case of *Coggs* v. *Bernard*, made free use of Bracton, and spoke of him as an old author full of reason and good sense.

Britton and Fleta, two treatises in the reign of Edward I., were nothing more than appendages to Bracton, and from whom they drew largely. Lord Coke says (*b*) that Britton was Bishop of Hereford, and of profound judgment in the common law, and that Fleta was written by some learned lawyer, while in confinement in the Fleet prison. (*c*) The dissertation which Selden annexed to the edition of Fleta, printed in his time, is evidence of the high estimation in which the work was then held; and it is a little singular that President Henault, in his chronological abridgment of the History of France, (*d*) should refer to this ancient English treatise of Fleta as an historical authority. (*e*)

(*d*) P. 357, 358. (*e*) 1 Show. 118; 11 State Trials, 143.

(*f*) Vol. iv. 570, 571.

(*a*) Selden's Dissertations, c. 1, sec. 3.

(*b*) Pref. to 10 Co.

(*c*) Lord Campbell, in his very interesting Lives of the Lord Chancellors, says that Britton set the example of writing law books in French, which was followed for some centuries.

(*d*) Tom. i. 258.

(*e*) The Mirror of Justices was said, recently, by Ch. J. Tindal (6 Bing. N. C. 237), to be a book of great authority, and of the earliest, though uncertain date. Lord Coke spoke of its authority and antiquity in high terms, and that most of it was written before the conquest. Pref. to 9 Co. and Pref. to 10 Co. Mr. Reeves,

Sir John Fortescue's treatise, De Laudibus Legum Angliæ, was written in the reign of Henry VI., under whom he was Chief Justice, and afterwards Chancellor. It is in the form of a dialogue between him and the young prince, and he undertakes to
* 502 show that the common law was the most * reasonable and the most ancient in Europe, and superior to the civil law. It displays sentiments of liberty, and a sense of a limited monarchy, remarkable, in the fierce and barbarous period of the Lancastrian civil wars, and an air of probity and piety runs through the work. He insisted, for instance, that the conviction of criminals by juries, and without torture, was much more just and humane than the method of the continental nations; and that the privilege of challenging jurors, and of bringing writs of attaint upon corrupt verdicts, and the usual wealth of jurors, afforded that security to the lives and property of English subjects, which no other country was capable of affording. He run a parallel, in many instances, between the common and the civil law, in order to show the superior equity of the former, and that the proceedings in courts of justice were not so dilatory as in other nations. Though some of the instances of that superiority which he adduces, such as the illegitimacy of antenuptial children and the doctrine of feudal wardships, are of no consequence, yet the security arising from trial by jury, and the security of life and property by means of the mixed government of England, and the limitations of the royal prerogative, were solid and pre-eminent marks of superiority.

This interesting work of Fortescue has been translated from the Latin into English, and illustrated with the notes of the learned Selden; and it was strongly recommended, in a subsequent age, by such writers as Sir Walter Raleigh and St. Germain. And while upon this author, we cannot but pause and admire a system of jurisprudence which, in so uncultivated a period of society, contained such singular and invaluable provisions in favor of life, liberty, and property as those to which Fortescue referred. They were unprecedented in all Greek and Roman antiquity, and, being preserved in some tolerable degree of freshness and vigor, amidst the profound ignorance and licen-

author of the History of the English law, speaks of it as a curious, and in some degree authentic tract, and as compiled by Horne, under Edward II., from some work of that kind, and legal documents in the Anglo-Saxon times. [*Ante*, 500, n. 1.]

tious spirit of the feudal ages, they justly entitle the common law to a share of that constant and vivid eulogy which the English lawyers *have always liberally bestowed upon *503 their municipal institutions.

Littleton's Book of Tenures was composed in the reign of Edward IV., and it is confined entirely to the doctrines of the old English law, concerning the tenure of real estates, and the incidents and services relating thereto. In the first book, Littleton treats of the quantity of interest in estates, under the heads of fee-simple, fee-tail, tenant in dower, tenant by the curtesy, tenant for life, for years, and at will. In the second book, he treats of the several tenures and services by which lands were then held, such as homage, fealty, villenage, and knight service. In the third book, he treats of divers subjects relative to estates and their tenures, under the heads of parceners, joint tenants, estates on condition, releases, warranty, &c. He explained the learning of that period on the subject of tenures and estates, with a felicity of arrangement, and perspicuity and precision of style, that placed him above all other writers on the law. No work ever attained a more decided and permanent reputation for accuracy and authority. Lord Coke says, (*a*) that Littleton's Tenures was the most perfect and absolute work, and as free from error as any book that ever was written on any human science; and he is justly indignant at the presumptuous and absurd censures which the celebrated civilian, Hotman, was pleased to bestow on Littleton's clear and accurate view of English feudal tenures. He said he had known many of his cases drawn in question, but never could find any judgment given against any of them, which could not be affirmed of any other book in our law. The great excellence of Littleton is his full knowledge of the subject, and the neatness and simplicity of his manner. He cites but very few cases, but he holds no opinion, says his great commentator, but what is supported by authority and reason. A great part of Littleton is not now law, or is entirely *obsolete *504 with us; and particularly much of the matter in the chapters on estates in fee-tail, copyholds, feudal services, discontinuance, attornment, remitter, confirmation, and warranty. But, even at this day, what remains concerning tenures cannot be well understood without a general knowledge of what is abolished;

(*a*) Preface to Co. Litt. and to 10 Co.

and even the obsolete part of Littleton can be studied with pleasure and profit by all who are desirous to trace the history and grounds of the law. It has been supposed by Mr. Butler that Littleton's treatise would still be a proper introduction to the institutes of the English law on the subject of real estates.

Perkins's Treatise of the Laws of England, written in the reign of Henry VIII., has always been deemed a valuable book for the learning and ingenuity displayed in it relating to the title and conveyance of real property. Coke said it was wittily and learnedly composed; and Lord Mansfield held it to be a good authority in point of law. It treats of grants, deeds, feoffments, exchange, dower, curtesy, devises, surrenders, reservations, and conditions; and it abounds with citations, and supports the positions laid down by references to the Year Books, and Fitzherbert's Abridgment.

The Dialogue between a Doctor of Divinity and a Student in Law was written by St. Germain, in the reign of Henry VIII., and discusses, in a popular manner, many principles and points of common law. The seventeenth edition of this work was published in 1787, and dedicated to the younger students and professors of law. It has always been considered by the courts, and the best of the juridical writers, as a book of merit and authority. The form of writing by dialogue was much in use among the ancients, and some of the finest treatises of the Greeks and Romans were written in that form, and particularly the remains of the Socratic school in the writings of Xenophon and Plato, and the rhetorical and philosophical treatises of Cicero. The three most interesting productions, in the form of dialogue, on the English law, are Fortescue, already mentioned,
* 505 * this work of St. Germain, and the elegant and classical work entitled Eunomus, or Dialogues concerning the Law and Constitution of England, by Mr. Wynne.

But the legal productions of the preceding ages were all surpassed in value and extent in the reigns of Elizabeth and James by the results of the splendid talents and immense erudition of Bacon and Coke. The writings of Lord Bacon on the municipal law of England are not to be compared in reputation to his productions in physical and moral science; but it is nevertheless true, that he shed light and learning, and left the impression of profound and original thought, on every subject which he touched.

It was the course of his life to connect law with other studies, and, therefore, he admitted that his arguments might have the more variety, and perhaps the greater depth of reason. His principal law tracts are his Elements of the Common Law, containing an illustration of the most important maxims of the common law, and of the use of the law in its application to the protection of person, property, and character, and his Reading upon the Statute of Uses. Lord Bacon seems to have disdained to cite authorities in his law treatises; and in that respect he approved of the method of Littleton and Fitzherbert, and condemned that of Perkins and Staunforde. (*a*) He admits, however, that in his own private copy he had all his authorities quoted, and that he did sometimes "weigh down authorities by evidence of reason;" and that he intended rather to correct the law than soothe received error, or endeavor to reconcile contradictions by unprofitable subtlety. He made a proposal to King James for a digest of the whole body of the common and statute law of England; and if he had been encouraged and enabled to employ the resources of his great mind on such a noble work, he would have done infinite service to mankind, and have settled in his favor the question, * which he said would be made with *506 posterity, whether he or Coke was the greater lawyer. The writings of Lord Bacon are distinguished for the perspicuity and simplicity with which every subject is treated.

Lord Coke's Institutes have had a most extensive and permanent influence on the common law of England. The first part is a commentary upon Littleton's Tenures; and, notwithstanding the magnitude of the work, it has reached seventeen editions. Many of the doctrines which his writings explain and illustrate have become obsolete, or have been swept away by the current of events. The influence of two centuries must inevitably work a great revolution in the laws and usages, as well as in the manners and taste, of a nation. Perhaps everything useful in the Institutes of Coke may be found more methodically arranged, and more interestingly taught, in the modern compilations and digests; yet his authority on all subjects connected with the ancient law is too great and too venerable to be neglected. The writings of Coke, as Butler has observed, (*a*) stand between and connect the ancient and the modern law, — the old and new juris-

(*a*) Preface to his Law Tracts.

(*a*) Pref. to Co. Litt.

prudence. He explains the ancient system of law as it stood in his day, and he points out the leading circumstances of the innovation which was begun. We have in his works the beginning of the disuse of real actions; the tendency of the nation to abolish the military tenures; the rise of a system of equity jurisdiction, and the outlines of every point of modern law.

The second part of the Institutes of Coke is a commentary upon the ancient statutes, beginning with Magna Charta, and proceeding down to the reign of Henry VIII.; and his commentaries upon the ancient statutes consisted, as he himself declared, of the authentic resolutions of the courts of justice, and were not like

the glosses of the civilians upon the text of the civil law,
* 507 which contain so many diversities * of opinion as to increase
rather than to resolve doubts and uncertainties. His commentary upon Magna Charta, and particularly on the celebrated 29th chapter, is deeply interesting to the lawyers of the present age, as well from the value and dignity of the text, as the spirit of justice and of civil liberty which pervades and animates the work. In this respect, Lord Coke eclipses his contemporary and great rival, Lord Bacon, who was as inferior to Coke in a just sense and manly vindication of the freedom and privileges of the subject, as he was superior in general science and philosophy. Lord Coke, in a very advanced age, took a principal share in proposing and framing the celebrated Petition of Right, containing a parliamentary sanction of those constitutional limitations upon the royal prerogative which were deemed essential to the liberties of the nation.

The third and fourth parts of the Institutes treat of high treason and the other pleas of the crown, and of the history and antiquities of the English courts. The harshness and severity of the ancient criminal code of England are not suited to the taste and moral sense of the present age; and those parts of the Institutes are of very inconsiderable value and use, except it be to enlighten the researches of the legal antiquary. In this respect, Coke's Pleas of the Crown are inferior to the work under that title by Staunforde, who wrote in the age of Philip and Mary, and was the earliest writer who treated didactically on that subject. Staunforde wrote in law French; but Lord Coke, more wisely and benevolently, wrote in English, because, he said, the matter of which he treated concerned all the subjects of the realm.

Before we quit the period of the old law, we must not omit to notice the grand abridgments of Statham, Fitzherbert, and Brooke. Statham was a baron of the Exchequer, in the time of Edward IV. His abridgment of the law was a digest of most titles of the law, comprising under each head adjudged cases from the Year Books, given in a concise manner. The cases were strung together without regard to connection of matter.
It is doubtful whether it was *printed before or after *508 Fitzherbert's work, but the latter entirely superseded it.
Fitzherbert was published in the reign of Henry VIII., and came out in 1514, and was, for that period, a work of singular learning and utility. Brooke was published in 1573, and in a great degree superseded the others. The two last abridgments contain the substance of the Year Books regularly digested; and by the form and order which they gave to the rude materials before them, and the great facility which they afforded to the acquisition of knowledge, they must have contributed very greatly and rapidly to the improvement of legal science. Even those exceedingly laborious abridgments were in their turn superseded by the abridgments of Rolle and his successors. Dr. Cowell, who was contemporary with Coke, published in Latin an Institute of the Laws of England, after the manner of Justinian's Institutes. His work was founded upon the old feudal tenures, such as the law of wards and liveries, tenures *in capite*, and knight service. While the writings of Lord Coke have descended with fame and honor to posterity, it was the fate of the learned labors of Dr. Cowell to pass unheeded and unknown into irreclaimable oblivion. (*a*) And, with respect to all the preceding periods, Reeves's History of the English Law contains the best account that we have of the progress of the law, from the time of the Saxons to the reign of Elizabeth. It covers the whole ground of the law included in the old abridgments, and it is a work

(*a*) Dr. Cowell published a Law Dictionary, or the Interpreter of Words and Terms used either in the Common or Statute Law, and in the Tenures. Cowell's Interpreter is frequently cited by the English antiquarians, and Mr. Selden makes much use of it in his notes to Fortescue. It is one of the authorities used by Jacob in compiling his Law Dictionary; but the first edition under James I. met with the singular fate of being suppressed by a proclamation of the King, at the instance of the House of Commons, for containing the heretical and monstrous doctrine that the king was an absolute monarch, and above the law, which he might alter or suspend at his pleasure.

* 509 deserving of the highest commendation. * I am at a loss which most to admire, the full and accurate learning which it contains, or the neat, perspicuous, and sometimes elegant style in which that learning is conveyed.[1]

The treatise of Sir Henry Finch, being a discourse in four books, on the maxims and positive grounds of the law, was first published in French, in 1613; and we have the authority of Sir William Blackstone for saying, that his method was greatly superior to that in all the treatises that were then extant. His text was weighty, concise, and nervous, and his illustrations apposite, clear, and authentic. But the abolition of the feudal tenures, and the disuse of real actions, have rendered half of his work obsolete.

Sheppard's Touchstone of Common Assurances was the production of Mr. Justice Dodderidge,[2] in the reign of James I. It is a work of great value and authority, touching the common-law modes of conveyance, and those derived from the Statute of Uses. It treats also copiously of the law of uses and devises; but the great defect of the book is the want of that lucid order and per-

[1] A new edition of Reeves's work has been published in three volumes by W. F. Finlason, with an elaborate introduction and copious notes. The book, however, is very carelessly printed; and has been severely criticised in Germany by Heinrich Brunner, 13 Krit. Vierteljahrschrift, 228. The very great reliance placed by the editor on the Mirror of Justices (*ante*, 501, n. 1), impairs the confidence of the reader in his conclusions.

Thus far the most learned and interesting English history of the origin and growth of English common law and equity, is to be found in the first volume of Spence's Equitable Jurisdiction of the Court of Chancery. The volume also contains an analysis of the common and of the civil law, in addition to the more extensive chapters on equity. *Ante*, 500, n. 1.

An invaluable contribution to the study of the origin of English law and of the English constitution is the compilation of extracts from early chronicles, statutes, and treatises, published in the Clarendon Press Series by Professor William Stubbs, under the title, Select Charters and other Illustrations of English Constitutional History, from the Earliest Times to the Reign of Edward the First. It is the work of a great scholar, and is enriched with a masterly introduction and explanations.

Those who are curious as to the origin of individual property in land should read the work of M. Nasse on the Agricultural Community of the Middle Ages, translated for the Cobden Club, Macmillan, 1871, and compare the much more lucidly and brilliantly written work of Sir Henry Maine on Village Communities in the East and West. *Post*, iv. 441, n. 1.

[2] But see Bridgman's Legal Bibliography, 343, 344, where it is observed that much of the Touchstone is founded on Co. Lit., which was first published in 1628, the year Judge Dodderidge died, that in all the other works ascribed to him there is no reference to that work, and that cases are cited in it of years subsequent to that of Dodderidge's death.

spicuous method which are essential to the cheerful perusal and ready perception of the merits of such a work. The second volume of Collectanea Juridica has an analysis of the theory and practice of conveyancing, which is only a compendious abridgment of the Touchstone; and there is a very improved edition of it by Preston, who has favored the profession with several excellent tracts on the law of real property.

Rolle's Abridgment of the Law was published soon after the restoration, with an interesting preface by Sir Matthew Hale. It brings down the law to the end of the reign of Charles I., and though it be an excellent work, and, in point of method, succinctness, and legal precision, a model of a good abridgment, Sir Matthew Hale considered it an unequal monument of the fame of Rolle, and that it fell short of what might have been expected from his abilities and great merit. It is also deemed by Mr. Hargrave a great defect in Viner's very extensive abridgment, that he should *have attempted to engraft it on such a *510 narrow substance as Rolle's work. Rolle was Chief Justice of England under the protectorate of Cromwell, and under the preceding commonwealth; but as his abridgment was printed in the reign of Charles II., he has no other title annexed to his name than that of Sergeant Rolle, and his republican dignity was not recognized.

Since the period of the English revolution, the new digests have superseded the use of the former ones; and Bacon, Viner, Comyns, and Cruise contain such a vast accession of modern law learning, that their predecessors have fallen into oblivion. Viner's Abridgment, with all its defects and inaccuracies, is a convenient part of every lawyer's library. We obtain by it an easy and prompt access to the learning of the Year Books and the old abridgments, and the work is enriched with many reports of adjudged cases not to be found elsewhere; but, after all that can be said in its favor, it is an enormous mass of crude, undigested matter, and not worth the labor of the compilation. The Digest of Lord Chief Baron Comyns is a production of vastly higher order and reputation, and it is the best digest extant upon the entire body of the English law. Lord Kenyon held his opinion alone to be of great authority, for he was considered by his contemporaries as the most able lawyer in Westminster Hall. (*a*)

(*a*) 3 T. R. 64, 631.

The title Pleader has often been considered as the most elaborate and useful head of the work; but the whole is distinguished for the variety of the matter, its lucid order, the precision and brevity of the expression, and the accuracy and felicity of the execution. Bacon's Abridgment was composed chiefly from materials left by Lord Chief Baron Gilbert. It has more of the character of an elementary work than Comyns's Digest. The first edition appeared in 1736, and was much admired, and the abridgment has maintained its great influence down to the present
*511 time, as being * a very convenient and valuable collection of principles, arising under the various titles in the immense system of the English law. And in connection with this branch of the subject, it will be most convenient, though a little out of the order of time, to take notice of Cruise's recent and very valuable Digest of the Laws of England respecting Real Property. It is by far the most perfect elementary work of the kind which we have on the doctrine of real property, and it is distinguished for its methodical, accurate, perspicuous, and comprehensive view of the subject. All his principles are supported and illustrated by the most judicious selection of adjudged cases. They are arranged with great skill, and applied in confirmation of his doctrines with the utmost perspicuity and force.

The various treatises of Lord Chief Baron Gilbert are of high value and character, and they contributed much to advance the science of law in the former part of the last century. His treatise on Tenures deserves particular notice, as having explained, upon feudal principles, several of the leading doctrines in Littleton and Coke; and it is a very elementary and instructive essay upon that abstruse branch of learning. His essay on the Law of Evidence is an excellent performance, and the groundwork of all the subsequent collections on that subject; and it still maintains its character, notwithstanding the law of evidence, like most other branches of the law, and particularly the law of commercial contracts, has expanded with the progress and exigencies of society. His treatise on the Law of Uses and Trusts is another work of high authority, and it has been rendered peculiarly valuable by the revision and copious notes of Mr. Sugden.

The treatises on the Pleas of the Crown, by Sir Matthew Hale and Sergeant Hawkins, appeared early in the last century, and

they contributed to give precision and certainty to that most deeply interesting part of jurisprudence. They are both of them works of authority, and have had great sanction, and been uniformly and strongly recommended * to the *512 profession. Sir Martin Wright's Introduction to the Law of Tenures is an excellent work, and the value of it cannot be better recommended than by the fact that Sir William Blackstone has interwoven the substance of that treatise into the second volume of his Commentaries. Dr. Wood published, in 1722, his Institutes of the Laws of England. His object was to digest the law, and to bring it into better order and system. By the year 1754, his work had passed through eight folio editions, and thereby afforded a decisive proof of its value and popularity. It was greatly esteemed by the lawyers of that age; and an American judge (*a*) (himself a learned lawyer of the old school) has spoken of Wood as a great authority, and of weight and respect in Westminster Hall.

But it was the fate of Wood's Institutes to be entirely superseded by more enlarged, more critical, and more attractive publications, and especially by the Commentaries of Sir William Blackstone, who is justly placed at the head of all the modern writers who treat of the general elementary principles of the law. By the excellence of his arrangement, the variety of his learning, the justness of his taste, and the purity and elegance of his style, he communicated to those subjects which were harsh and forbidding in the pages of Coke the attractions of a liberal science, and the embellishments of polite literature. The second and third volumes of the Commentaries are to be thoroughly studied and accurately understood. What is obsolete is necessary to illustrate that which remains in use, and the greater part of the matter in those volumes is law at this day and on this side of the Atlantic.

I have necessarily been obliged to omit the mention of many valuable works upon law, as my object in the present lecture was merely to select those which were the most useful or distinguished. With respect to the modern didactic * treatises *513 on various heads of the law, and which have multiplied exceedingly within the period of the present generation, I can only take notice of a few of those which relate to the law of real

(*a*) M'Kean, C. J., 1 Dallas, 357.

property, and are deemed the most important. The numerous works, both foreign and domestic, on various branches of the law of personal rights and commercial contracts, I may have occasion to refer to hereafter, as the subjects of which they treat pass under consideration, in the course of these lectures. Any critical notice of them at present would lead us too far from the general purpose of this inquiry, and many of them are not sufficiently matured by time to become of much authority.

Sanders's Essay on Uses and Trusts is a comprehensive and systematic treatise, but it wants that fulness of illustration, and neat and orderly arrangement, requisite in the discussion of so abstruse and complicated a branch of the law. The learned Mr. Butler has given a very elaborate note on the same subject; (*a*) and there is an excellent summary of the law of uses and trusts in Cruise's Digest, arranged with his customary skill, and supported by an accurate analysis of adjudged cases, which are apposite and pertinent to the inquiry.

Sugden's Practical Treatise on Powers is the best book we have on that very abstruse title in the law. It was regarded by the author as his favorite performance, and he is entitled to the gratitude of the student for his masterly execution of the work. It is perspicuous, methodical, and accurate. Mr. Sugden's Treatise on the Law of Vendors and Purchasers is also a correct and useful collection of equity principles on a subject extremely interesting, and of constant forensic discussion. (*b*) Roberts on Fraudulent Conveyances covers a very important head in the jurisprudence of the courts of equity. He has collected the cases arising under the statutes of 13 and 27 Elizabeth, respecting conveyances that are deemed fraudulent
* 514 in respect to creditors * and purchasers; and though the treatise is written in bad taste, it is a useful digest of the law on that subject. Powell's Essay upon the Learning of Devises contains a systematical and valuable view of an important branch of the law concerning title to real property, and it is enlivened with some spirited discussions; but neither the essay,

(*a*) Note 231 to lib. 3 Co. Litt.

(*b*) In 2 Molloy, 561, Lord Ch. Hart, as late as 1829, spoke very disparagingly of Sugden's Treatise on Vendors and Purchasers, by saying that it was not to be cited as an authority *per se*. This was going quite as far as decorum would warrant, considering that Mr. Sugden had been his immediate predecessor on the Irish Chancery Bench.

nor the one of his upon mortgages, are to be compared to the clear, succinct, and masterly analysis of the cases under similar titles, in the great work of Mr. Cruise. Fearne's Essay on Contingent Remainders and Executory Devises is a performance of a very superior character. It is eminently distinguished for the ability and perspicuity with which it unfolds and explains the principles of the most intricate parts of the law. Mr. Preston's recent Essays on Estates and Abstracts of Title contain sound and clear views of the law of real property, and they have already attained the authority of works of established reputation.

I have thus attempted, for the assistance of the student, to unfold, in this and the preceding lecture, the principal sources from which we derive the evidence and rules of the common law. (*x*) There is another source still untouched, from which a great accession of sound principles, particularly on the subject of personal contract, has been received, to enlarge, improve, and adorn our municipal codes. I allude to the body of the civil law contained in the Institutes, Digest, and Code of Justinian; and our attention will be directed to that subject in the next lecture.

(*x*) In an address discussing "The True Professional Ideal" before the American Bar Association in 1894, (see 28 Am. L. Rev. 671, 681), Judge John F. Dillon said: "It is to be remembered that it is of the essence of our legal systems that they are in their historical development and nature technical, and so far as they are so, instruction, to be adequate and thorough, must itself be technical, and in an important sense it is not predicable of it that it is too technical. Having in view the circumstances which surround the subject of legal education in this country, I approve the wisdom of the general course of instruction in our law schools, so far as it gives chief attention to the usual and enumerated branches of practical private law. But I still insist that it is defective in the want of adequate provision for instruction in the history and the literature of the law and in what I call, for short, "general jurisprudence." Great lawyers like Coke and Blackstone and Eldon may be made by the current methods; but the growth of greater lawyers like Hale, Bacon, and Mansfield, who in their day wisely amended and improved the law, and who represent the higher professional ideals, is not adequately promoted and encouraged by the existing course of methods of law instruction in the law schools in this country."

LECTURE XXIII.

OF THE CIVIL LAW.

THE great body of the Roman or civil law was collected and digested by order of the Emperor Justinian, in the former part of the sixth century. That compilation has come down to modern times, and the institutions of every part of Europe have felt its influence, and it has contributed largely, by the richness of its materials, to their character and improvement. With most of the European nations, and in the new states in Spanish America, in the province of Lower Canada (*a*) and in one of the United States, (*b*) it constitutes the principal basis of their unwritten or common law. It exerts a very considerable influence upon our own municipal law, and particularly on those branches of it which are of equity and admiralty jurisdiction, or fall within the cognizance of the surrogate's or consistorial courts. (*c*)

The history of the venerable system of the civil law is peculiarly interesting. It was created and gradually matured on the banks of the Tiber, by the successive wisdom of Roman statesmen, magistrates, and sages; and after governing
*516 *the greatest people in the ancient world for the space of thirteen or fourteen centuries, and undergoing extraordinary vicissitudes after the fall of the western empire, it was revived, admired, and studied in modern Europe, on account of

(*a*) Real property law in Canada, under French grants, was established upon the basis of the Coutume de Paris, with feudal burdens. The French civil law, as it existed in Canada at the time of the conquest of the province, still prevails, without any of the ameliorations of the Code Napoleon.

(*b*) See the Civil Code of the State of Louisiana, as adopted in 1824.

(*c*) The Roman law is blended with that of the Dutch, and carried into their Asiatic possessions; and when the island of Ceylon passed into the hands of the English, justice was directed to be administered according to the former system of laws in the Dutch courts; and Van Leeuwen's Commentaries on the Roman Dutch law were translated into English in 1820, expressly for the benefit of the English judiciary in that island.

the variety and excellence of its general principles. It is now taught and obeyed, not only in France, Spain, Germany, Holland, and Scotland, but in the islands of the Indian Ocean, and on the banks of the Mississippi and the St. Lawrence. So true, it seems, are the words of D'Aguesseau, that "the grand destinies of Rome are not yet accomplished; she reigns throughout the world by her reason, after having ceased to reign by her authority."

My design in the present lecture is to make a few general observations on the history and character of the civil law, in order to excite the curiosity and direct the attention of the student to the proper sources of information on the subject. The acquaintance which I have with that law is necessarily very imperfect; and I am satisfied that no part of it can be examined, and no one period of its history can be touched, by a person not educated under that system, without finding himself at once admonished of the difficulty and delicacy of the task, by reason of the overwhelming mass of learning and criticism which presses upon every branch of the inquiry.

That part of the Roman jurisprudence which has been denominated the ancient, embraced the period from the foundation of the city by Romulus to the establishment of the twelve tables.

1. Early Roman Law. — The fragment of the Enchiridion inserted in the Pandects (*a*) is the only ancient history of the first ages of the Roman law now extant. It was composed by Pomponius, in the second century of the Christian era, and rescued from oblivion by Justinian; and Bynkershoek has republished
* it, and endeavors to restore the integrity of the original * 517
text by emendations and a critical commentary. (*a*) From this fragment we learn that Sextus, or Caius Papirius, who was a Pontifex Maximus about the time of the expulsion of Tarquin, made a collection of the *reges legiæ*, or laws and usages of the Romans under their kings, and which was known by the name of the Jus Civile Papirianum. Very few, if any, fragments of this original collection by Papirius now remain, though efforts have been made to restore, if possible, some portion of these early Roman laws. (*b*) Such a work was evidence of great progress in

(*a*) Dig. lib. 1, tit. 2. De Origine Juris.
(*a*) Prætermissa ad leg. 2 D. De Origine Juris. Opera, i. 301.
(*b*) Heinecc. Antiq. Rom. Jur. Proœm. sec. 1 and 2; Hist. Jur. Civ. i. sec. 15, 16.

jurisprudence under the kings, and it must have contained an account which would have been at the present day most deeply interesting and curious, of the primitive institutions of a city destined to become the mistress of the world. (*c*)

The genius of the Roman government and people had displayed itself by the time of the expulsion of their kings, and the foundations of their best institutions and discipline had been laid. The Roman people were originally, or very early in their history, divided into three tribes and thirty curiæ, and the patrician order and the Roman senate were instituted under Romulus, and that last body became in process of time the most powerful and majestic tribunal in all antiquity. (*d*) The general assemblies
* 518 of the people or *comitia* were * a part of the primitive government, and a very efficient portion of the legislative power, and they met in their *curiæ*, parishes or wards, and the vote of every citizen belonging to the curiæ was equal in these *comitia curiata*. The senate was a select body of three hundred of the elder citizens, from the heads of the clans or *gentes*, and regard was had to rank, birth, property, honor, and age. The king was elected for life by the curiæ, upon the nomination of the senate, and the laws of the *comitia* conferred upon him the powers of a civil and military chief. (*a*) The fecial and other colleges

(*c*) Gibbon, in his History, viii. 5, note, denies altogether the fact of any such original compilation by Papirius. Niebuhr, on the other hand, though he treats much of the early Roman history as a legend, says, that the high antiquity of the collection of the laws of the kings, compiled by Papirius, seems unquestionable. History of Rome, i. 211. I am incompetent to decide such a question. It is cited as an original and authentic work by Pomponius, who had infinitely better means of knowledge than any modern writer; and it is assumed to be so by such master critics as Bynkershoek and Heineccius; and yet the singular learning and acuteness of Gibbon give almost overbearing weight to his critical opinions.

(*d*) Cic. de republica, b. 2. In hoc orbis terræ sanctissimo gravissimoque concilio. Cic. in Cat.

(*a*) I have followed Dionysius of Halicarnassus, Livy, Cicero, and the other authors of the classical ages, in respect to the early political and legal history of Rome; and I have not been inclined to adopt the historical scepticisms of some modern antiquaries (of whom Niebuhr may be placed at the head), so far as to reject as fable what the classics have taught us concerning the civil and political institutions of the earlier Romans. The account in the text of the mixed monarchy of Rome, under the kings, is confirmed by Niebuhr himself. Hist. of Rome, i. 200–295, English ed. Camb. 1828. He holds, however, contrary to the received opinion, that the *curiæ* were assemblies of the patricians, or *gentes*, or heads of families, and not of the whole people; and that the *Plebs* were landholders of the neighboring towns and country, and field-laborers, who were free, and above the degree or condition of the

established by Numa bound the Romans to religious discipline. (*b*) Servius Tullius divided the people into six classes, and one hundred and ninety-three centuries, and this was a most important change in the Roman polity. The first class contained the patricians, knights, and rich citizens, * and ninety- * 519 eight centuries; the *Plebs* were also now admitted to a vote in the legislature, and when the people assembled by centuries in their *comitia centuriata* (as they generally did thereafter when called by the consuls or senate), they voted by centuries; and the first class, containing a majority of all the centuries, if unanimous, dictated the laws. This arrangement threw the powers of government into the hands of the patrician order, and of men of property. (*a*)

After the establishment of the republic, all the higher magistrates were elected by the burghers or patricians in their *curiæ*, or by the whole people in the *comitia centuriata*, which were con-

clients attached to the patricians, but that they had no vote. Niebuhr's work is so intermixed with true and fabulous story, and he goes so deeply into the "tangled thickets of the forest," that it becomes rather difficult to know what is and what is not to be deemed genuine history, amid his incessant scepticisms and complicated narration. I am quite reconciled to the observation of Dr. Arnold, in his profound and learned History of Rome, i. 100, that, "although the legends of the early Roman story are neither historical nor yet coeval with the subjects which they celebrate, still their fame is so great, and their beauty and interest so surpassing, that it would be unpardonable to sacrifice them altogether to the spirit of inquiry and of fact, and to exclude them from the place which they have so long held in Roman history."

(*b*) Numa religionibus et divino jure populum devinxit. Tac. Ann. 3, 26. According to Cicero, the auspices, religious ceremonies, courts of justice, appeals to the people, the senate, and the whole military discipline, were instituted by royal authority, as early as the foundation of the city. He imputes the institution of the auspices and the senate particularly to Romulus. Tusc. Quæst. lib. iv. 1; De Repub. lib. ii. sec. 9, 10, 14. He says, further, that *Numa was the author of laws which were then extant!* Ib. lib. v. sec. 2. He regarded the office of augur as one of the most important in the commonwealth; for the augurs, as he observed, had power to dismiss the *comitia*, and to command the consuls to lay down their office, and to grant or refuse permission to form treaties, and to abrogate laws not legitimately executed. No edict of the magistrates, relating to domestic or foreign affairs, could be ratified without their authority. Ib. lib. 2. Fuss on Roman Antiquities, ed. Oxf. 1840, 164, 165.

(*a*) Eosque ita disparavit, says Cicero (that is, he so distributed the citizens in classes), ut suffragia non in multitudinis, sed in locupletium potestate essent; curavitque, quod semper in republica tenendum est, ne plurimum valeant plurimi. De Repub. lib. ii. sec. 22. Cicero seems to have been aware of the danger to property from universal and equal suffrage, — Ita nec prohibebatur quisquam jure suffragii: et is valebat in suffragio plurimum, cujus plurimum intererat esse in optimo statu civitatem. Ib.

voked by the consuls, and they presided in them, counted the votes, and declared the result; and their resolutions were *leges* of the highest authority, and binding on the whole community. After the institution of tribunes, the assemblies of the people were frequently convoked by tribes, and there all the people met on an equality, and voted *per capita.* In the *comitia tributa*, the people, after violent struggles, elected the tribunes and subordinate magistrates, and enacted *plebiscita*, binding on the plebeians alone, until the Hortensian law made the decrees of the people in their *comitia tributa* binding equally on patricians and plebeians. (*b*)

As the whole administration of justice, civil and criminal, had been transferred from the kings to the consuls, it soon became necessary to control the exercise of this formidable power. *520 This was done by the Valerian law, proposed by *the consul Valerius Publicola, granting to persons accused of capital crimes a right of appeal from the judgment of the consuls to the people. It then became an established principle in the Roman constitution, that no capital punishment could be inflicted upon a Roman citizen without the vote of the people, though the consuls retained the power of inflicting very severe imprisonment. (*a*) The Valerian law became an imperfect *palladium* of

(*b*) Dig. 1. 2. 2. 8; Gravina, de Ortu et Prog. Jur. Civ. sec. 28. The *plebiscita*, prior to the Hortensian law, required the sanction of the senate and of the assembly of the *curiæ* to be binding on all orders in the state. As the *comitia curiata* were assemblies of the patricians and plebeians, and in which all the great offices and powers of sovereignty were conferred, the *comitia tributa* were assemblies of the plebeians only, and were held independently of patrician magistrates and influence. They could be held without a previous *senatus consultum*, and were not subject to the check of the auspices, which were under the management of the patricians. The *comitia centuriata* embraced all the orders of the state, and all persons of an age for military service, and the patricians and their clients, and plebeians, all found a place in them. In the *comitia tributa* the votes were taken by tribes, and in the *comitia curiata* by *curiæ.* The patricians exercised controlling influence in the *comitia centuriata* by means of the votes of their clients. The increase of the numbers and wealth of the *clients* of the burghers or patricians gave the *comitia centuriata* in which they voted, in the progress of time, a popular character and influence; for though the clients lost their order and tribe by becoming dependent clients, they became wealthy, for they could follow retail trade and manufactures; and the *comitia* of centuries, in which the commons formed every century except six, grew to be assimilated, in a great measure, to those of the tribes. Arnold's Hist. of Rome, i. 140, 141.

(*a*) Dig. 1. 2. 2. 16. The Roman dominion was absolute after a mile beyond the walls of the city, and the magistrates wielded the sword with full sovereignty. Arnold's Hist. iii. 10.

civil liberty, and was in some respects analogous to the *habeas corpus* act in the English law; but the appointment of a dictator was a suspension of the law. (*b*)

As the royal laws collected by Papirius had ceased to operate, except indirectly by the force of usage; and as the Romans, for twenty years after the expulsion of Tarquin, had been governed without any known public rules, (*c*) they began to suffer the evils of uncertain and unsteady laws, and of the absolute and capricious power of the consuls beyond the walls of the city. The call for a written law was a long time resisted on the part of the magistrates and senate; but it was at last complied with, and a commission of three persons, by the joint consent of the senate and tribunes, was instituted to form a system of law. This commission gave birth to the twelve tables, which form a distinguished era in the history of the Roman law, and constitute the commencement of what has been called the middle period of the Roman jurisprudence. (*d*)

(*b*) This great law of appeal was reënacted in the fifth consulship of M. Valerius Corvus.

(*c*) Incerto magis jure et consuetudine quam per latam legem. Dig. 1. 2. 3.

(*d*) The Enchiridion of Pomponius says, that the deputies were commissioned to seek laws from the Grecian cities (Dig. 1. 2. 2. 4); and the original historians (Livy, b. 3, c. 31, 32), and Dionysius of Halicarnassus (Antiq. Rom. b. 10), say, that the deputation was sent to Athens to learn the laws and institutions of Greece. Gravina (De Ortu et Prog. Jur. Civ. sec. 32, and De Jure Nat. Gent et XII. Tabularum, sec. 23), Heineccius (Hist. Jur. Civ. sec. 24, and Antiq. Rom. Jur. Proæm. sec. 3), Voet (Com. ad Pand. 1. 2. 1), Dr. Taylor (Hist. of the Roman Law, 8), Pothier (Præfatio seu Prolegomena in Pandectas Justinianeas, part i. c. 1; De Legibus Antiquis), and the generality of modern writers on Roman history and law, assume it to be a conceded fact, on the authority of Livy, Dionysius, Cicero, Pliny, and others, that the embassy went to Athens. Tacitus (Ann. 3, 27) observes generally, *accitis quæ usquam egregia*, and the deputies must have visited at least the Grecian cities in lower Italy. M. Bonaby, a learned French writer, has, however, written three dissertations upon the origin of the laws of the twelve tables, and he considers the story of a Roman deputation to Athens as fabulous. He endeavors to maintain, by an able discussion concerning the early history of the Roman constitution and laws, and by a critical and even profound examination of the laws of the twelve tables, that they were not borrowed from the jurisprudence of Athens, but that they were essentially a restoration of the ancient Roman laws under Romulus, Numa, and Servius Tullius, and which had gone into disuse under the consuls. He admits, however, that the plan of the mixed monarchy, and many of the Roman usages under the kings, had their origin in the usages of Athens and Sparta. (Mem. de l'Acad. des Inscriptions et Belles-Lettres, xviii. ed. Amst. 1743.) It is worthy of observation, that this sceptical as well as learned writer does not hesitate to assume, on the authority of Dionysius of Halicarnassus, the authenticity of the history of the Roman kings. Gibbon (Hist. viii. 8) is also decidedly of opinion that the deputation

* 521 **2. The Twelve Tables.**—* The twelve tables were digested by ten decemvirs, appointed, with the consent of the commons, out of the patrician order, on the return of the deputies from Greece. They were ratified by the consent equally of the patricians and plebeians, (*a*) and they consisted partly of laws transcribed from the institutions of other nations, partly of such as were altered and accommodated to the manners of the Romans, partly of new provisions, and mainly, perhaps, of laws and
* 522 usages under their ancient kings. (*b*) They * were written

never visited Athens, and he gives plausible reason for his belief; and though Cicero says (De Leg. b. 2, c. 23 and 25) that the regulations in the twelve tables concerning funerals were translated from the laws of Solon, and the decemviri had adopted almost the very words of Solon, yet M. Bonaby very ingeniously relies upon Cicero, as one of the authorities in support of his hypothesis. Niebuhr, in his History of Rome (ii. ed. Phil. 1835, by Hare and Thirlwall, pp. 228–231), concludes that the deputies visited Athens, but that there is no resemblance between the Attic civil law and the twelve tables, either as to personal rights or judicial proceedings. But Niebuhr was evidently in an error when he says (ii. 231, note 7), that "nowhere does Cicero give the least hint that there was any Greek element in the twelve tables." He must have forgotten the passages from Cicero, de Legibus, to which I have referred.

(*a*) Niebuhr (Roman History, ii. 235, ed. Phil. 1835), says that the code of the decemvirs, being approved by the senate, was brought before the centuries, and their assent was ratified by the *curiæ*, under the presidency of the colleges of priests, and the sanction of happy auspices.

(*b*) Gravina, de Ortu et Prog. J. C. sec. 32; Niebuhr's Hist. of Rome, ii. 248, 251, note, 253. Niebuhr says that the twelve tables were nothing more than the ancient statutes consolidated. A learned writer of our own country, in the New York Review for October, 1839, who avows his education and shows his acquirements in the European schools of the civil law, gives very solid reasons for his opinion that the code of the twelve tables was essentially declaratory of ancient laws and usages. Fragments of the twelve tables were collected, and distributed with great accuracy under their original and proper divisions, by J. Gothofred, in a work entitled, Quatuor Fontes Juris Civilis, printed in 1653; and his collection, Heineccius says (Antiq. Jur. Rom. Proæm. sec. 5), is to be preferred to that of all others. His collection, distribution, and interpretation of the tables has been followed by Gravina, who has inserted the originals with a paraphrase at the conclusion of his treatise De Jure Naturali Gentium et XII. Tabularum. He has also given a copious commentary upon that collection. They were redigested and inserted at length in a voluminous L'Histoire Romaine of the Jesuits Cotrou and Rouille, and copied from them into Hooke's Roman History, b. 2, c. 27. A summary of this curious and celebrated code, which had such permanent influence on Roman jurisprudence, and is so constantly alluded to by Roman jurists, will not be unacceptable to the American student.

The 1st table related to *law suits*, and regulated the right of citation of the defendant before the prætor. The creditor, of his own authority, seized his debtor, where he found him in public, and carried him before the prætor, and if the debtor resisted, the creditor might seize and drag him. *Ambula in jus — Te in jus voco;* and

in a style exceedingly brief, elliptical, and obscure; and they show the great simplicity of Roman manners, and are evidence

if old or infirm, the plaintiff was to provide him with a *jumentum*, or open carriage. (But even this provision was reprobated in after ages for its severity. A. Gell. Noct. Att. 20, 1.) The debtor, if he wanted time, was obliged to give a caution or bail for his appearance at a future day. The prætor was to decide the cause promptly by daylight; and if the accuser wanted witnesses, he was allowed to go before his adversary's house, and to repeat his demand for three days together by loud outcry. Mr. Justice Ware, of the District Court of Maine, has given, in the case of Lane *v.* Townsend, Ware, 299, a brief account of the commencement and progress of a Roman suit in its first stages. It is an interesting examination, and sheds much learning and light on the obscure subject; and points out inaccuracies not only in Brown's Civil and Admiralty Law, but in Blackstone's Commentaries, in respect to the stipulation or bail required of the defendant in the suit. Dr. Arnold, in his History of Rome, i. 280, says, that our whole knowledge of the old actions at law is derived from the Institutes of Gaius, which, in their original form, were discovered by Niebuhr in 1816.

The 2d table related to *robbery, theft, trespass, and breaches of trust.* It allowed the right to kill a robber by night. It inflicted corporal punishment and slavery on conviction of robbery, unless the parties settled with each other. Slaves, guilty of robbery, were to be thrown down the Tarpeian rock. Thefts and trespasses were punished by pecuniary mulct. Trespassers by night, on harvest or cornfields, were punished capitally, as victims to Ceres. No term of prescription gave a right to stolen goods, nor any right of a foreigner to the goods of a Roman citizen. Breaches of trust were punished with the forfeiture of double the value of the deposit.

The 3d table related to *loans, and the right of creditors over their debtors.* It prohibited more than one per cent interest for money. The weight of authority would seem rather to be in favor of one per cent *a year*, though Montesquieu insists that interest at the time of the twelve tables was twelve per cent a year, and that the law reducing it to one per cent was passed many years afterwards. Esprit des Lois, liv. 22, c. 22. In this construction he is supported by Livy, b. 7, c. 27. But Tacitus says that the twelve tables restrained usury to one per cent a year. Tacit. Ann. lib. vi. 16. And this is the construction given to the words *Si qui unciario fœnore amplius fœnerassit*, by the generality of commentators. Pothier's Pandectæ Justinianeæ, i. Frag. XII. Tab.; Gibbon, viii. 86, note. It is, however, a doubtful question whether the twelve tables allowed only one or twelve per cent a year. Professor Hugo, of the University of Göttingen, in his History of the Roman Law, sec. 126, inclines to the latter opinion. A recent writer on this vexatious point in Roman history holds it to be quite clear that the uncial rate of interest of the Romans was an ounce in every *as* for the cyclic year of ten months, that is, eight and a half per cent, equivalent to ten per cent for the civil year of twelve months. Foreign Quarterly Review, No. 22, art. 6. This is the conclusion to which Niebuhr and Dr. Arnold arrive. (History of Rome, by N. iii. 53, 57; History of Rome, by A. i. 284.) The debtor was to have thirty days after judgment to pay his debt; and if he did not then pay or give security, or sell himself by entering into the *nexum*, his creditor had a right to seize him, load him with chains of a certain weight, and treat him as a slave, on a prescribed scanty allowance; and if he failed to pay after being sixty days in prison, he was to be brought before the people on three market days, and the debt proclaimed; if no friend appeared, he was either to be put to death or sold as a slave into Etruria; and if there were several creditors, he might at their elec-

* 523 of a people under a rugged police, * and very considerably advanced in civilization. They contain a great

tion be sold beyond the Tiber, or his body cut into pieces. Gibbon (Hist. viii. 92) takes this law in the literal sense, and so does Gravina, de Jure Nat. Gent. et XII. Tab. sec. 72; and he adopts the argument of Sextus Cæcilius, in A. Gell. Noct. Att. 20, 1, who maintained that the law was only cruel in appearance, and that he had never read or heard of its being executed, for its extreme severity prevented the creation of debt. Montesquieu well observes that, upon such reasoning, the most cruel laws would be best; and he thinks the better construction to be, that the law only related to the division of the debtor's property. Esprit des Lois, b. 29, c. 2, Bynkershoek, Observ. Jur. Rom. lib. i. c. 1, and Heineccius, Antiq. Rom. lib. iii. tit. 30, sec. 4, are of the same opinion. Pothier, in his introduction to his Pandectæ Justinianeæ, has inserted the fragments of the twelve tables, as they were restored by Gothofredus, and he has illustrated them by brief notes and commentaries. He is for a literal construction of this part of the twelve tables, and he says this was the construction of all the writers of antiquity who make mention of them, such as Quintilian, Tertullian, and A. Gellius. Professor Hugo is also obliged to renounce the metaphorical, and follow, with the ancients, the literal interpretation of the twelve tables on this subject. Histoire du Droit Romain, par G. Hugo, traduite de l'Allemand par Jourdan, i. 233, sec. 149. Niebuhr, in his History of Rome, ii. 597, takes the law literally, and says that no sound-headed person ought to construe it otherwise. He says its severity was designed to compel the debtor to redeem himself, or to enter into a *nexum*, by which he became liable to pay interest, and to work out his debt by labor. Gravina, de Jure Nat. Gent. sec. 21, says there are grounds to conclude that the *leges regiæ*, with the exception of such as relate to regal domination, were incorporated into the first three of these twelve tables.

The 4th table related to *the rights of fathers and families.* It gave to fathers the power of life and death and of sale over their children, and the right to kill immediately a child born deformed. On the other hand, and as some compensation for these atrocious provisions, it declared that if a father neglected to teach his son a trade, he was not obliged to maintain his father when in want; nor was an illegitimate child bound to maintain his father.

The 5th table related to *inheritances and guardianships.* It declared that if the father died intestate (for he had a right to dispose of his property by will), and had no children, his nearest relations were to be his heirs; and if he had no relations, a man of his own name was to be his heir. He had the right to appoint guardians to his children. If a freedman died intestate and without heirs, his effects went to the family of his patron. The heirs were to pay the debts of the ancestor in proportion to their share of his estate. It also provided, in the case of lunatics and prodigals, that the relations, and if none, that one of the name, was to have the care of the person and estate. If he left children, the sons and daughters inherited equally; but though daughters inherited on an equal footing with the sons, yet they became wards to their brothers; and all women were, at all times of their lives, and under all circumstances, under guardianship and civil disabilities. (Dr. Arnold, in his History of Rome, i. 257–295, has examined the state of the Roman law, as left by the decemvirs, with great research and ability.)

The 6th table related to *property and possession.* It declared that the title of goods should not pass on sale and delivery, without payment. Two years' possession amounted to a right of prescription for lands belonging to private individuals, provided the possession was not obtained by force or fraud, and one year for movables.

deal of wisdom and good sense, intermixed with folly, injustice, and cruelty. They were engrossed *on tablets *524

It likewise declared that, in litigated cases, the presumption should always be on the side of the possessor; and that in disputes about liberty and slavery, the presumption should always be on the side of liberty. All sales of land or movables were by delivery (*mancipatio*) verbally, in the presence of witnesses.

The 7th table related to *trespasses and damages.* It provided that compensation be made for trespasses; and that for arson or maliciously setting fire to a house, or to grain near to it, the offender was to be scourged and burnt to death. The *lex talionis* was applied to losses of limb, unless the injured party accepted some other satisfaction. A pecuniary fine of three hundred pounds of brass was declared for dislocating a bone, and twenty-five asses of brass for a common blow with the fist. (It is related in the Noct. Att. 20, 1, that one Lucius Neratius, in after times, when the city became wealthy, and such a fine insignificant, amused himself with striking freedmen in the face as he met them in the street, and then ordering his servant, who followed him for the purpose with a bag of brass money, to count out and tender the twenty-five pieces, as the compensation fixed by law.) It was provided, also, by this table, that slanderers, by words or verses, should be beaten with a club. False witnesses were to be thrown headlong from the capitol, and parricides were to be sewed up in a sack and thrown into the Tiber. Whoever wilfully killed, or poisoned, or prepared poison for a freedman, or used magical words to hurt him, was punishable as a homicide. Guardians and patrons who acted fraudulently in their trust were to be fined and held odious.

The 8th table related to *estates in the country.* It required a space of two and a half feet to be left between every house; and it allowed societies or private companies to make their own by-laws, not being inconsistent with the public law. The prætor was to assign arbitrators in cases of disputes about boundaries; and it provided redress for nuisances to fields by the shade of trees, or by watercourses. It required roads to be eight feet wide, and double at corners. It allowed travellers to drive over the adjoining land, if the road was bad.

The 9th table was concerning *the common rights of the people.* It prohibited all special privileges to any person, and it restored debtors, who had been redeemed from slavery, to their former rights. It made bribery, in a judge or arbitrator, or the holding or attending seditious assemblies in the city by night, or delivering up a Roman citizen to a foreigner, or soliciting a foreigner to declare himself against Rome, capital offences. It declared that all causes relating to the life, liberty, or rights of a Roman citizen should be tried in the *comitia centuriata.* The people were to choose quæstors to take cognizance of capital cases. (The *burghers* of the city of Rome, in the early period of the Commonwealth, engrossed the wealth and the foreign commerce, and were the patricians and money-lenders, while the *free commoners*, who were agriculturists on small farms in the country, adjoining the city, were forbidden to engage in commerce, and were the money-borrowers, and suffered greatly from hostile incursions, and were poor and oppressed. Arnold's History of Rome, i. 135.)

The 10th table related to *funerals.* It prohibited the dead to be interred or burnt within the city, or within sixty feet of any house. It prohibited all excessive wailings at funerals, and women from tearing their faces or making hideous outcries on such occasions. It regulated and limited the expense of funeral piles, and all costliness at funerals, such as the dress of the deceased, the players upon the flute, the perfumed liquors, the gold thread, the crown, festoons, &c.

The 11th table made part of the *jus sacrum*, or pontifical law. All the other tables

of wood, or brass, or ivory, (*a*) and were exposed to destruction, though unquestionably preserved, when the city was burned by the Gauls. (*b*) They existed entire in the third, * 525 * but did not, as Heineccius supposes, survive the sixth century of the Christian era. This code obtained, in the related to civil rights, but this related to *religion and the worship of the gods.* It required all persons to come with purity and piety to the assemblies of religion; and no person was to worship any new or foreign gods in private, unless authorized by public authority. Every one was to observe his family festivals, and the rites used in his own family, and by his ancestors, in the worship of his domestic deities. Honor was to be paid to those heroes and sages whom their merit had raised to heaven. The commendable virtues were to be ranked among the gods, and to have temples erected to them, but no worship was to be paid to any vice. The sacrifices to the gods by the priests were to be the fruits of the earth and young animals, and with the most authorized ceremonies. No one was to be initiated in any mysteries but those of Ceres. Stealing of what was devoted to the gods, and incest, were declared to be capital crimes.

The 12th table related to *marriage and the rights of husbands.* It prescribed freedom of divorce at the pleasure of the husband; and it allowed the husband, with the consent of his wife's relations, to put her to death, when taken in adultery or drunkenness; and it declared it to be unlawful for patricians to intermarry with plebeians.

Mr. Prescott, in his learned and excellent History of the Conquest of Mexico, has given a short but interesting view of the judicial system, and of the code of laws in the Aztec or Mexican monarchy, prior to the overthrow of it by Fernando Cortez. He says that the Aztec code, though stamped with the ferocity of a rude people, evinced a profound respect for the great principles of morality. Their military usages had a remarkable resemblance to those of the early Romans, and their political institutions denoted a degree of civilization not much short of that enjoyed by the Anglo-Saxons under Alfred. I should think that their legal code might bear a favorable comparison with much that is to be found in the celebrated twelve tables of the Roman law. The superior judges were wholly independent of the monarch, and held their offices for life, and were maintained from the produce of the crown lands. Punishments were, generally, like the laws of Draco, capital; but their application to crimes showed a solicitude for the rights of property and of good order. Murder, even of a slave, was punished with death; so was the conviction of adultery, removing the boundaries of another's land, altering the established measure, abuses of guardian's trust, drunkenness, prodigal waste of patrimony, and theft. Hospitals were established in the principal cities for the cure of the sick, and the permanent refuge of the disabled soldier. Public defaulters were liable to be sold as slaves. The marriage institution was protected and respected. Prescott's Hist. i. 29–38, 44, 49.

(*a*) Heineccii Hist. Juris Civilis, lib. 1, sec. 26. Niebuhr says they were graven on ten tables of brass, and posted up in the Comitium.

(*b*) Livy, b. 6, c. 1, says, Quæ in commentariis pontificum, aliisque publicis privatisque erant monumentis, incensa, urbe, *pleraque interiere.* N. Hook's Diss. on the credibility of the first five centuries of Rome. Cicero speaks of them as being in his time on tables of brass, and as having been injured by lightning,—*legum æra liquefacta.* Orat. in Cat. 3, 4.

subsequent ages of the republic, from the most distinguished * philosophers, historians, and statesmen, the blind * 526 tribute of patriotic veneration, and the most extravagant eulogy, as being a system inculcating the soundest principles of ethics and civil polity, and surpassing in value the jurisprudence of Solon and Lycurgus, the twelve books of the laws of Plato, and whole libraries of Grecian philosophy. (*a*) As Rome increased in territory, wealth, arts, and refinement, her laws were progressively enlarged and improved, and adapted to the progress of society, and its increasing wants and vices. The obligation of the twelve tables was gradually diminished or destroyed by the multitude of new regulations, and the history of the Roman law, from the time of the twelve tables to the reign of Hadrian, is eminently instructive.

* After many struggles, the patricians were obliged, by * 527 the *lex Hortensia*, to submit to the authority of the *plebiscita*, enacted by the plebeians alone in their *comitia tributa*, as being of equal force with the *leges*, passed at the instance of a consular or senatorial magistrate, by the whole aggregate body of the people, patricians and plebeians. (*a*) The senate also frequently promulgated laws under the name of *senatus consulta*, by their own authority. (*b*) A *senatus consultum* was allowed to continue in force only one year, unless ratified by the common course of *rogatio ad populum;* and the tribunes could, at any time, by their *veto*, put a negative upon any projected decree of the senate. That body likewise assumed the right to dispense with laws, though, by a law proposed by the tribune Caius Cornelius, the senate could not exercise their dispensing power

(*a*) Cic. de Orat. b. 1, c. 43, 44; De Leg. 2, sec. 23; Livy's Hist. 3, 34; Tacit. Ann. 3, 27; A. Gell. Noct. Att. 20, 1. In the newly discovered treatise of Cicero, de Republica, lib. ii. c. 36, 37, he insists that the ten first tables were composed with the greatest equity and prudence, but he declares that the two last tables, added by the decemvirs, were iniquitous laws, and that the law prohibiting marriages between plebeians and senatorial families was a most infamous law.

(*a*) The Hortensian law abolished the senate's veto upon *plebiscita*, after the Publilian law had done away with the authority of the *curiæ* respecting them; and Niebuhr considers the Hortensian law as the commencement of the destruction of the constitution. Niebuhr's Hist. iii. 419–421.

(*b*) Inst. 1. 2. 4; Dig. 1. 2. 9. The proofs are abundant, that even before the Augustan age the *senatus consulta* had become one of the regular sources of the Roman law. Cicero, de Legibus, b. 3; Histoire du Droit Rom. par G. Hugo, sec. 174, 175, 176. Qui consulta Patrum, qui leges juraque servat. Hor. Epist. 1. 16. v. 41.

unless two hundred senators were present. By the Publilian law, passed in the year of the city 416, the comitia of the *curiæ* were deprived of their veto or power as a branch of the legislature in passing upon laws enacted by the comitia of tribes, and their consent was no longer requisite to laws submitted by the senate to the comitia of the centuries. But the senate, which now consisted of the most eminent men, and was a mixed body of both patricians and commoners, continued to be the great national council. (*c*) Within a very few years after the adoption of the twelve tables, the prohibition of marriages between the patricians and plebeians was abolished; but the patricians had the address to retain the management and control of the whole administration of justice. This was effected in several ways. It was effected by the institution of legal forms of judicial proceeding, called *legis actiones*, and by means of the *pontifices*, who regulated the calendar, and were the repositories of the laws and annals, and assumed the power of fixing the lawful days of business, and *dies fasti et nefasti.* These judicial forms and solemnities gave order and uniformity to the administration of justice; but they were mysteries of jurisprudence, confined to the learned of the patrician order, and locked up in the pontifical archives. They could not be changed at the pleasure of the people, and the right to interpret them belonged to the
*528 pontifical college, and the patricians had retained * the exclusive right of being eligible to the offices of the priesthood. (*a*) The forms remained confused and undigested until Appius Claudius Cœcus, a member of the pontifical fraternity, reduced them into one collection, which his scribe, Cnæus Flavius,

(*c*) Arnold's Hist. of Rome, ii. 155, 158. It was the province of the *censors* to revise the list of senators and add to the roll, as well as to revise the rolls of the several tribes. The censorship was an office of the highest rank and power, with a command of the public moneys, and with the power of commencing and conducting public works, such as roads and aqueducts. Ib. 282–287; Cicero, de Legibus, b. 3. With respect to the senate, the Hortensian law, prior to the year of Rome 474, deprived the senate of its veto, and declared the people assembled in their tribes to be a supreme legislative power. The tribes in the forum and the senate were placed on a footing of equality; neither had a veto on the enactments of the other, and the tribunes had a veto upon both alike. The enactments of both were considered as equal to laws. The senate, in its original form, was only a select assembly of the *patres*, whose great assembly was the *comitia curiata.* Ib. 383–385.

(*a*) Dig. b. 1, tit. 2; De Orig. Jur., sec. 6. Gravina says, De Ortu et Prog. J. C. sec. 33, that they were established by the policy of the ancient lawyers.

surreptitiously published, together with the calendar, or *fasti*, to the great satisfaction of the people. (*b*) It acquired the title of the *Jus civile Flavianum;* and a second collection of these legal precedents afterwards appeared, and was called the *Jus civile Ælianum*. (*c*) This Roman science of special pleading became a subject of ridicule by Cicero, as being a cunning and captious verbal science; and these forms were expressly abolished by the Emperor Constantine as insidious. (*d*)

3. The Prætorian Law. — The edicts of the prætor became another very important means of the increase and improvement of the Roman law. By the Licinian law, passed in the year of Rome 384, the office of consul was no longer confined to the patrician order, and a plebeian consul was elected in the centuries, and confirmed by the *curiæ*. But as a compensation for this loss of patrician power, the judicial was separated from the consular office, and a prætor was instituted, who was always to be a patrician. (*e*) The judicial decisions of the prætors, or *edicta prætorum*, became of great consequence. They were called *jus honorarium*, or patrician law, derived from the honor of the prætor. (*f*) There had been, from the foundation of the city, a magistrate called *præfectus urbis*, to administer justice in the absence of the king or consul; and after the plebeians obtained a share in the consular dignity, the patricians created a permanent city prætor, and they confined his province to the administration of justice; and such a magistrate was indispensable, as the consuls were engaged in foreign and executive duties. (*g*) The prætor was at first a patrician, and * elected in the *comitia* *529 *centuriata*, though the office in time became accessible to plebeians. Business soon required a second prætor to preside over the causes of foreigners, called *prætor peregrinus*, (*a*) and

(*b*) Cic. pro Muræna, sec. 11; De Orat. 1, 41.

(*c*) Dig. 1. 2. 7; Livy's Hist. 9, 46; Gravina, de Ortu Jur. Civ. sec. 33, and de Jur. Nat. et XII. Tab. sec. 79, 80.

(*d*) Leguleius quidam cautus et acutus præco actionum, cantor fabularum, auceps syllabarum. Cic. de Orat. 1, 55. See also Cod. 2. 58. De formulis et impetrationibus actionum sublatis.

(*e*) Dr. Arnold gives an interesting history of the struggles which produced this great innovation in the Roman constitution. History of Rome, ii. 33–61. The institution of the office of prætor was in A. U. C. 387.

(*f*) Dig. 1. 1. 7, and 1. 2. 10.

(*g*) Dig. 1. 2, sec. 26, 28.

(*a*) Professor Hugo, in his History of the Roman Law, sec. 158, attributes to the

prætors were afterwards allotted to the provinces as the empire widened. Under Augustus the prætors had multiplied to sixteen; and in the time of Pomponius there were eighteen, and one of them judged *de fideicommisso*. (*b*) Every prætor, on entering into office, established and published certain rules and forms, as the principle and method by which he proposed to administer justice for the year. He had no power to alter these rules, and this *jus prætorium vel honorarium* tempered the ancient law by the spirit of equity and public utility, and it was termed the living interpreter of the civil law. (*c*) The edicts of the prætor were generally declaratory of the customary or unwritten law and practice of his predecessors. But as the prætor was apt to vary from his annual edict, and to change it according to circumstances, which opened the way to many frauds, it was provided, by a law enacted at the instance of the tribune Caius Cornelius, that the prætor should adhere to his edicts promulgated on the commencement of his magistracy. These prætorian edicts were studied as the most interesting branch of Roman law, and they became a substitute for the knowledge of the twelve tables, which fell into neglect, though they had once been taught as a *carmen necessarium*, and regarded as the source of all legal discipline. (*d*)

* 530 **4. Responsa Prudentum.** — * The opinions of lawyers, called the *responsa* or *interpretationes prudentum*, composed another and very efficient source of the ancient Roman jurisprudence.

The most ancient interpreters were the members of the college of *pontifices*, composed of men of the first rank and knowledge.

institution of the *prætor peregrinus* the rise and growth of the *jus gentium*, which had a propitious influence even upon the Roman municipal jurisprudence. The civilians used the *jus gentium* as synonymous with reason and natural law, and in contradistinction to the *jus civile*, which was considered as local, peculiar, and exclusive to one particular people. It was their municipal law; the other was international. To the authority of the *jus prætorium* the edicts of the *prætor urbanus* and the *prætor peregrinus* seem to have equally contributed. Ib. sec. 188, 189.

(*b*) Dig. 1. 2. 32.

(*c*) Dig. 1. 1. 7, 8.

(*d*) Cic. de Leg. b. 1, c. 5, and b. 2, c. 23; Cic. de Orat. b. 1, c. 10; Gravina, de Ortu et Prog. J. C. sec. 88. The *edicta magistratuum*, or *jus prætorium*, was not only a fruitful, but a legitimate source of the Roman law, as Hugo has labored to prove. Hist. du Droit Rom. sec. 177, 178, 179. He compares this prætorian law to the English equity jurisprudence. Many of the edicts bore a resemblance to the modern ordinances, or Codes de Procédure Civile.

Civil statesmen and eminent private citizens followed their example, and sometimes debated in the forum. Their answers to questions put were gradually adopted by the courts of justice, by reason of their intrinsic equity and good sense; and they became incorporated into the body of the Roman common law under the name of *fori disputationes* and *jus civile*, or *responsa prudentum*. (*a*) This business, undertaken gratuitously by persons of the highest distinction, grew into a public profession, and law became a regular science, taught openly in private houses as in schools. The names of the principal lawyers who became, in this way, public professors of the law, are to be found in the work of Pomponius, (*b*) and in the writings of Cicero, Horace, Tacitus, and the other authors of the classical ages. Their opinions were preserved by their successors, and fragments of them are, no doubt, dispersed in different parts of the Pandects, without the sanction of their names. (*c*) Cicero speaks of
* this employment of distinguished jurists with the great- *531
est encomiums, and as being the grace and ornament and most honorable business of old age. The house of such a civilian becomes a living oracle to the whole city; and this very accomplished orator and statesman fondly anticipated such a dignified retreat and occupation for his declining years. (*a*) The philosophy and policy and wisdom of Greece were collected together, says Gravina, (*b*) by the Roman civilians, and all that was useful introduced into the Roman law; and if it were really true that the twelve tables were not drawn by the rough agents who compiled them directly from Grecian fountains, we are assured that

(*a*) Dig. 1. 2. 5. (*b*) Dig. 1. 2.

(*c*) In the times of the republic, the practice of the law was gratuitous and highly honorary. All employment for hire was prohibited by a law enacted in the year of the city 550, at the instance of the tribune Marcus Cincius. The profession at length became a business of gain, and was abused, until Augustus revived the Cincian law, with additional sanction by a decree of the senate. But as a reasonable compensation was necessary to advocates who devoted their time and talents to the profession, the compensation was allowed and regulated by a decree of the senate in the time of Claudius (Tacit. Ann. b. 11, c. 5, 6, 7); and afterwards, according to the law of the Pandects, b. 50, tit. 13, c. 1, sec. 5, 10, 12, the judges in the province were to determine on, and allow, a reasonable charge to the advocate. [Kennedy *v.* Broun, 13 C. B. N. S. 677.]

(*a*) Cic. de Orat. 1, 45; De Legibus, b. 1. See also Quintilian's Inst. lib. 12, c. 11, where he alludes to Cicero, and strongly approves of this employment of the orator when he retires from practice at the bar.

(*b*) Orig. Jur. Civ. b. 1, Proœm.

the omission was abundantly supplied in after ages; and the institutions of Greece were studied by more enlightened statesmen, and contributed to perfect and adorn the Roman law. (*c*)

In the Augustan age, the body of the Roman law had *532 *grown to immense magnitude. (*a*) It was composed of the *leges*, or will of the whole Roman people declared in the *comitia centuriata;* the *plebiscita*, enacted in the *comitia tributa;* the *senatus consulta*, promulgated by the single authority of the senate; the *legis actiones;* the *edicta magistratuum;* the *responsa prudentum;* and, subsequent to the age of Cicero, is to be added the *constitutio principis*, or ordinances of the Roman emperors. (*b*) The Roman civilians began very early to make collections and digests of the law. The book of Sextus Ælius contained the laws of the twelve tables, the forms of actions, and the *responsa prudentum*. Publius Mucius, Quintus Mucius, Brutus, and Manilius, all left volumes upon law, and the three books of the latter existed in the time of Pomponius, as monuments of his fame. (*c*) Servius Sulpicius left behind him nearly one hundred and eighty volumes upon the civil law. Many distinguished scholars arose under his discipline, who wrote upon jurisprudence; and Aufidius Namusa digested the writings of ten of those scholars into one hundred and forty books. Antistius Labeo, under Augustus, surpassed all his contemporaries, and he compiled four hundred volumes, many of which, Pomponius says, he possessed. (*d*) The noble design of reducing the civil law into a

(*c*) The Grecian philosophy was not more fatal to the ancient Roman superstition, than Grecian forensic eloquence was to the severity of the Roman civil law. Hugo's Histoire du Droit Romain, sec. 161. Cicero was of opinion that his countrymen excelled the Greeks in laws and institutions, as well as morals and manners. Mores et instituta vitæ, resque domesticas ac familiares nos profecto et melius tuemur et lautius; rem vero publicam nostri majores certe melioribus temperaverunt et institutis et legibus. Tuscul. Quæst. lib. 1, c. 1. He supposes that the early Romans had imbibed a tincture of the philosophy of the Greeks from the doctrines of Pythagoras, who dwelt in southern Italy at the time of the expulsion of the Tarquins. Ib. lib. 4, 1. But it was Cicero himself, who, by his writings, transferred into his own vernacular tongue the great body of the Grecian philosophy.

(*a*) Immensus aliarum super alias acervatarum legum cumulus. Livy, 3, 34. Heineccius applied this passage of Livy to the civil law, but Hugo says he was in an error, and that the most part of the laws referred to by Livy were political regulations, and had no concern with private right. Hist. du Droit Rom. par Hugo, sec. 167.

(*b*) Dig. 1. 1. 7, and 1. 2. 12; Inst. 1. 2. 3; Gaius, 1. 2.

(*c*) Dig. 1. 2. 36, and 39.

(*d*) Dig. 1. 2. sec. 41, 43, 44, 46, 47.

convenient digest was conceived by such great men as Cicero, (*e*) Pompey, and Julius Cæsar; (*f*) though it is certain that no systematic, accessible, and authoritative treatise on the civil law appeared during * the existence of the republic; and *533 Cicero says that the law lay scattered and dissipated in his time. (*a*) The Roman jurisprudence was destined to continue for several centuries under the imperial government, a shapeless and enormous mass, receiving continual accumulations; but it was fortunately cultivated under the emperors by a succession of illustrious men, equally distinguished for their learning, wisdom, and probity.

Before the time of Augustus, the *responsa prudentum* were given *viva voce*, and they had not the force of any authority in the forum, and the business was free to all persons. The character of these *responsa* was abused and discredited by the crude opinions of pretenders, and Augustus restrained the profession of the jurisconsults to such as he should select as most worthy, and they were to be first approved of and commissioned by him. They then began to give their opinions in writing, with their reasons annexed. (*b*) This raised their influence, and reduced the prætors to a state of comparative dependence upon those living oracles of law, who were under the influence of the emperor, and who obtained, by their means, the control of the administration of the law. (*c*) Heineccius says that Augustus instituted this college of civilians in order that he might covertly assume legislative power, and adapt the republican jurisprudence to the change in the government. He likewise instituted a cabinet council, which was called the *consistory*, by succeeding princes. It was composed of the consuls, several other magistrates and jurists, and a certain number of senators chosen by lot. (*d*) Ulpian was a member of this royal council under

(*e*) Cicero says he had long thought of the task of digesting and reducing the civil law into a few elementary and definite principles, and thereby relieving it from difficulty and obscurity. De Orat. lib. 1, c. 42.

(*f*) Suet. J. Cæsar, sec. 44.

(*a*) Cic. de Orat. lib. 2, c. 33; Heineccii Elementa Juris Inst. Proæm. sec. 2; Dr. Taylor's Elements of the Civil Law, 14.

(*b*) Dig. 1. 2. 47; Heinecc. Hist. Jur. Civ. lib. 1, sec. 157, 158, 180.

(*c*) Gravina, de Ortu et Prog. sec. 42; Heinecc. Antiq. Rom. lib. 1, tit. 2, sec. 39.

(*d*) Gravina, de Romano Imperio, sec. 17. This imperial consistory was imitated by the provincial governors. History of the Roman Law during the Middle Ages, by Savigny, i. 87.

*534 Alexander *Severus. It was the imperial legislature. The power of the *comitia* was transferred to this shadow of a Roman senate, for the old constitutional senate, not being able conveniently to govern all the provinces (according to the courtly language of the Pandects), (*a*) gave to the prince the right to make laws.

5. Imperial Rescripts.—The judgments of the prince were called imperial constitutions, and they were usually enacted and promulgated in three ways: 1st. By rescript, or letter in answer to petitions, or to a distant magistrate. (*b*) 2d. By decrees passed by the emperor on a public hearing in a court of justice; and Paulus collected six books of those decrees, and from which he for the most part dissented. (*c*) 3d. By edict, or mere voluntary ordinances. Gravina says that these imperial constitutions proceeded not as from a single individual, but as from the oracle of the republic, by the voice of the senators, who were consulted, and were the visible representatives of the majesty of the commonwealth. (*d*) Many of these imperial ordinances were suggested by the best of the civilians, and do great honor to their authors; and with regard to private and personal rights, the Romans enjoyed, to a very great degree, under the emperors, the benefit of their primitive fundamental laws, as they existed in the times of the republic. The profession of the law was held in high estimation under the emperors; and during the second and third centuries, the science of jurisprudence was elevated higher than it ever has been in any other age, or among any other people. Hadrian took off the restriction of Augus-

*535 tus, and gave the privilege of being *a public interpreter of the law to the profession at large. (*a*) It was restored by the emperor Severus, and the *responsa prudentum* assumed an air of great importance. Though in the first instance they were received as mere opinions, they gradually assumed the weight of authority. The opinions were sent in writing to the judges, and in the time of Justinian they were bound to determine according

(*a*) Dig. 1. 2, sec. 11.

(*b*) Code, 1. 14. 3; Gravina, de Ortu et Prog. sec. 123, 124.

(*c*) Gravina, ib. sec. 122; De Romano Imperio, sec. 20.

(*d*) Gravina, de Romano Imperio, ib. The imperial *rescripta* thus assumed the character and weight of judicial precedents, and were entitled to at least equal authority with the *responsa prudentum*.

(*a*) Dig. 1. 2. 2. 47.

to those opinions. (*b*) These *responsa* (of which many are preserved in the Pandects) were not of the same authority as the constitutional *leges*, but they were law for the case, and they were applied to future cases under the character of principles of equity, and not of precepts of law. In the ages immediately preceding Justinian, the civil law was in a deplorable condition, by reason of its magnitude and disorder; and scarcely any genius, says Heineccius, was bold enough to commit himself to such a labyrinth. As a remedy for the evil, the Emperor Theodosius the younger and Valentinian III. addressed to the senate of the city of Rome an imperial constitution, which confirmed, by decree, the writings of Papinian, Paulus, Gaius, Ulpian, and Modestinus, by name, and directed that they alone be permitted to be cited in the courts of justice, with the exception of such extracts as they had transferred into their books from the ancient lawyers, and with some other qualified exceptions in favor of Scævola, Sabinus, Julianus, and Marcellus. The opinion of the majority of these five legislative characters was to govern; and where there was in any case an equal division of opinion, that of Papinian was to be preferred. (*c*)

* The first authoritative digest of the Roman law which * 536 actually appeared was the Perpetual Edict, compiled by Salvius Julianus, under the orders of the Emperor Hadrian, and of which nothing now remains but some fragments collected and arranged by Gothofrede, and published along with the body of the civil law. Hadrian was the first emperor who dispensed with the ceremony of the *senatus consulta*, and promulgated his decrees upon his sole authority. (*a*) The prætorian edicts had been so controlled under the government of the emperors by the

(*b*) Inst. 1. 2. 8.

(*c*) Heinecc. Antiq. Rom. Jur. lib. 1, tit. 2, sec. 41; Histor. Jur. Civ. lib. 1, sec. 378. Heineccius says, that Papinian was everywhere called *juris asylum et doctrinæ legalis thesaurus*, and he far surpassed all his brethren, *omnes longo post se intervallo reliquerit*. Gaius (Inst. lib. 1, sec. 2) refers to a rescript of the Emperor Hadrian, in which the *responsa prudentum* were to be received as law, if they were unanimous, and if not, the judge was at liberty to follow his own judgment. At the period of Valentinian, the writings of the great jurists and the constitutions of the emperors were alone consulted as authorities. Savigny's History of the Roman Law, i. 7.

(*a*) Gibbon's History, viii. 16. The *plebiscita* had ceased under Augustus, but the *senatus consulta* did not absolutely cease with Hadrian. They continued to enrich the civil law in matters of private right long afterwards. Hugo, Hist. du Droit Rom. sec. 284, 307.

opinions of the civilians, that they lost the greater part of their ancient dignity, and Hadrian projected the design of reducing the whole Roman law into one regular system. All that he, however, lived to perform, was to procure the compilation of those edicts of the prætors which had stood the test of experience on account of their authority and equity, and had received the illustrations of civilians. (*b*) Many able professors undertook, from time to time, a digest of the civil law. Papirius Justus collected some of the imperial constitutions into twenty books, and Julius Paulus compiled six books of decrees, or imperial decisions. Gregorius made a collection of a higher character, and he digested into order the chief, if not the whole of the imperial rescripts, from Hadrian down to the reign of Diocletian and his colleagues, and which was called the Gregorian Code, and attained great authority in the forum. Hermogenes continued this collection under the name of the Hermogenian Code. (*c*) Theodosius *537 the younger * appointed a committee of eight civilians to reduce the imperial constitutions, or the edicts and rescripts of a succession of emperors, from the time of Constantine, into a methodical compendium; and this Theodosian Code became a standard work throughout the empire, and it was published in six folio volumes in 1665, with a vast and most learned commentary by Gothofrede. (*a*) Another century elapsed before Justinian directed Tribonian, who was an eminent lawyer and magistrate, to unite with him a number of skilful civilians, and to assume the great task of collecting the entire body of the civil law, which had been accumulating for fourteen centuries, into one systematic code. Whether the Roman law at that period exceeded or fell short of the number of volumes in which the English law is now embodied it is not easy to determine. Tribonian represented to the emperor, that, when he and his learned associates undertook the business of digesting the civil law, he found it dispersed in two thousand books, and in

(*b*) Gravina, de Ortu et Prog. Jur. Civ. sec. 38.

(*c*) Heinecc. Hist. Jur. Civ. lib. 1, sec. 368–372.

(*a*) The great merit of this edition of the Theodosian Code, and the fitness of Gothofredus for the task, by his extraordinary industry, erudition, and judgment, are forcibly stated by Dr. Irving, in his Introduction to the Study of the Civil Law, 4th ed. London, 1837, — a work well worthy of the attention of the student in the civil law, for its historical and biographical learning, and the critical sagacity of the author.

upwards of three millions of verses, (*b*) detached from the writings of the sages, which it was necessary to read and understand in order to make the selections. The size of these volumes, and the exact quantity of matter in these verses, we cannot ascertain. (*c*) It is, however, a fact beyond all doubt, that the state of the Roman law rendered a revision indispensable. Justinian himself assures us (*d*) that it lay in such great confusion, and was of such infinite extent, as to be beyond the power of any human capacity to digest.

6. Justinian. — * The compilations made under Justinian, * 538 and which constitute the existing body of the civil law, consist of the following works, and which I shall mention in the order in which they were originally published.

His Code. — The Code, in twelve books, is a collection of all the imperial statutes that were thought worth preserving, from Hadrian to Justinian. In the revision of them, the direction to Tribonian, and his nine learned associates, was, that they should extract a series of plain and concise laws, omitting the preambles, and all other superfluous matter; and they were likewise intrusted with the great and hazardous power to extend, or limit, or alter the sense, in such a manner as they should think most likely to facilitate their future use and operation. (*a*)

His Institutes. — The Institutes, or Elements of the Roman Law, in four books, were collected by Tribonian and two associates. They contain the fundamental principles of the ancient law in a small body, for the use and benefit of students at law. This work was particularly adapted to the use of the law schools at Berytus, Rome, and Constantinople, which flourished in that age, and shed great lustre on the Roman jurisprudence. (*b*) It is such an admirable compendium of the elements of the civil law, that it has in modern times passed through numerous editions,

(*b*) Duo pene millia librorum esse conscripta, et plus quam trecentiens decem millia versuum a veteribus effusa. Secund. Præf. Dig. sec. 1.

(*c*) Professor Hugo, in his History of the Roman Law, sec. 318, reduces by computation the Roman laws to 580 volumes, of a moderate size. He allows 24 of the three millions of verses to a page, and 400 pages to a volume. The 2000 books, judging from the books in the Pandects, will give only 280 volumes. This reasonable estimate takes away every appearance of the marvellous from the magnitude of the Roman law.

(*d*) Prima Præf. Dig. sec. 1.

(*a*) Prima Præf. Cod. sec. 2.

(*b*) Justinian had forbidden all schools of law but the three mentioned in the text.

and received the most copious and laborious illustrations. It has been a model, by reason of its scientific and orderly arrangement, for every modern digest of municipal law. The Institutes were compiled chiefly from the writings of Gaius; and a discovery by M. Niebuhr, so late as 1816, of a rewritten manuscript of the entire Institutions of Gaius has given increased interest to the Institutes of Justinian. (*c*)

*539 * *His Pandects.* — The Digest, or Pandects, is a vast abridgment, in fifty books, of the decisions of prætors, and the writings and opinions of the ancient sages of the law. This is the work which has principally excited the study and reflections and commentaries of succeeding ages. It is supposed to contain the embodied wisdom of the Roman people in civil jurisprudence for near 1200 years; and the European world has ever since had recourse to it for authority and direction upon public law, and for the exposition of the principles of natural justice. The most authentic and interesting information concerning the compilation of the Pandects is to be found in the ordinances of Justinian, prefixed, by way of prefaces, to the work itself.

In the first ordinance addressed by Justinian to his quæstor Tribonian, he directs him and his associates to read and correct the books which had been written by authority upon the Roman law, and to extract from them a body of jurisprudence in which there should be no two laws contradictory or alike, and that the collection should be a substitute for all former works; that the compilation should be made in fifty books, and digested upon the

(c) See an account of that discovery in N. A. Review for April, 1821. The Institutes of Gaius are the prototype of Justinian's Institutes. They were discovered by Niebuhr, the historian, in 1816, in the Cathedral Library at Verona. The manuscript was a *codex rescriptus*, and in 62 out of 251 pages *iterum rescriptus*. The original text had, during the dark ages, been obliterated for other matter, which, in its turn, was supplanted by the Epistles of St. Jerome. The original work was restored to the world by the skill and perseverance of Professors Göschen, Bekker, and Hollweg, of Berlin, who, upon Niebuhr's report, went to Verona. The work appeared for the first time in 1820. It awakened renewed zeal, bordering on enthusiasm, in Germany, for the study of the civil law. It led to dissertations from every quarter; and M. Boulet, in the preface to his French translation of Gaius's Institutes, says that no work ever produced a more remarkable revolution in the study of the Roman law. Institutes de Gaius, par J. B. E. Boulet, Pref. Professor Hugo makes great use of the Institutes of Gaius, as shedding new and bright light on many branches of the civil law. See Histoire du Droit Romain, par G. Hugo, sec. 329, *et passim.*

plan of the perpetual edict, and contain all that is worth having in the Roman law for the preceding 1400 years, so that it might * hereafter be regarded as the temple and sanctuary * 540 of justice. He directed that the selection be made from the civilians, and the laws then in force, with such discretion and sagacity as to produce in the result a perfect and immortal work. And, in the anticipation of the result, he declared that no commentaries were to be made upon the digest, as it had been found that the contradictions of expositors had disturbed the whole body of the ancient law.

In about three years after the publication of this first ordinance, Justinian issued another upon the completion of the work. In the latter ordinance, addressed to the senate and people, he declared that he had reduced the jurisprudence of the empire within reasonable limits, and within the power of all persons to possess at a moderate price, and without the necessity of expending a fortune in acquiring useless volumes of law. He stated that, in the compilation of the Pandects, Tribonian and his associates had drawn from authors of such antiquity that their names were unknown to the learned of that age. If defects should be discovered, recourse must be had to the emperor; and he pointedly prohibited all persons to have any further recourse to the ancient laws, or to institute any comparisons between them and the new compilation. And to prevent the system from being disfigured and disordered by the glosses of interpreters, he declared that no citations were to be made from any other books than the Institutes, the Pandects, and the Code; and that no commentaries were to be made upon them, upon pain of being subjected to the charge of the *crimen falsi*, and to have the commentaries destroyed.

The Pandects are supposed to have been compiled with too much haste, and they were very defective in precision and methodical arrangement. The emperor allowed ten years, and Tribonian and his sixteen colleagues finished the work in three years. It is said that the Pandects were composed of the writings of forty civilians, the principal part of whom lived under the latter Cæsars, and the doctrines only, and not the names of the more ancient sages, were * preserved. (*a*) If the * 541

(*a*) Professor Hugo concludes that the compilers of the Pandects had never seen the original writings of Mucius Scævola, though they are referred to as if they had

work had been executed with the care and leisure that Justinian intended, it would have been an incomparable monument of human wisdom. There are, as it is, in the compilation, a great many contradictory doctrines and opinions on the same subject, and too much of that very uncertainty which Justinian was so solicitous to avoid. But with all its errors and imperfections, the Pandects are the greatest repository of sound legal principles, applied to the private rights and business of mankind, that has ever appeared in any age or nation. Justinian has given it the venerable appellation of the temple of human justice. The excellent doctrines and the enlightened equity which pervade the work were derived from the ancient sages, who were generally men of distinguished patriotism, and sustained the most unblemished character, and had frequently been advanced to the highest offices in the administration of the government. The names of Gaius, Scævola, Papinian, Ulpian, Paulus, and Modestinus may be selected from a multitude of civilians, as models of exalted virtue, and of the most cultivated reason and philosophy, drawn from the precepts and examples of freer and better ages. It is owing to their writings that the civil law, for the purity and vigor of its style, almost rivals the productions of the Augustan age. (*b*)

*542 **His Novels.* — The Novels of Justinian are a collection of new imperial statutes, which constitute a part of the body of the civil law. These ordinances were passed subsequent to the date of the Code, and had been required in the course of a long reign and by the exigencies of succeeding times. They were made to supply the omissions and correct the errors of the preceding publications; and they are said, by competent judges, to show the declining taste of the age, and to want much of that brevity, dignity, perspicuity, and elegance which distin-

really been read and consulted. Hist. du Droit Rom. sec. 320. He is further of opinion that the merit of the order which is so visible in the civil law is to be attributed to Servius Sulpicius, the friend of Cicero. Ib. sec. 322. In the preface to Pothier's Pandects, the number of jurisconsults whose writings were employed in the compilation of the Pandects, *or whose opinions are therein referred to*, amounts to ninety-two, and sketches of their lives are given.

(*b*) According to Hommel, a writer cited by Professor Hugo, of the 1800 pages of which the Pandects are composed, 600 were taken from the writings of Ulpian, 300 from Paulus, 100 from Papinian, 90 from Julian, 78 from Scævola, 72 from Pomponius, 70 from Gaius, 41 from Modestinus, and so on to other civilians of less note in diminished proportions.

guished the juridical compositions of the ancients. Some of these novels are of great utility, and particularly the 118th novel, which is the groundwork of the English and American statutes of distribution of intestates' effects. (*a*) The Institutes, Code, and Pandects were afterwards translated into Greek, and the Novels were generally composed in that language, which had become the vernacular tongue of the eastern empire; and, as evidence of the universality of that tongue, Justinian declared that one of his constitutions was composed in the Greek language, for the benefit of all nations. (*b*)

7. Loss of the Civil Law. — When the body of the civil law, as contained in the Institutes, the Pandects, and the Code, was ratified and confirmed by Justinian, it became exclusively the law of the land; and the various texts from which the compilation was made fell speedily into oblivion; and all of them except the Theodosian Code, and fragments of the other parts, disappeared * in the wreck of the empire.(*a*)(*x*) The great * 543

(*a*) Sir William Blackstone, Comm. ii. 516, does not seem willing to admit that the statute of distributions was taken from the civil law; but when Lord Holt and Sir Joseph Jekyll declare (1 P. Wms. 27; Prec. in Chan. 593) that the statute was penned by a civilian, and is to be governed and construed by the rules of the civil law, and when we compare the provisions in the English statute with the Roman novel, the conclusion seems to be very fair and very strong that the one was borrowed essentially from the other.

(*b*) Inst. 3. 8. 3. The Latin language, in the time of Justinian, was the official language, but it was spoken only by a small portion of the inhabitants, and the language of the Church and of literature was Greek.

(*a*) Pothier, in his preface to his Pandectæ Justinianeæ, has given a rapid view of the Progress of the Roman jurisprudence, from the Jus Civile Papyrianum, under Tarquinius Priscus, to the time of Justinian, and an interesting sketch of the series of Roman lawyers, from the earliest notice of them far beyond the age of Cicero, down to the compilation of the Pandects. And notwithstanding the efforts of Justinian to supersede and destroy the admirable materials of the civil law, from which he was enabled to erect the splendid and ever-enduring monument of his reign, yet from the remains of the works of the civilians there has been compiled the Jus Civile Antejustinianeum, which is a collection of great interest and currency on the continent of Europe. It has now received an addition of the utmost value in the newly discovered Institutions of Gaius.

(*x*) The law books issued at Constantinople by Justinian for the lands surrounding the Eastern half of the Mediterranean Sea, in the beginning of the sixth century of our era, are directly or indirectly a large, or even the principal, source of private law in all the civilized countries of the world in the nineteenth century. "We in England do not stand in the same close and direct connection with them that our continental neighbors do. No part of the Digest or Code is law with us, or is now of more

work itself was in danger of being involved in the general destruction which attended the irruption of the northern bar-

than illustrative or casual bearing on the decisions of our courts. But partly through the early law-writers, much more through the Chancellor's jurisdiction, and partly, perhaps in an increasing degree, through intercourse with other nations and through literary and professional training, the Roman law has materially helped, and is still helping, to form our rules for the business of life." Roby's Introduction to Justinian, p. xv.

Prior to Justinian's compilations (565 A. D.) "the only systematic collections were the *Codices Gregorianus* and *Hermogenianus*, both compiled about A. D. 450, and the *Codex Theodosianus*, published in A. D. 438; and these, besides being published after the Roman legions had left Britain, only extended in operation over the Eastern Empire. This, the Justinianean body of law, appears to have had no force in Western Europe, and indeed, with the exception of a partial and temporary application in Italy, to have been almost unknown until the revival of its study by the Bolognese Law School about the year 1150. The collections of law in the Western Empire, which was overrun by Goths, Vandals and Huns, were as follows: — I. The *Edictum Theodorici*, issued at Rome A. D. 500, and imposed on the conquered Romans, and conquering Ostrogoths. Though this was derived almost entirely from the Roman Law, and especially from the *Codex Theodosianus*, the sources were used so arbitrarily and with such freedom, that the character of the Roman Law can scarcely be traced in them. — II. The *Breviarium Alaricianum*, current among the Visigoths; published in 506 by Alaric, and also derived, with modifications, from Roman sources. — III. The *Lex Romana Burgundiorum*, published between the years 517–534; and largely compiled from Roman Law; intended for the Roman subjects of the Burgundian Empire. — This Roman Law, ante-Justinianean in character, and much altered in the different collections, was the only source which could modify, by Romanizing, the Saxon institutions. The comparison, until the twelfth century, is not with the Corpus Juris of Justinian, but with a much mutilated code of earlier date, largely added to from barbarian sources. The Roman Law seems never to have been very popular among the early Western Nations." Scrutton's Roman Law in England, p. 10. See also, upon the Romano-Barbarian Codes, Muirhead's Roman Law, p. 397. Mr. Scrutton further says (p. 48): "The earliest Teutonic civil procedure is purely executive. There is no trace in Anglo-Saxon sources of any period of usucapion, or adverse possession giving ownership or protection from actions. The first trace of such an institution is in the Laws of the Conqueror. Anglo-Saxon procedure, civil or criminal, owes nothing in its origin to the Roman Law, and is but slightly influenced in its development. The introduction of charters and writings as modes of proof is clerical, and probably Roman." (p. 67.) "Justinianean Law was almost unknown in the Western Empire until the teaching of the Law School at Bologna in the twelfth century brought it into prominence." (p. 152.) "While the judges of the Common Law Courts after the fourteenth century recognized no authority in the Civil Law, and the English people were led by the financial exactions of the Papal Court, and the controversies of the Reformation, to regard with suspicion and dislike everything savoring of Rome, three important courts in the Kingdom were largely influenced by the Civil Law, if their procedure was not entirely derived from it. These were the Court of Chancery, the Court of